

Diminishing Conflict in Timor-Leste

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Susan Harris Rimmer, CIGJ, RegNet

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Introduction

This week in 'Diminishing Conflicts' series, I am charged with examining Timor Leste as an example where an internal conflict has waned, diminished or apparently disappeared, and attempt to explain why. I am to bring to bear my disciplinary perspective as a transitional justice scholar and international lawyer on this pressing question of why conflicts within states sometimes wane.

Timor Leste is a compelling example for this series. Most of the academic analysis brought to bear on Timor during the period from 1975- 1999 is as an international armed conflict with Indonesia, seen as now resolved. Analysis from 1999 to the present day is often focused on TL as an example of a rare 'successful' UN transitional administration with unexpected domestic flare-ups. The primary question about diminishing conflict is usually framed as 'when can the UN safely and politely withdraw?' In fact, as I will describe in this speech and the accompanying paper, traditional security analysis and transitional justice processes have not been sophisticated enough to really grapple with the complexity of what is going on in Timor Leste, and have consistently failed to predict or prevent simmering conflict from escalating. There is a real threat of such an escalation happening again. Whether Timor is ever at threat from an Indonesian invasion again is a less fraught but still uncertain question, and the Timor leadership act upon the assumption that it is a real threat, as I shall demonstrate.

Tonight I will put forward three main arguments for discussion.

1. Conflict has diminished in Timor in some important ways according to traditional security analysis in relation to Indonesia but historic and contemporary elements of civil conflict may merely morphed into a less visible type of social aggression.
2. The transitional justice mechanisms employed in TL have done little to address the causes of the 1975 - 1999 conflict, especially in relation to the 1975 civil war within TL. The Indonesian military has only reluctantly and partially addressed its culpability for the invasion and occupation of TL. The mechanisms have largely failed to provide the foundations of a rule of law culture in TL.
3. There is a real question mark over whether conflict has diminished at all for the women and children of TL, but just morphed into private violence and deprivation.

Methodology

I approach the topic from the perspective of a feminist transitional justice scholar. I come at the question from a fairly rare disciplinary position, as an international lawyer, also trained in international relations, writing in the transitional justice field. Transitional justice is a relatively young but burgeoning area of research, which has rapidly gathered momentum in the post-Cold War period. It began with work in the 1980s and 1990s, mainly produced by US political scientists and economists in relation to post-conflict states in Latin America and Eastern Europe.¹ Transitional justice scholars focus on what it means for a nation to come to terms with a violent past and what to do with the perpetrators of the violence. This is usually done by analysing accountability mechanisms at a point of transition for those accused of having committed human rights violations during the prior regime.² Analysis is heavily focused on institutions and institution-building.³

¹ Jack Snyder and Leslie Vinjamuri, 'Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice' (2004) *Annual Review of Political Science* 7: 345-362.

² See especially Priscilla B. Hayner, 'Fifteen Truth Commissions—1974 to 1994: A Comparative Study' (1994) *Human Rights Quarterly* 16(4): 597-655; Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*. New York: Routledge, 2001; Carla Hesse and Robert Post, *Human Rights in Political Transitions: Gettysburg to Bosnia*. New York: Zone Books, 1999; Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, Norman: University of Oklahoma Press, 1991; Michael Ignatieff, *The Warrior's Honor: Ethnic War and the Modern Conscience*, London:

Accountability options include the following mechanisms; (a) international prosecutions; (b) international and national investigatory commissions; (c) truth commissions; (d) national prosecutions; (e) national lustration mechanisms; (f) civil remedies and (g) mechanisms for the reparation for victims.⁴

Theoretical position

Theoretical debates in the political science field focus on the balance to be achieved in transitional societies between 'truth' and 'reconciliation';⁵ 'peace' and 'justice'; 'amnesty' and 'punishment'; and the contested nature of these terms.⁶ In some senses, the theoretical task of such a scholar is quite easy, because the title of the discipline itself poses inescapable questions. Transition to what? For whom? What sort of justice? How do we know when a transition is achieved? When will a conflict be seen as diminished or over?

Vintage, 1998; Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Washington DC: United States Institute of Peace Press, 1995; Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*, Boston: Beacon Press, 1998; Mark Osiel, *Mass Atrocity, Collective Memory and the Law*, New Brunswick, NJ: Transaction Publishers, 1997; Naomi Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice*, New York: Oxford University Press, 1995; Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights*, Penn Press, 2006; Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, Cambridge: Cambridge UP, 2006; Tina Rosenberg, *The Haunted Landscape: Facing Europe's Ghosts After Communism*, New York: Random House, 1995; and Ruti G. Teitel, *Transitional Justice*. New York: Oxford University Press, 2000.

³ Katherine Hite describes the dominant political science approach to addressing past political violence as 'crafting or recrafting political institutions, constitutions, electoral laws, political party system legislation, in the belief that new and appropriate political institutions are the best ways to overcome or reshape the behaviour which led to the past violence.' 'Panel 6: Amnesty and Truth Commissions', *Accounting for Atrocities: Prosecuting War Crimes 50 Years after Nuremberg: Proceedings of the Conference October 5-6, 1998*, Bard College Annandale-on-Hudson, New York 1998.

⁴ M. Cherif Bassiouni (ed), 'Accountability for Violations of International Humanitarian Law,' *Post-Conflict Justice*, Transnational Publishers: New York. 2002, at p. 27.

⁵ For example, for an excellent overview and analysis of the claims made for truth in transitional justice settings, see David Mendeloff, 'Truth-seeking, truth-telling, and post-conflict peacebuilding: curb the enthusiasm?' (2004) *International Studies Review* 6: 355-380.

⁶ Michael Ignatieff. 'Articles of Faith'. (1996) *Index on Censorship* 5, at p. 11. See further Mark A Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (2005) 99 *Northwestern University Law Review* 539; Susanne Karstedt. 'Coming to Terms with the Past in Germany after 1945 and 1989: Public Judgments on Procedures and Justice' (1998) *Law and Policy*, 20(1):15-56; Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, NY; London, Routledge, 2001; Neil Kritz, 'Progress and Humility: The Ongoing Search for Post-Conflict Justice' M. Cherif Bassiouni (ed). *Post-Conflict Justice*. Transnational Publishers: New York. 2002: 55-87; Charles Call, 'Is Transitional Justice really Just?' (2004) *Brown Journal of World Affairs* XI(1): 101-113; and Laurel Fletcher and Harvey M. Weinstein. 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation'. (2002) *Human Rights Quarterly* 24(3): 573-639.

Charles T Call in his recent article 'Knowing peace when you see it' has pointed out that there are no settled standards for what should be considered success in peace-building.⁷ Most security scholars assume the standard is no war reoccurrence. Social scientists would think root causes of the conflict must be addressed. Political scientists may argue the development of a legitimate democratic regime through free and fair elections is the hallmark (Ruti Teitel, the foremost authority on transitional justice would fall into this category).⁸ International economists often argue that economic recovery is the foundation of all other development possibilities.

Transitional justice is a blend of political science and law, and so is interested in the tensions between establishing democracy and addressing the demands of justice. The task of transitional justice is in part forward-looking, to ensure that 'never again' will such violations reoccur in the society.⁹ In that sense, the link to the idea of 'diminishing' conflict in this discipline is that a post-conflict states should take active steps to unearth the root causes of the conflict by 'truth-telling', and then undertake various anti-impunity diminishing measures. Only by this series of conscious steps will a conflict really be banished to history, never to repeat itself. In this sense, transitional justice is after more than just a cessation of hostilities or secure borders, which might constitute 'peace' according to orthodox security studies. Martin Luther King Junior in his celebrated letter from Birmingham Jail on 16 April 1963 differentiated between those who prefer 'a negative peace which is the absence of tension' to 'a positive peace which is the presence of justice'.¹⁰ However, the new regime may find such attempts destabilising.

Most legal scholarship in the transitional justice field has been almost exclusively trials-focused. The overwhelming majority of international law

⁷ T. Call, Charles (2008) 'Knowing Peace When You See It: Setting Standards for Peacebuilding Success', *Civil Wars*, 10:2, 173 — 194.

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⁹ Never Again (Hebrew: לעולם לא שוב, *L'vlim la suv*), is a common phrase used in relation to The Holocaust, coined by Rabbi Meir Kahane.

