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Conflict, International Intervention and Criminal Tribunals as Transitional Justice Mechanisms: The Legacy of Failed Justice in Timor-Leste

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On 27 January 1999 the President of Indonesia, Habibie, announced that the people of the Indonesian province of East Timor[1] would be given a vote in which they could decide whether they wanted to become an autonomous region of Indonesia or to separate from it. This event, which became known as the 'Popular Consultation', amounted effectively to an offer of a referendum on independence.

It is unlikely that the then recently installed President could have realised the consequences of his decision and of the legacies that it would produce; it set in train a course of events that would have extreme and ongoing repercussions for Indonesia and East Timor as well as for the role of the international community in dealing with violent conflict. During the 10 years since this announcement Indonesia has emerged from the political and social convulsions which toppled Suharto and led to Habibie's ascent to power, and through a succession of elected presidencies, has undergone a transition to a democratic state, albeit one which is still subject to significant influence by previous centres of power including the military. East Timor is still living through the lengthy process of its transition from occupation to independence. It has suffered the convulsions of mass violence and atrocities, the liberation of freedom and the depressing post colonial reality of dealing with civil conflict and entrenched poverty. The international community and the United Nations (UN) have grasped with the difficulties of how to reconstruct post conflict states and the implementation of transitional justice. The UN has been actively involved in East Timor for over a decade firstly in negotiating the conditions for a free vote, then governing the territory and dealing with the atrocities of one of its member states, and

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[1] East Timor became the Democratic Republic of Timor-Leste on 20 May 2002. Its abbreviated name, Timor-Leste is used in this paper interchangeably with East Timor.

finally in its ongoing role of guiding Timor-Leste through its transition from a post-conflict state to one where there is at least some semblance of peace, security and prosperity.[2]

By the time of the Consultation in 1999 the international community had the experience of establishing and operating two international criminal tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). These at the time ground breaking enterprises, were established in an international environment which, despite massive general support and goodwill, was circumspect about the creation of criminal tribunals as forums for dealing with human rights violations, even where grave atrocities compelled a decision for doing so. Thus, an assessment of the state of criminal tribunals published at the time noted that for all their benefits:

'trials should not be pursued where there is no chance or perception of fairness; where the tribunal is entirely subject to a particular nation's self interest; or where there are overwhelming disparities between the resources and will needed to undertake trials and the capacities of lawyers and judges, witnesses and offenders actually in hand'[3]

This prescient and foreboding view of international criminal tribunals has been borne out by the experience of the criminal tribunals that were established to deal with the atrocities inflicted upon East Timor civilians by the Indonesian military[4] in 1999. In the light of the guarded role for criminal tribunals as transitional justice interventions in post-conflict states, this article considers three issues that are related to the establishment of the tribunals for East Timor. These are firstly why the international community chose the particular form of criminal tribunals they did, secondly why they nonetheless failed, and thirdly what have been the effects of this failure. In this regard the focus of this paper is on the continuing tensions in Timor-Leste as a major consequence of the failure of the tribunals.

These issues are addressed in three sections. The first section provides an overview of significant events of the last 10 years in East Timor highlighting the influential role of Australia as an example of the approach

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2 The UN was the effective sovereign of East Timor exercising plenary authority since 25 October 1999 when UNTAET (the United Nations Transitional Authority for East Timor) was established. See for analysis of this role and the concept of 'international administration' for which it is an outstanding example, Caplan, R., *International Governance in War-Torn Territories: Rule and Reconstruction*. Oxford: Oxford University Press, 2005, p. 1 ff.