¹⁰ Martin Luther King Junior (ed), 'Letter from Birmingham Jail', *Why We Can't Wait*, New York: Harper & Row, 1963 at pp. 77-100.

academics advocate the holding of trials as the preferred accountability option for post-conflict settings.¹¹ This is also the stated view of the United Nations secretariat.¹² Where legal scholarship is critical, it tends to focus on the question of whether amnesties given in relation to truth commissions are compliant with international law;¹³ or whether trials are better than truth commission processes or no process at all.¹⁴

Louise Arbour observes that transitional justice is 'out-growing' its intellectual and political origins as a sub-discipline of law.¹⁵ She refers to efforts to establish a common base of human rights for the future political and social order for all members of society, including perpetrators, victims and bystanders.¹⁶

In contrast, academic literature assessing the transitional justice processes in East Timor from a political science perspective tends to focus on institution-building,¹⁷ especially as an example of UN transitional administrations,¹⁸ and explores the idea of the balance struck between

¹¹ Miriam Aukerman describes this as the 'prosecution preference': 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice' (2002) 15 *Harvard Human Rights Journal* 39, at p. 47. See generally Jack Snyder and Lesley Vinjamuri., 'Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice' (2004) *Annual Review of Political Science* 7: 345-362.

¹² Secretary General, United Nations. *Report to the Security Council, on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*. United Nations Doc S/2004/616, 23 August 2004.

¹³ See further Andreas O'Shea, *Amnesty for crime in international law and practice*. The Hague; London: Kluwer Law International, 2002.

¹⁴ Diane E. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale Law Journal* 2537. See also Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice*, London, NY: New Press, 2000, see particularly his discussion of amnesties at p. 263; Juan Mendez, 'In Defense of Transitional Justice' in A. James McAdams (ed), *Transitional Justice and the Rule of Law in New Democracies*, Notre Dame: University of Notre Dame, 1997, at pp. 4-8.

¹⁵ Louise Arbour, United Nations High Commissioner for Human Rights, '*Economic and Social Justice for Societies in Transition*'. Paper presented at the Second Annual Transitional Justice Lecture, New York University School of Law, New York, 25 October 2006.

¹⁶ See also Susanne Karstedt, 'Coming to terms with the Past in Germany after 1945 and 1989: Public Judgements on Procedures and Justice' (1998) *Law and Policy* 20(1): 15-56.

¹⁷ Sven Gunnar Simonsen, 'The Authoritarian Temptation in East Timor: Nationbuilding and the Need for Inclusive Governance' (2006) *Asian Survey* 46(4):575-596.

¹⁸ Simon Chesterman, *Justice under International Administration: Kosovo, East Timor and Afghanistan*. The International Peace Academy: New York, 2002; Henriette Sachse, 'East Timor: Is the Country Back on Track?' *Asian Analysis*, December 2006.

peace and justice.¹⁹ The emphasis on democracy is where differences in the field arise for international lawyers.

Most international lawyers believe international law is central to the project of transitional justice because it imposes an obligation on States to punish individuals guilty of the most serious violations of international law, and this determines that trials must be among the mechanisms chosen (the 'legalist' approach). The counter-point to this position posed by 'realist' political scientists is that these choices should be left entirely to the post-conflict state concerned in the interests of democracy and stability.

Political realists see justice as an impediment to peace, of use only as a bargaining chip to be bartered away for a better settlement.²⁰ There are three key realist arguments against the legalist approach. Firstly, a realist would argue that the notion of legal accountability itself is fanciful and irrelevant. A pragmatist believes that the international community's decision-making with respect to the nature and extent of post-conflict justice needs is governed more often by geopolitical considerations than by notions of international law, ethics, or morals. This belief is often part of a broader theoretical position which claims that international law has no impact or place in international relations.²¹ But secondly, even if it was relevant, the realist argues that the legalist approach is destabilising and undemocratic. A realist favours the role of the elected leader in deciding transitional justice issues, unfettered by any supranational considerations.²² Finally, realists argue that the legalist approach is applied selectively and usually only to assuage Western guilt, rather than in any consistent or objective manner. This realist position has often been reflected in the public speeches of Timor's leaders.

¹⁹ Jeffrey Kingston, 'Balancing justice and reconciliation in East Timor' (2006) *Critical Asian Studies*, 38(3): 271-302; Taina Järvinen, *Human rights and post-conflict transitional justice in East Timor*. UPI Working Papers. Helsinki: Finnish Institute of International Affairs, 2004.

²⁰ M. Cherif Bassiouni (ed). 'Introduction.' *Post-Conflict Justice*. Transnational Publishers: New York. 2002, at p. xv.

²¹ See further Shirley Scott, 'International law as ideology: theorizing the relationship between international law and international politics' (1994) *European Journal of International Law* 5: 1-325 at p. 98.

²² Mark A. Drumbl. 'Pluralizing International Criminal Justice' (2005) 106 *Michigan Law Review* 1295, at pp. 1309-11.

I argue that both theoretical positions are based on the absence and silence of women. I present a third-way counter-narrative to both positions is examined—that so-called ‘realist’ international relations theorists focus only on elite men as the subject of discourse and do not describe the reality of women’s lives or the complexity of gender roles.²³ I am rare from a disciplinary perspective then, because I tend to argue against the immediate holding of trials, for a variety of practical and normative reasons, and argue for a much wider understanding of the role of justice in a post-conflict setting, which also focuses on economic, social and cultural rights.²⁴

Methodology

This speech is informed by my recently completed dissertation ‘Transitional Justice and the Women of East Timor’. This Doctor of Juridical Science thesis in the ANU College of Law sought to answer the question of what role international law has played in relation to East Timorese women engaged with transitional justice processes. Despite the placement of women in some key decision-making positions within the transitional justice mechanisms,²⁵ I argue that women in East Timor generally did not receive tangible and satisfactory results from the justice system in the post independence period. I assess what women can demand and expect from transitional justice processes, and how transitional justice models can be revised to achieve these results.

²³ ‘Gendered and feminist analysis [of international relations] reveal that the state is in almost all cases male-dominated, and is in different ways a masculinist construct. It is simply not possible to explain state power without explaining women’s systematic exclusion from it’. Jan Jindy Pettman. *Worlding Women: A Feminist International Politics*. St. Leonards, NSW: Allen and Unwin, 1996 at p. 5.

²⁴ See further, Hilary Charlesworth, ‘Saddam Hussein: My part in his downfall’ (2005) *Wisconsin International Law Journal* 27: 127-143.

²⁵ For example, the first Justice Minister was a woman (Ana Pessoa). The most prominent international General Prosecutor for the tribunal in Dili was a woman (Siri Frigaard). There was a female Timorese public defender, Lisete Quintão. The Timorese member of the Appeals court for the Special Panels is a woman (the Hon. Judge Jacinta Correia da Costa who operated the Appeals Court for one year by herself during the transitional justice period). The other most influential Timorese judge on the Special Panels was a woman (Judge Maria Natércia Perreira Gusmão S.H., now President of the Dili District Court, and was herself a survivor of the 1999 violence). The NGO FOKUPERS was consulted by the Prosecution, Defense and both truth commissions with regards to cases of sexual crimes. The CAVR specifically commissioned research about and held special programs for women who were survivors. This program was led by a woman (Galuh Wandita).

The transitional justice choices in East Timor were novel and informed by previous experiences of the UN in other countries. Secretary-General Kofi Annan went so far as to call Timor a 'child of the international community'.²⁶ I examined the Dili and Jakarta trials, assessing the operations of the trials, specific cases and jurisprudence produced by the courts and the overall experience of women complainants. The operation of the trials is contrasted with the reality of the experience of Timorese women, and the aims of transitional justice theory, to see if the design and results of the mechanism met the experience of gender persecution, and fulfilled the existing requirements of international law.

The effectiveness of the mechanisms was judged according to four main criteria as applied to women. The first criterion is whether victims of serious violations and their relatives obtain any measure of restorative justice. For example, do they receive reparations, including compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition? Second, in the wider interests of reconciliation and ending impunity, does the process provide a full and truthful account of the events that took place in East Timor from 1975 to 1999? Third, are perpetrators of serious crimes, including crimes against humanity, held to account for their actions in accordance with international law according to the principles of retributive justice? Finally, is there an effective justice process that contributes to preventing such crimes from occurring in the future?

I also focused on gender issues in the operation and outcomes of the Commission for Reception, Truth and Reconciliation process in East Timor ('the CAVR'). The Final Report entitled *Chega!* ('No more, stop, enough!' in Portuguese) was released in late 2005 and details gender-persecution in East Timor from 1975 to the present. The Report did not win full acceptance by the Timorese Government, mainly due to controversial recommendations about national and international reparations. The Joint Truth and Friendship Commission report was delayed too long to be considered fully in my thesis

²⁶ Security Council media release, 'United Nations determined not to abandon Timor-Leste at critical time of need,' SC/8745 13 June 2006. See adverse comment on this phrase by Charles Scheiner, 'Suggestions for the Next United Nations Mission in Timor-Leste', Timor-Leste Institute for Reconstruction Monitoring and Analysis (La'o Hamutuk), 22 June 2006.

but turned out to slightly exceed expectations by admitting that the Indonesian military was indeed at fault in the 1999 violence.²⁷ I concluded that holding trials in the wrong circumstances may prove worse for women than doing nothing at all in the early periods of transition.

History of conflict in Timor Leste

This section provides a brief background on the historical backdrop of East Timor from 1975 to 1999, then post-conflict developments. I then outline the transitional justice choices made by the UN in East Timor and Indonesia after 1999 to 2008.

Timor Leste 1975-1999

East Timor became a Portuguese colony in the 16th century. In 1960 it was deemed by the UN General Assembly a 'non-self governing territory'.²⁸ In 1974 the colonial power Portugal withdrew from East Timor and a brief civil war followed. After achieving nine days of independence, declared by the Revolutionary Front for an Independent East Timor (*Frente Revolucionária de Timor Leste Independente*, or Fretilin) on 28 November 1975, Indonesian forces occupied and annexed East Timor.²⁹

An estimated 20,000 Indonesian troops were deployed to the region by the end of 1975. While casualty estimates vary, anywhere from 60,000-100,000 Timorese were probably killed in the first year after the violence began in 1975.³⁰ Timor was declared the 27th province of Indonesia on 31 May 1976.

²⁷ The report was tabled in July 2008 and is still only available from Wikileaks - http://wikileaks.org/wiki/Final_Report_of_the_Commission_for_Truth_and_Friendship_Indonesia-Timor_Leste_2008.

²⁸ See UN General Assembly Resolution 1542(XV) of 16 December 1960.

²⁹ An excellent summary of the history of East Timor is contained in the International Commission of Inquiry on East Timor, *Report of the International Commission of Inquiry on East Timor to the Secretary-General*. UN Document A/54/726. 31 January, 2000, at paras. 18-36.

³⁰ James Dunn cites a study by the Catholic Church suggesting that as many as 60,000 Timorese had been killed by the end of 1976. This figure does not appear to include those killed in the period between the start of the civil war in August 1975 and the invasion on December 7. See James Dunn, 'The Timor Affair in International Perspective,' P. Carey and G. Carter Bentley (eds), *East Timor at the Crossroads: The Forging of a Nation*. London: Cassell, 1995, at p. 66. The 100,000 figure is cited in Hamish McDonald, Desmond Ball, James Dunn, Gerry van Klinken, David Bouchier, Douglas Kammen, and Richard Tanter (eds). *Masters of Terror: Indonesia's Military and Violence in East Timor in 1999*. Strategic and Defence Studies Centre Canberra Paper #145. Canberra: Australian National University, 2002, at p. 215, and also in John Taylor's chronology, 'East Timor: Contemporary History,' P. Carey and G. Carter Bentley (eds), *East Timor at the Crossroads: The Forging of a Nation*.

Indonesia's claim over Timor was never accepted by the UN, and was only unilaterally accepted by one nation, Australia.³¹

In 1979 the U.S. Agency for International Development estimated that 300,000 East Timorese (nearly half the population) had been uprooted and moved into camps controlled by Indonesian armed forces.³² During the 25 year occupation of Indonesia, the UN documented a series of massacres including in Kraras (August 1983), Santa Cruz (2 November 1991), Maubara and Liquiça (4-6 April 1999) and Dili (17 April 1999).³³

The exact number of Timorese deaths at the hands of Indonesian military is not definitively known, with estimates ranging from 120 000 to 230 000.³⁴ On November 12, 1979, Indonesia's foreign minister, Mochtar Kusumaatmadja, estimated that 120,000 people had died in East Timor since 1975.³⁵ Amnesty International estimates that 200,000 died from military action, starvation or disease from 1975-1999.³⁶ A genocide expert Ben Kiernan has noted that the deaths must also be seen in context of the total original population base of just 700,000 people.³⁷

The Final Report entitled *Chega!* ('Enough' in Portuguese) by Timor's Commission for Reception, Truth and Reconciliation (CAVR) released in 2006 says that an upper estimate of 183,000 died as a result of both killings and deaths due to privation.³⁸ CAVR's estimate of the minimum total number of conflict-related deaths is 102,800 (plus or minus 12,000). The report finds

London: Cassell, 1995, at p. 239. McDonald's figure includes the pre-invasion period while Taylor's does not.

³¹ There was arguably de facto acceptance by other nations. See *Case Concerning East Timor (Portugal v. Australia)* International Court of Justice General List No. 84, 1995 I.C.J. 90 (1995).

³² William Burr and Michael L. Evans (eds), *Ford and Kissinger gave green light to Indonesia's invasion of East Timor, 1975: New Documents Detail Conversations with Suharto*. National Security Archive Electronic Briefing Book No. 62, 6 December 2001.

³³ James Dunn, *East Timor: a rough passage to independence*. (3rd ed). Double Bay, NSW: Longueville Books, 2003.

³⁴ Adam Schwarz, *A Nation in Waiting: Indonesia's Search for Stability*. Boulder: Westview Press, 2000, at p. 205.

³⁵ See John Taylor's chronology, 'East Timor: Contemporary History,' P. Carey and G. Carter Bentley (eds), *East Timor at the Crossroads: The Forging of a Nation*. London: Cassell, 1995, at p. 240.

³⁶ See Amnesty International, '200,000 Dead. Enough is Enough.' *New York Times* (advertisement), 23 September 1999.

³⁷ *ABC Radio Asia-Pacific*. 'East Timor: Indonesia's Actions 'Genocide' says Expert.' 29 August 2001.

³⁸ Commission for Reception, Truth and Reconciliation (CAVR). *Chega! Final Report of the Commission for Reception, Truth and Reconciliation*. Dili: Commission for Reception, Truth and Reconciliation, 2005.

that 18,600 non-combatant East Timorese were killed or disappeared and at least 84,000 more died as a direct result of displacement policies during Indonesia's occupation.³⁹

Ongoing and systematic violations were prevalent in all areas of East Timor life, specifically targeting the civilian population, and included loss of employment and livelihood; repression of cultural traditions, including language and religion; lack of access to basic needs including health care; loss of home and property, and forced displacement.⁴⁰ The UN Commission on Human Rights condemned the imprisonment of thousands of activists (most notably Xanana Gusmão in 1992), the exile of thousands more and incidences of torture, assault and inhumane treatment against Timorese resistance and civilians; including systematic gender persecution outlined below.⁴¹

Contemporaneously within Indonesia a political transition began in 1998 after 33 years of widespread human rights abuses committed by the armed forces and other groups under the 'New Order' regime led by General Soeharto.⁴² In January 1999, against a backdrop of economic crisis, Indonesian President Habibie unexpectedly announced that the East Timorese would be allowed a referendum to decide between greater autonomy within Indonesia or a transition to independence. A formal agreement between Indonesia, Portugal and the UN was reached on 5 May 1999 which established the United Nations Mission in East Timor (UNAMET) to organise a referendum. According to the agreement, Indonesia was to

³⁹ Mark Forbes, 'Indonesian Rule Led to 100,000 East Timor Dead', *Sydney Morning Herald*, 20 December 2005; John McBeth, 'Commentary: Juggling Pragmatic Politics with Bloody Past', *The Straits Times* (Singapore), 19 December 2005.