3 Minow, M., *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*. Boston: Beacon Press, 1998, p. 50

4 This term is used generally in this article as referring to the Indonesian National Army, or the Indonesian Armed Forces, the *Tentara Nasional Indonesia*, abbreviated as the TNI.

of regional powers during this period. The repeating themes of these years are conflict, violence, the duplicitous role of international intervention, poverty, the failure of law, relations with Indonesia, and the balancing of justice and peace. The second section considers the form and nature of the criminal tribunals that were established in response to the violence of 1999, why it was done in the way it was, and what this demonstrates about criminal tribunals as transitional justice mechanisms. Thirdly, the article addresses the significant reasons for the failure of these tribunals and its consequence, namely the absence of justice and accountability for the atrocities committed in East Timor.

Timor-Leste before and after the Consultation

Occupation and complicity

Indonesia occupied East Timor from December 1975 until September 1999 and incorporated it as its 27th province. The occupation was characterised by a pattern of violence and atrocities which were deliberate, planned, widespread, systematic, and methodically executed.[5] The violence was committed by Indonesian military and security forces and their proxies, East Timor militia groups, which operated under the command of the military and which were recruited, trained and supplied by them. The atrocities were institutionally and individually sanctioned at the highest levels of the Indonesian security apparatus and civil administration; they led to the death of at least 120,000 East Timorese and included thousands of serious human rights violations.

The Indonesian invasion and occupation had the tacit consent and acquiescence of the major international and regional powers,[6] including Australia. Indonesia was perceived as a pro-US and anti-communist force in a volatile political region. It held geographic, ideological and political inter-

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5 Cumes, G., 'Impunity, Truth and the Rule of Law: The Political Compromise of Accountability and Justice for Human Rights Atrocities in East Timor', in Binchy, W. (ed.), *Timor-Leste: Challenges for Justice and Human Rights in the Shadow of the Past*. Dublin: Clarus Press, 2009, p. 479

6 This is most clearly demonstrated by the response of ASEAN (the Association of South East Asian Nations) of which Indonesia was a leading member. It ignored the East Timor question during the whole of the period of the occupation even though Indonesia's invasion violated its foundational principles of the supremacy of sovereignty and non-interference in the affairs of other states. See Cotton J, 'The Rhetoric of Australia's Foreign Policy', in Lovell, D. W. (ed.), *Asia-Pacific Security: Policy Challenges*. Canberra: Asia Pacific Press, Australian National University, 2003, p. 41

ests for regional powers, as well as presenting strategic and economic opportunities.[7] This view of Indonesia directly informed Australian policy; Australian support for Indonesia was founded on perennial fears of communism and immigration from South-East Asia, and Indonesia's geostrategic location meant that it was (and is) regarded as an 'area of direct military interest'.[8] Accordingly Australia's foreign and defence policy was premised upon maintaining a close relationship with Indonesia which Australia did not want to jeopardize.[9] This policy has had cross-party political support; it is demonstrated by ongoing economic and military aid to Indonesia independent of the governing political party in Australia.[10]

Given this approach, the maintenance of friendly relations with Indonesia was and remains a matter of critical importance for Australian foreign policy.[11] During the period of occupation this was of mutual benefit for both states. Australia and Indonesia established important and lucrative business relationships particularly with regard to the exploration and development of natural resources.[12] In return, with bipartisan political support Australia condoned Indonesia's annexation of East Timor,[13] recognized East Timor as irreversibly part of Indonesia[14] and consistently downplayed Indonesia's human rights violations on its behalf.[15]

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7 Stanley, E., *Torture, Truth and Justice: The Case of Timor-Leste*. London / New York: Routledge, 2009, p. 4–5. (Unless otherwise noted all following references to Stanley are to this work.)