⁴⁰ Commission for Reception, Truth and Reconciliation (CAVR). 'Chapter 7.3 Forced displacement and famine', *Chega! Final Report of the Commission for Reception, Truth and Reconciliation*. Dili: Commission for Reception, Truth and Reconciliation, 2005.

⁴¹ Henry J. Steiner & Philip Alston, *International Human Rights in Context: Law, Politics, Morals: Text and Materials*, (2nd ed), Oxford: Oxford University Press, 2000, pp. 672-694.

⁴² Hilmar Farid and Rikardo Simarmata, 'The Struggle for Truth and Justice: A Survey of Transitional Justice Initiatives Throughout Indonesia', *International Center for Transitional Justice Occasional Paper Series*, January 2004, at p. 20. See also Mary S. Zuburchen, 'History, Memory and the '1965 Incident' in Indonesia' (2002) 42 *Asian Survey* 564, at p. 564; and M.N. Djuli and Robert Jereski, 'Prospects for Indonesia's Survival', (2002) 11 *The Brown Journal of World Affairs* 35: 38-9, at p. 40.

provide the security for the ballot.⁴³ Voter registration began on 16 July 1999, with teams of independent observers reporting serious accounts of political violence by the Indonesian military (*Tentara Nasional Indonesia*, or TNI) and paramilitary groups, designed to intimidate voters.⁴⁴

A popular consultation was held on 30 August 1999. On 4 September 1999, it was announced that 78.5% of the population had voted against East Timor remaining as part of Indonesia, and therefore independence would be granted to the territory.⁴⁵ The announcement of the ballot result on 4 September 1999 resulted in immediate acts of violence, a scorched earth policy, looting, massive evacuations and forced deportation of the population. In the months surrounding the 1999 vote, pro-Jakarta militias killed an estimated 1,400 people, burned towns to the ground, destroyed 80 percent of the territory's infrastructure and forced or led more than a quarter of a million villagers into Indonesian-ruled West Timor.⁴⁶ There were also concerns about the possibility of genocide raised by members of the international community observing the referendum violence.⁴⁷

Post-conflict Timor

In late 1999, Security Council Resolution 1264 approved the immediate dispatch of the Australian-led, International Force for East Timor (INTERFET), and expressed concern at 'reports indicating that systematic, widespread and flagrant violations of international humanitarian and human rights law have been committed in East Timor' and stressed individual responsibility for these acts.⁴⁸

⁴³ Between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor (5 May Agreements), Annex 1, Article 3.

⁴⁴ See further Hamish McDonald et al (eds) *Masters of Terror: Indonesia's Military and Violence in East Timor in 1999*, Canberra Papers on Strategy & Defence No. 145, Canberra, Australian National University, 2002.

⁴⁵ KPP-HAM, *Full Report of the Investigative Commission into Human Rights Violations in East Timor (KPP-HAM)*, in Hamish McDonald et al (eds.) *Masters of Terror: Indonesia's Military and Violence in East Timor in 1999*, Canberra Papers on Strategy & Defence No. 145, Canberra, Australian National University, 2002 at p. 16.

⁴⁶ KPP-HAM, *ibid*, at p.17.

⁴⁷ Deputy British Representative to the United Nations Stewart Eldon, statement to the Security Council, 11 September 1999. See also Matthew Jardine, *East Timor: Genocide in Paradise*. Tuscon, AZ: Odonian Press, 1995, at p.62.

⁴⁸ UN Doc. S/RES/1264 (1999).

UNTAET was established under UN Security Council Resolution 1272 of 25 October 1999. It was the executive and legislative authority from 25 October 1999 until East Timor became independent on 20 May 2002. The UN Special Representative to East Timor, Sergio de Mello (the transitional administrator) became the executive and law making authority for East Timor on 25 October 1999.

The resolution also condemned all acts of violence in the Indonesian claimed province of East Timor, demanded that those responsible be brought to justice and called for all parties to cooperate with investigations into reports of systematic, widespread and flagrant violations of international humanitarian law and human rights law.⁴⁹

Investigations into the post-ballot violence were carried out by special UN teams, in particular the International Commission of Inquiry on East Timor (ICIET),⁵⁰ and by the National Human Rights Commission (*Komisi Nasional Hak Asasi Manusia*, or Komnas HAM) in late 1999.⁵¹ Komnas HAM used its powers under a government regulation expressly issued for the purpose to set up a special team, the National Commission of Inquiry on Human Rights Violations in East Timor (*Komisi Penyelidik Pelanggaran HAM di Timor Timur*, or KPP HAM), to investigate human rights abuses in East Timor during the period from 1 January to 25 October 1999.

In a letter of 31 January 2000 accompanying the International Commission of Inquiry (ICIET) report, Kofi Annan wrote of the violence in 1999:

...[T]he actions violating human rights and international humanitarian law were directed against a decision of the Security Council and were contrary to the agreements reached by Indonesia with the United Nations to carry out the decision of the Security Council. This fact reinforces the need to hold the perpetrators accountable for their actions... The International Commission of Inquiry found that the United Nations and the international

⁴⁹ UN Doc.S/Res/1272 (1999)

⁵⁰ Report of the International Commission of Inquiry on East Timor to the Secretary-General, January 2000. UN Doc A/54/726 and S/2000/59, 31 January 2000.

⁵¹ KPP-HAM. *Full Report of the Investigative Commission into Human Rights Violations in East Timor*. Jakarta: KPP-HAM, 2000.

community had a particular responsibility to the people of East Timor in connection with investigating the violations, establishing responsibilities, punishing those responsible and promoting reconciliation. I believe the United Nations has an important role to play in this process in order to help safeguard the rights of the people of East Timor, promote reconciliation, ensure future social and political stability and protect the integrity of Security Council actions.⁵²

As a result of the recommendations of these investigations, three main transitional justice mechanisms were established to address the crimes. Firstly, in East Timor the UN set up the Serious Crimes Unit and Special Panels of the Dili District Court and the Commission for Reception, Truth and Reconciliation (CAVR).

In Indonesia the chosen transitional justice mechanism was the East Timor trials at the Indonesian ad hoc Human Rights Court in Jakarta, as well as a proposed truth commission (KKR). In 2005, East Timor and Indonesia agreed to set up a Joint Truth and Friendship Commission, which could offer a full amnesty to all who participated in violations in return for their cooperation. At the same time, developments in governance and moves to independence were as follows. The UN Mission of Support in East Timor (UNMISSET) was to withdraw from East Timor entirely in May 2004, but the Secretary-General announced the Mission would stay for another year but be dramatically reduced from almost 3,000 civilian and military personnel to 700 while the country becomes self-sufficient. In May 2004, roughly 1,650 peacekeeping troops, 300 civilian police and 1,000 civilian personnel were deployed in East Timor.⁵³

In 2005, another extension was granted. The United Nations Office in Timor-Leste (UNOTIL) was established by Resolution 1599 (2005) adopted by the Security Council on 28 April 2005, with effect from 21 May 2005. UNOTIL was mandated to support the development of critical State

⁵² Kofi Annan, Identical letters dated 31 January 2000 from the Secretary-General to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights. New York, United Nations General Assembly. UN Doc. A/54/726, 2000.

⁵³ Traci Hukill, *UN Wire*. Dili, 4 May 2004.

institutions by providing up to 45 civilian advisers; support further development of the police through the provision of up to 40 police advisers and support the development of the Border Patrol Unit (BPU), by providing up to 35 additional advisers, 10 of whom may be military advisers; provide training in observance of democratic governance and human rights by providing up to ten human rights officers; and review progress in all those tasks.⁵⁴

Diminishing or Morphed?

Post-independence, there have been episodes of serious internal conflict in Timor. Violence in the Timorese capital Dili in April and May between police, the military and youths resulted in at least 37 persons killed, more than 150 injured and some 150,000 persons displaced, as well as arbitrary arrests and detention by the armed forces. There was significant damage to property, particularly looting and burning of houses in Dili.

In mid-July 2006, 72,000 internally displaced persons were receiving food aid in 62 makeshift camps scattered throughout Dili, while up to 80,000 people had fled to the countryside where they were sheltered by host families and in a very small number of camps.⁵⁵

In late June 2006 the United Nations High Commissioner for Human Rights, on the request of the UN Secretary-General established a Special Independent Commission of Inquiry for Timor-Leste which reported on 17 October 2006. The Commission found that 'failures of the rule of law and accountability were at the heart of the events in April and May.'⁵⁶

After the Dili riots in April/May 2006, the United Nations Integrated Mission in Timor-Leste (UNMIT) was established, on 25 August 2006 by Security Council Resolution 1704 with the priority of restoring public security (and replacing UNOTIL). At full strength it included some 1,608 UN Police (UNPol)

⁵⁴ Security Council, 'Security Council Establishes One-Year Political Mission in Timor-Leste, Unanimously Adopting Resolution 1599 (2005). UN Office Will Remain until 20 May 2006, Supporting Development of Police, Border Patrol, Other Critical Institutions'. *Press Release SC/8371*, New York, 2005.

⁵⁵ Report of the Secretary-General on Timor-Leste pursuant to Security Council resolution 1690 (2006), S/2006/628, 8 August 2006.

⁵⁶ Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste, Geneva, 2 October 2006, para.136.

as well as 34 military liaison and staff officers. UNPol will provide support to the Timorese police force (PNTL) while it is being reconstituted, plus provide interim law enforcement. UNMIT had an initial six-month mandate, and at the date of this speech, .

There has been considerable unrest across East Timor in relation to the Presidential and Parliamentary elections in mid-2007. An estimated 600 houses and confirmed 142 were allegedly burnt by pro-FRETILIN supporters in villages between Viqueque and Baucau. In August, violence occurred in several places, including Dili and Metinaro, with two people reported as killed in Ermera. On 10 August 2007, a convent in Baucau was attacked and damaged, and a number of female students at the convent were said to have been raped.⁵⁷

In February 2008, rebel East Timorese soldiers invaded the homes of the President and Prime Minister of East Timor, leading to the shooting and serious wounding of President José Ramos-Horta, the shooting up of the car of Prime Minister Xanana Gusmão, and the fatal shooting of rebel leader Alfredo Reinado. The attacks have been variously interpreted as attempted assassinations, attempted kidnappings and an attempted coup d'état. The rebels' intentions remain unknown. An investigation is the highest priority of the Office of the Prosecutor, who is trying to link the investigations to the ongoing investigations over the 2007 violence. The UN Security Council passed [resolution 1802](#) of 25 February 2008, authorising UNMIT to extend its mission and assist with the investigation.

On 12 October 2008 (this week) Agence France Presse reported that 'Fears of unrest swirl in East Timor', saying that an opposition plan for a massive march on Dili and rumours of tension in the police force are raising concerns of a return to instability. AFP report that an unsigned pamphlet has been circulated in Dili complaining of official discrimination against Timorese from the impoverished country's western region in favour of those from the east. The pamphlet also threatened protests against the government if an easterner is appointed the new police commander when the post becomes

⁵⁷ Jill Joliffe, 'Suffer the Children Caught in Timor Crossfire', *Canberra Times*, 24 August 2007.

vacant in November. It is notable that the alleged 'east-west' divide does not feature in the Chega! report at all. It is therefore difficult to say whether these tensions are a purely post-conflict problem, relating to perceived injustice in dividing the spoils of independence or have a longer history.

As of August 2007, East Timor is the poorest country in Asia. According to a United Nations Development Programme report on East Timor released in January 2006, 90 out of 1,000 children die before their first birthday, half the population is illiterate, 64 percent suffers from food insecurity, half lack access to safe drinking water, and 40 percent live below the official poverty line, defined by an income of 55 cents a day.⁵⁸

The Wiranto file



[Photograph: Reuters, 30 May 2004]

⁵⁸ United Nations Development Program. 'The Path out of Poverty', *Timor Leste Human Development Report 2006*, Dili, 2006

This photograph, taken on 29 May 2004, shows Timor President Xanana Gusmão and Indonesian Presidential candidate General Wiranto in a friendly embrace in Bali. The picture belies a dramatic background and is a great example that appearances of diminished conflict may be deceiving.

The Serious Crimes Investigation Unit (SCIU) in Dili indicted General Wiranto on 24 February 2003. The indictment alleged that Wiranto, at that time Minister of Defence and Security and Commander of the Indonesian Armed Forces, was responsible under international law for the crimes against humanity of murder, deportation and persecution. This was based on failing to punish or prevent crimes committed by his subordinates or those acting under his effective control in the period before and after the 1999 popular consultation in East Timor.

The Special Panel for Serious Crimes (SPSC) issued a warrant for the arrest of Wiranto on 10 May 2004 after declining a public hearing. General Wiranto was then a leading candidate in the Indonesian Presidential elections. Several days later Wiranto was pictured above hugging President Xanana Gusmão on the anniversary of Timorese independence. The photo was published widely in the Timorese and Indonesian press. Gusmão was met when he returned home to Dili with demonstrations and the sound of hundreds of women weeping.⁵⁹ This embrace has become a potent symbol of the complex dilemmas faced by Timor's transitional justice process. From a realist point of view, Gusmão was given little choice but to reconcile with Wiranto. The February 2003 indictment caused a strong reaction from the Indonesian government. Indonesia blamed the UN for what they saw as a 'politically motivated case'.⁶⁰ UNMISET issued a public statement subtly disavowing the action, declaring that the indictment was issued through the prosecution service of Timor-Leste and not by the UN.⁶¹ The International

⁵⁹ *Lusa*, 'Demonstrators protest Wiranto meeting on Gusmão's return' 31 May 2004. *Tempo Magazine*, 'Xanana and Wiranto meeting reaped condemnations in Timor-Leste', 40:IV, 8-14 June 2004.

⁶⁰ 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, New York, June 2005, at p. 25.

⁶¹ United Nations News Centre, 'Timor-Leste, not UN, indicts Indonesian General for war crimes', 26 February 2003. The International Center for Transitional Justice explains that 'while this is technically correct, it did not acknowledge the work of the prosecution service was carried out by a UN unit and staffed by UN employees.' Megan Hirst and Howard Varney, *ibid.* See also *Catholic Institute*

Center for Transitional Justice states that the UN statement 'provoked the dismay of those in the Timorese leadership who had expected the UN to show a clear commitment to the justice process and strengthened the view that the UN's support for justice could not be taken for granted'.⁶² The Timorese government then countered with a public declaration that the indictment was the work of the UN and not of East Timor.⁶³ The government also declined offers of overseas aid for the funding and staffing of the serious crimes process.⁶⁴

It was in this context that President Xanana Gusmão met the then Indonesian President Megawati Sukarnoputri in May 2004. They agreed that outstanding human rights issues between the countries would not be solved judicially but through a reconciliatory approach.⁶⁵ President Gusmão praised the Jakarta trials in his Independence Day national address, and then met personally with General Wiranto to hug him as an act of reconciliation.⁶⁶

After the photo was taken, General Wiranto chatted to the press. He said the discussion was 'nostalgic':

Before, we were the same in the forest, the mountains, in positions opposing each other. To see us now, it's quite funny. I think now we have become friends. We are two people who understand that war and battles are not good.⁶⁷

President Gusmão left without comment. However later that month he told a conference in Berlin that his stance was pragmatic:

We fought for 24 years and during the struggle we followed many other conflicts, some of them ended, some of them are on the way

International Relations. 'Church network urges UN to press ahead with Timor prosecutions.' 18 March 2003; 'East Timor: General Wiranto said ready for Dili video-conference atrocity hearing', *Lusa*, 4 February 2004 and Mark Dodd. 'Massacres Go Unpunished as UN Crimes Unit Heads for Collapse.' *Sydney Morning Herald*, 1 May, 2001.

⁶² 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, New York, June 2005, at p. 25.

⁶³ Megan Hirst and Howard Varney, *ibid*.

⁶⁴ Megan Hirst and Howard Varney, *ibid*.

⁶⁵ Megan Hirst and Howard Varney, *ibid*.

⁶⁶ Megan Hirst and Howard Varney, *ibid*.

⁶⁷ Matthew Moore, 'Lay off Wiranto', *Sydney Morning Herald*, 31 October 2004.

to [an] end. Two and a half years after independence we are ahead of Guinea Bissau, a former Portuguese colony which was the first to start its independence struggle, and they still face human rights abuses and poverty. With our policy we have security, stability and progress. We have good relations with our big neighbour. NGOs say, on behalf of victims there must be justice. For our process, real justice was that the international community recognized our independence and helped to achieve it. For all the sacrifices of our people, our obligation is to bring them real independence, meaning social justice and development. East Timor should not live in the past, but look towards the future.⁶⁸

Then President Xanana Gusmão's reconciliation attempts reached their apex with "Operasaun Domin" (Operation Love), which collected \$77,000 from Timor-Leste people for tsunami victims, and then presented it as a personal gift to President Susilo Bambang Yudhoyono.⁶⁹ The smiling embrace can therefore be read as a broader symbol of the complex interactions between law and politics, common to studies of transitional justice.

Failure of transitional justice to address root causes

In 1999, Mary Robinson, then UN High Commissioner for Human Rights said of the violence in East Timor:

To end the century and the millennium tolerating impunity for those guilty of these shocking violations would be a betrayal of everything the United Nations stands for regarding the universal protection and promotion of human rights.⁷⁰

In 2008, the outcomes of the transitional justice processes set in place by the UN and Indonesia are cause for deep concern in terms of their

⁶⁸ Xanana Gusmão, 'Notes on comments by Xanana Gusmão and Jose Ramos-Horta on dealing with past human rights violations made during a Panel Discussion'. Paper read at German Council on Foreign Relations (Deutsche Gesellschaft für Auswaertige Politik, DGAP), Berlin, *Watch Indonesia*.20 October 2004.

⁶⁹ Douglas Keatinge, 'All to play for in East Timor's modest aid gesture', *The Irish Times*, 31 January 2005.

⁷⁰ United Nations, 'High Commissioner for Human Rights reports on the situation in East Timor as the Commission on Human Rights considers holding special meeting', *media release*, HR/99/90, 17 September 1999.

inadequacy, and would confirm Robinson's worst fears. Not one Indonesian perpetrator has been punished. As journalist Sian Powell stated:

Justice for the thousands of East Timorese who were murdered, raped, assaulted and forcibly exiled in 1999 has been slowly but surely buried in an avalanche of paperwork churned out by tribunals, commissions, panels and committees.⁷¹

There is no doubt that justice for the victims of the crimes committed in East Timor still has to be done. A full analysis of the reasons is necessary, if a more effective formula is to be found. The general view of commentators and human rights groups has been that the trials within East Timor were well intentioned but massively under-resourced, hamstrung by jurisdiction and lack of access to indictees, and that they ran out of time. The trials in Indonesia have roundly been dismissed as a 'sham' and accused of deliberate design by a politicised Attorney-General's office to avoid successful prosecutions of military commanders.

My research confirms that these conclusions are broadly correct. The failure of both processes can be traced squarely to dwindling political will on behalf of the main actors, the Governments of Timor, Indonesia and key Member States of the UN.⁷² In Indonesia, the pressures of democratic and economic reform influenced the political will in the executive and the legislative sectors. In East Timor, the priority for dealing with these crimes was shared with other, formidable priorities. In other words, the political will at the national level in both States was not up to the level required to see the machinery of justice put into effect.

At the international level, the political will, despite the expressions of outrage and condemnation, and the cogent reports of the UN Commission on Human Rights, simply was not sufficiently strong to bring about the kind of consensus that led to the establishment of ICTY and ICTR. The procedure for convening the extra-ordinary session of the Commission on Human Rights in September 1999, and the complications surrounding that session,

⁷¹ Sian Powell, 'East Timor forgoes justice for the rape of a nation' *The Australian*, Jakarta, 1 August 2005.

⁷² 'Editorial: Indonesia's Generals Take a Back Seat', *Sydney Morning Herald*, Sydney, 2004

provided clear evidence of the absence of international consensus to handle the crimes through international action. By 2005, the Security Council in Resolution 1599 (2005), acknowledges the improvement of relations between Indonesia and Timor Leste, including the agreement to establish the CTF. The Council also slightly softened its position on the judicial process regarding serious human rights violations in East Timor in 1999, by only reaffirming the need for credible accountability, instead of reaffirming the fight against impunity mentioned in the Resolution 1573 adopted in 2004.

Whether justice will be done for East Timor in the future is unclear. The Special Representative of the Secretary-General in East Timor, Dr Hasegawa, stated that with many competing opinions and interests for Timor, one option would be 'call it a partial victory and close the curtain' when the UN mission finally departs. He thought the only other option was a full international tribunal costing much more than has been invested in the process so far.⁷³

The Timorese Government ostensibly placed its faith in the bilateral Truth and Friendship Commission established in Bali with the Indonesian Government. East Timor's Ambassador to the United Nations, Jose Luis Guterres outlined:

I don't believe that the Government of East Timor will again try to prosecute any of the military figures in Indonesia because of the past human rights violation in East Timor.

The reasons are, as you know, there is the Government has the present determination to first, consolidate the process of democracy, freedom and justice in East Timor. Second, to maintain the good relations with Indonesia. At the same time, also giving the opportunity to the Indonesian system of democracy and freedom to be consolidated in that region.⁷⁴

⁷³ Sarah Boyd, 'Timor justice slow but sure', *Asia Intelligence Wire*, 29 July 2004.

⁷⁴ Tom Iggulden, 'East Timor plays down damning UN report', *ABC Radio National AM*, 19 January 2006.

The Government will still be under pressure from the CAVR report and its own citizens to pursue justice. New President Jose Ramos-Horta has responded to an alleged recommendation of the CAVR report to pursue indictments of Indonesian military in the following manner:

Well, these are very high-sounding statements, but the United Nations were here, from 99 to 2003, with the massive peacekeeping force. They didn't do that. So why should the East Timorese, with our own priorities and concerns, to continue to consolidate peace, reconciliation, creating jobs for our people, reducing poverty -- should pretend to be a sort of Don Quixote de la Mancha of justice, in fighting the mighty Indonesian army?⁷⁵

Contemplating the incongruous picture of a smiling President Gusmão hugging General Wiranto forces introspection from an international lawyer. A warrant to arrest Wiranto had been issued only days earlier for crimes against humanity inflicted on the Timorese people in 1999. But in May 2004 when the picture was taken, Wiranto could have also become President of Indonesia, thereby in a position to wield enormous power over the fragile new State of East Timor. The UN had disavowed the actions of the Special Panel that issued his arrest warrant, a court the UN had itself created. The photograph is a reminder that leaders of post-conflict societies must sometimes make heart-breaking choices.

In examinations of transitional justice processes, in theoretical discussions of the role of international law, the political consequences of decisions for leaders and citizens in new States must not be lost. The goal of accountability for *jus cogens* crimes is not unrealistic, but is more difficult than setting up a UN court by decree. It is therefore very important that international lawyers, when advocating for the implementation of the minimum accountability requirements for *jus cogens* crimes required by international law, pay more attention to the practical realities faced by states in an international relations context. This does not mean that accountability is not possible or realistic, but it does mean that

⁷⁵ Sen Lam, 'Timor: No compensation wanted for occupation', *Radio Australia*, 1 December 2005.

international lawyers must be more strategic and cautious in their push for immediate trials after a conflict. The realist challenge to the obligation to punish imposed by international law must be fully reckoned with.

A proper grasp of political challenges is even more of an imperative for a feminist lawyer attempting to assist the promotion of gender-inclusive transitional justice processes and the restoration of a rule of law that protects women. It is tempting to analyse the transitional justice processes as an overall failure, and accede some ground to the realist viewpoint. This would merely accord with the pragmatism on transitional justice matters from the Timorese leadership, and there is no guarantee it has afforded Timorese women a positive future. Too many Timorese women who were herded as refugees into West Timor in 1999 are living as internally displaced persons in their own country in 2007. Within the overall failure of the transitional justice process, it is still crucial to consider how transitional justice processes will have a gendered impact. It is even more crucial to start thinking creatively how to gain material benefit for women in a post-conflict state.

A luta continua! Undiminished Conflict against women and children in TL

The link between violence against women and children during the conflict with violence in the post-conflict period is made by Timorese women themselves.

One of the bravest but least known acts during the East Timorese resistance to Indonesian occupation occurred in November 1998 when over 20 Timorese women told their stories of surviving sexual violence⁷⁶ to crowds of hundreds at a public meeting in Dili. The stories were collated into an English language book called *Buibere*,⁷⁷ which means 'woman' in Mumbai, the second most common Timorese language after Tetum. It was written only in English, published in Australia, and intended as an advocacy

⁷⁶ This paper relies on the definition of sexual violence in the *Akayesu* case in the ICTR as 'a physical invasion of a sexual nature committed on a person under circumstances which are coercive' at paras 6.4 and 7.7. *Prosecutor v. Jean-Paul Akayesu*, Judgement, Case No. ICTR-96-4-T, 2 September 1998, at para. 598.

⁷⁷ Rebecca Winters (ed). *Buibere: Voice of East Timorese Women*. Darwin, NT: East Timor International Support Center, 1999.

document for the international community. Between 1975 and 1999, there had only been four short but searing reports from international non-governmental organisations (NGOs) about gender-based persecution of women in East Timor, and no official United Nations (UN) comment.⁷⁸ But the persecution, as described first-hand in these collected testimonies, was intense, and included rape, torture and other inhumane acts.

In November 2001, in an independent East Timor, the local women's rights NGO FOKUPERS⁷⁹ released a second version of *Buibere* in Tetum at a public event, with many of the women who contributed stories to the book present. The second edition is intended to formally respect and honour the contribution of East Timorese women to independence and the high price they paid during the Indonesian occupation.

Some of the problems that continue to face the women of East Timor were graphically outlined by advocate Sister Maria de Lourdes Martins Cruz at the launch:⁸⁰

'A luta continua!' she said, and described how the women of East Timor were still second-class citizens in their own land. 'A luta continua!' and she described how girls still don't receive the same educational or employment opportunities as men. 'A luta continua!' and she told of domestic violence still rampant, women still serving as slaves in their own homes, women bought and sold like

⁷⁸ Amnesty International. *Women in Indonesia and East Timor*. AI Index ASA 21/51/1995. London: Amnesty International, 1995; Miranda E. Sissons, *From One Day to Another: Violations of Women's Reproductive and Sexual Rights in East Timor*, Melbourne: East Timor Human Rights Centre, 1997; George J. Aditjondro, *Violence by the State against Women in East Timor: A Report to the UN Rapporteur on Violence Against Women, including its Causes and Consequences*. Newcastle: East Timor Human Rights Centre, 1997; and Catherine Scott. 'The Feminine Face of Resistance'. Torben Retbøll (ed). *East Timor: Occupation and Resistance*, Copenhagen: International Work Group for Indigenous Affairs, 1998.

⁷⁹ FOKUPERS, an acronym for 'Forum Komunikasi Untuk Perempuan Loro Sae' (East Timorese Women's Communication Forum), was founded in 1997. It focuses on political victims and gives counselling and other forms of assistance to women victims of violations, including ex political prisoners, war widows and wives of political prisoners. Its mandate also includes promoting women's human rights among the local population, especially the East Timorese women. In September 1999, the office of FOKUPERS in Dili was attacked by militia, resulting in looting and burning of the premises and the staff of the organisation having to flee to save their lives.

⁸⁰ Sister Maria assisted many thousands of Timorese in the aftermath of the 1999 violence in Liquicia, Dili and West Timor, and founded the institute Maun Alin Iha Kristo ('Brothers and Sisters of Christ') to help the poorest people in East Timor improve their economic situation by reviving and preserving their culture.

commodities under the tradition of bride price, and men leaders still unwilling to accept East Timorese women as equals. Ovation after ovation shook the hall.⁸¹

Given the serious nature of the crimes outlined in *Buibere*, Sister Lourdes' speech is striking in that in the eyes of those survivors present that day, independence did not necessarily mark the end of violence against women, just a new manifestation of violence and subordination. There appeared to be a clear linkage between the gender-based political persecution and violence by invading forces, understood as the burden of the feminine face of resistance, and endemic gender-based violence and inequality experienced by women as citizens in the transitional Timorese society.

I contend that Sister Maria was correct in stating that the problems facing Timorese women in the independence period are linked to the problems women faced during the occupation. Recognition and redress under the law for gender-based violence in war is linked to recognition and redress for domestic violence and socio-economic rights in the 'peace'.⁸² The claims made for the transitional justice mechanisms chosen for Timor were that they would contribute to building the rule of law in both Timor and Indonesia. Women in Timor generally lack political power and representation in comparison to men,⁸³ and possess the worst socio-

⁸¹ Curt Gabrielson. 'East Timorese Women's Fight Against Violence'. *International Council World Affairs Newsletter*, 1 January 2002.

⁸² The World Health Organisation supports the hypothesis that where there is war, post-war or other social upheaval there is an increased incidence of domestic violence. See G. Krug, Dahlberg L, Mercy J, Zwi A and Lozano R (eds). *World Report on Violence and Health*, Geneva: World Health Organisation, 2002. See also Mary O'Kane. 'East Timor: Return of the Revolutionaries'. *The Guardian*, London, 15 January 2001; and Elizabeth Colson. 'War and Domestic Violence' (1995) *Cultural Survival Quarterly* 19 (Spring): 35-38.

⁸³ Women make up 49.4% of the population of East Timor. Fretilin won an absolute majority in the 2001 Constituent Assembly election, which became the first parliament. Several women unsuccessfully stood as independent candidates for the Constituent Assembly. Under Fretilin's leadership, 27.6% of the Members of Parliament were women, 20% of the ministers and administrators were women, 24.3% of civil servants were women and 27.6% of the village councillors were women (each council contains two women's representatives and a female youth representative). In the May 2007 Parliamentary elections, it was required of parties that one out of every four candidates on their candidate lists be for women, although the women were mostly placed fourth. Polling data was disaggregated by gender for the first time. 27.69% or 18 women were successful from a total number of 65 seats. Eight candidates stood for election as President, including Lucia Lobato as the one woman candidate. See further Manuela Leong Pereira and Jill Sternberg, 'Women's Involvement in Timor-Leste's Presidential Elections', *1325 PEACEWOMEN E-NEWS*, Issue 89, 24 May 2007.

economic indicators of the Timorese population.⁸⁴ One can assume that the strength or weakness of the rule of law in a new state will have a gendered impact.⁸⁵

The evidence is that the cultural and political realities of women in East Timor were and remain extremely complex and fluid. Timorese women play multiple roles, including in government, politics and transitional justice systems, which will be outlined in detail in relation to the different mechanisms. Women played an active role in the liberation movement (*Buibere* paints only one portrait)⁸⁶, and at times were armed fighters in the guerrilla movement and are therefore also potential perpetrators of international crimes. The equality of women occupied a central place in the liberation ideology of FRETILIN,⁸⁷ and continued to be one of the party's key platforms when it gained a parliamentary majority in the 2001 elections.⁸⁸ This is reflected in the Timorese Constitution.⁸⁹

Despite this complexity, Timorese women's groups have identified some general problems for women in the post-conflict period, which include: the failure of domestic and international law to adequately address gender-based persecution experienced during the Indonesian occupation from 1975 to the present; the impact of poor economic and social conditions, including bars to property ownership; the failure of policy or law to provide acknowledgment or compensation for survivors of gender-based persecution

⁸⁴ See further Asian Development Bank and UNIFEM, *Gender and Nation Building in Timor-Leste: Country Gender Assessment*, Manila: Asian Development Bank, November 2005; and United Nations Development Programme, *Human Development Report 2006 Timor-Leste: The Path out of Poverty, Integrated Rural Development*. Dili: UNDP, 2006.

⁸⁵ United Nations Population Fund, *Gender-based Violence in Timor-Leste: a Case Study*. New York: UNFPA, 2005; Vijaya Joshi, *Building Opportunities: Women's Organizing, Militarism and the United Nations Transitional Administration in East Timor*. PhD thesis, Clarke University, Ann Arbor, Michigan, 2006; and Simi Daniel Schroeter, 'Senses of Violence and the Education of Senses: Gender, Body and Violence in the Independent East Timor' (2006) *Lusotopie* 13(2): 155-172.

⁸⁶ Rebecca Winters (ed). *Buibere: Voice of East Timorese Women*. Darwin, NT: East Timor International Support Center, 1999.

⁸⁷ See for example, the Magna Carta concerning Freedoms, Rights, Duties and Guarantees for the People of East Timor adopted by the National Council of East Timorese Resistance (CNRT), Peniche, Portugal, 25 April 1998.

⁸⁸ For a fascinating narrative-based description of the situation of post-independence women, see Irena Cristalis and Catherine Scott, *Independent Women. The Story of Women's Activism in East Timor*. Progressio: London, 2005.

⁸⁹ See further Organização Popular da Mulher Timor (OPMT - The Popular Organisation of East Timorese Women, or Fretilin women's arm), 'Letter to the editor: Response to Kirsty Sword Gusmão's opinion in *The Australian* newspaper dated 7 July 2006', published 8 July 2006 at Appendix D.

or the children born of rape; the failure of domestic law to protect women from the escalation of domestic violence post-independence; obstacles to participation in pre and post-independence decision-making, including representation in formal elections; and obstacles to participation in key decisions about transitional justice mechanisms, such as amnesties.⁹⁰

My wider research has shown that where women have been recognised at all in legal processes in Timor, there is a danger that it has only led to marginalisation and stigmatisation of survivors of sexual violence. Trials have not contributed to a material rise to the basic living standards and status of women. There may also be negative consequences for survivors of domestic violence if there is no confidence in the judicial sector to acknowledge and protect women. I therefore propose one alternative way of addressing the situation of women. By moving beyond ideas of women as victims or even survivors, by redefining what it is to be a 'veteran', progress could be made as veterans receive both maintenance and status in the new State. East Timorese women themselves have continuously stressed the need for justice to encompass their ongoing economic and social rights.⁹¹

The danger for East Timorese women now is what I term the 'changing the curtains' phenomena—that fundamental changes in the sovereignty of the State in the form of independence may mean that the basic conditions of women's lives, or their potential to claim their legal rights, does not change in any meaningful sense, as described in the call to arms by Sister Lourdes. Despite some important efforts to include women and their experiences in the justice mechanisms established in East Timor since 1999, Timorese women such as Sister Maria may indeed have cause to be disenchanted.

When Natércia Godinho-Adams addressed the UN Security Council on behalf of Timorese women's networks, she pointed out that whilst the Indonesian

⁹⁰ Susan Harris Rimmer. 'Untold Numbers: East Timorese Women and Transitional Justice'. Sharon Pickering and Caroline Lambert (eds). *Global Issues, Women and Justice*. Sydney: Federation Press, 2004: 335-366.

⁹¹ Commission for Reception, Truth and Reconciliation (CAVR). 'Women and the Conflict: National public hearing 28-29 April 2003'. Audiensi Publik Nasional: Balide, East Timor, 2005. See also the Women's Charter of Rights at Appendix A.

occupation had been a tragedy for the women of East Timor, the crisis had also created a number of new opportunities for them:

Men's and women's roles changed substantially during the years of conflict and social disruption since 1974. A significant number of women assumed active roles in the clandestine liberation front and the armed resistance. They were soldiers, they smuggled medication, food, armament, and information to the resistance movement hiding in the mountains. [...] East Timorese women want to build a society that will respect their newly acquired post-conflict roles, and will not force them to return to traditional powerless roles.⁹²

Transitional justice processes are meant to assist a nation to come to terms with a violent past and decide what to do with the perpetrators of the violence. However, the supposedly gender-neutral processes in East Timor did not address the experience and contribution of women to the independence struggle and are not designed to assist their situation in post-independent East Timor.

Transitional justice models may have moved on slightly from the crude *realpolitik* position of openly bartering justice for peace, but the substantive outcomes of justice mechanisms are still extremely selective and have substantial flaws in terms of competence and fairness.⁹³

Generally, my research on East Timor suggests the political debates around transitional justice still reflect differing *Realpolitik* versus anti-impunity views regarding the 'trade-ability' of justice outcomes, the selective gaze and resources of the international community for justice outcomes, and questions over who is the key audience for those outcomes.

A close analysis of the Serious Crimes process in Dili and the Jakarta ad hoc human rights trials through a gendered lens showed that women were poorly represented, and poorly treated in the court room. Timorese women's

92 Natércia Godinho-Adams, 'UN Security Council 'Arria formula' meeting on the implementation of Security Council Resolution 1325', 30 October 2001.

93 See further Charles T. Call, 'Is Transitional Justice Really Just?' (2004) *Brown Journal of World Affairs* XI(1):101-113.

gendered experience of conflict was ignored in court or only acknowledged as an afterthought. Worse still, their experience of sexual violence and forced maternity was seen as a source of stigmatisation and marginalisation in an independent Timor. The trials did nothing to counter that perception. Women could lose faith in the courts to deal with violence against them under international law, just as their need to be protected by domestic law from domestic violence dramatically increases.

Only the CAVR process gives cause for hope. Even though the CAVR was designed to be a companion for justice, not a substitute for it, generally it was the mechanism that offered the most benefit to Timorese women, in terms of both recognition and redistribution. The CAVR Report stressed that the position of women is fluid. While in many ways East Timor remains a patriarchal and traditional society, the Report allowed public space for the suggestion that women could start to play a greater role in post-conflict reconstruction and governance. As one survivor told the CAVR:

I will not... hold office like these important men who once fought together with us. All I ask for is my right to a decent life as the family member of a fighter. I got this way because my husband and children disappeared. The important men are not permitted to forget us [just because they] now have a strong chair stuck on the ground. In the past, when their positions were not yet certain, we fought together.⁹⁴

My research also outlined the position of Timorese women under the legal system in the post-conflict period, noting the serious problems with legislation, traditional justice mechanisms (*adat*) and treatment by the courts. The experience of women in the trials set up for transitional justice purposes may have a direct impact on their faith in the legal system to provide redress for domestic violence in the post-conflict era, and vice versa.

⁹⁴ BK from Fatubessi, quoted by Galuh Wandita, Karen Campbell-Nelson, and Manuela Leong Pereira. 'Learning to Engender Reparations in Timor-Leste: Reaching Out to Female Victims' Ruth Rubio-Marín (ed), *What Happened to the Women?: Gender and Reparations for Human Rights Violations* New York: Social Science Research Council, 2006, at p. 319.

The question is whether Timorese society can shed the euphemistic veil that lies over a substantial social and moral issue in East Timor – that of the reintegration and acceptance of women who have suffered human rights violations and the right of their children to a future free from violence.

Conclusion: Undiminished uncertainty

President Xanana Gusmão stated in 2002 that '[w]e must do our best to eradicate all sentiments of hatred, of revenge. If you still feel like this, then you are living with the ghosts of the past.'⁹⁵ Bishop Belo countered: 'I hear the voices of widows, the complaints of raped women, of orphans. They don't like to live together and meet in the street their perpetrators.'⁹⁶ The 'ghosts of the past' for many women are living threats. These contrasting attitudes, State versus Church, male versus female, capture neatly one of the key dilemmas of transitional justice—who is to bear the cost of the compromises made for peace?

It is easy to empathise with Gusmão in his publicly articulated dilemmas over pursuing the best future for his country. East Timor is poor, with a giant, hostile neighbour and vulnerable borders. Within Timor, peace is fragile, as shown by the April-May 2006 Dili riots and 2007 election violence.

However, the question of compromise for peace cannot be answered by a democratic society, or a society that hopes to become democratic, without properly considering the perspective of women.

The situation for East Timorese women in 2008 reflects what I termed the 'changing the curtains' phenomena – that fundamental changes in the sovereignty of the State in the form of independence may mean that the basic conditions of women's lives, or their potential to claim their rights, does not change in any meaningful sense. Recognition is flawed and partial and there has been no redistribution of the benefits of peace, not even redistribution of shame.⁹⁷

⁹⁵ Associated Press, 'Revenge is Low on the List of Priorities', *The Weekend Australian*, 18-19 May 2002, p. 15.

⁹⁶ Associated Press, *ibid.*

⁹⁷ Katherine M. Franke, 'Gendered Subjects of Transitional Justice' (2006) *Columbia Journal of Gender and Law* 15(3):813-828.

Unless international law can confront and make itself relevant to that potential for gender justice in a post-conflict setting, not only may opportunities for the betterment of women's situation be lost, but the interventions may worsen their situation. To the call by Sister Maria de Lourdes Martins Cruz of 'a luta continua (the fight continues)', international law should respond to violations against women with a resounding 'chega' (enough).