8 See for example, Cotton, op. cit., p. 29–31, 36; Ballard, J. R., *Triumph of Self-Determination: Operation Stabilize and the United Nations Peacemaking in East Timor*. Westport / London: Praeger Security International, 2008, p. 24; Rae, J. D., *Peacebuilding and Transitional Justice in East Timor*. Boulder / London: FirstForumPress, 2009, p. 158; Zajec, O., 'Australia's Tricky Place in the Pacific', *Le Monde Diplomatique*, May 2010, p. 7

9 Fernandes, C., 'The Continuity of Australian Foreign Policy towards East Timor', in Binchy, W. (ed.), *Timor-Leste: Challenges for Justice and Human Rights in the Shadow of the Past*. Dublin: Clarus Press, 2009, p. 205

10 Rae, op. cit., p. 46

11 Stanley, op. cit., p. 4–5; Ballard, op. cit., p. 24

12 The process of negotiation of maritime boundaries with Indonesia commenced already in 1979 (Rae, op. cit., p. 46). Australia signed the Timor Gap Treaty with Indonesia in 1989 by which Australia was given access to rich oil and gas reserves in the Timor Sea.

13 Cotton, op. cit., p. 36

14 Fernandes, C., 'East Timor in Transition: an Australian Policy Challenge', in Kingsbury, D. (ed.), *Violence in between: Conflict and Security in Archipelagic Southeast Asia*. Singapore: Institute of Southeast Asian Studies / Clayton: Monash Asia Institute, 2005, p. 255. Australia was the first western state to recognize Indonesian sovereignty of East Timor in 1978, which it formalized with *de jure* recognition in 1979.

15 Rae, op. cit., p. 158

This strategic and economic policy impacted detrimentally upon East Timor; it ignored East Timorese aspirations for self determination and freedom from Indonesian occupation and its legitimate interests in, and claims to, possession of oil and gas reserves in the Timor Sea. These matters were constantly discounted in Australian political rhetoric and policy. An independent East Timor was perceived as unviable and a potential communist threat. Whether factually correct or not, this remained a foundation of Australian policy during the occupation, so that despite numerous UN Security Council resolutions calling for Indonesian withdrawal, Australia, with other powers, took no action to stop Indonesian violations in East Timor or to support the main opposition movement, Fretlin.[16]

All of these matters – the complicity in, and tolerance of, the Indonesian government's excesses by Australia and the international community – had an important impact. It contributed both to the absence of accountability for the Indonesian aggression and human rights violations, as well as the climate of impunity that prevailed during the occupation.

The Consultation and military intervention

The referendum promised by President Habibie took place on 30 August 1999; it was carried out by the United Nations Assistance Mission in East Timor (UNAMET) which was established by the United Nations Security Council on 11 June 1999. UNAMET registered 451,792 potential voters of which 98 per cent voted, deciding by a margin of 94,388 (21.5 per cent) to 344,580 (78.5 per cent) to reject the proposed autonomy and begin a process of transition towards independence. With the announcement of this result on 4 September 1999, the Indonesian military and East Timor militia groups unleashed an orchestrated campaign of violence which led to massive destruction of buildings and dwellings, widespread rape, torture, looting and approximately 1400–1500 cases of murder. At least 70 percent of the already depleted infrastructure of East Timor was destroyed including public utilities, health and education institutions, administrative buildings and villages. East Timor judicial infrastructure and law and order system was particularly affected; courts were looted, documents destroyed and legal professionals and law enforcement officials fled to West Timor. Some 240,000–250,000 East Timorese civilians were forcibly deported to Indonesian West Timor and thousands of others displaced within East Timor or in other regions of Indonesia.

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[16] ibid., p. 52; Stanley, op. cit., p. 4–5; Kingsbury, D., *South-East Asia: A Political Profile*. Oxford: Oxford University Press, 2001, p. 396

The violence was unleashed as reprisal for what the Indonesian elite, especially the military, regarded as the audacity of an ungrateful East Timorese population in so overwhelmingly rejecting Indonesian governance and the Indonesian development of their country and society.[17] Unlike the Indonesian invasion a quarter of a century earlier however the violence was received with widespread international outrage. The international community sharply rebuked the Indonesian leadership and under heavy pressure Indonesia agreed, on 12 September 1999, to accept the installation of an international military force in East Timor, INTERFET,[18] to quell the violence and restore peace.

The possibility of a military mission in East Timor was not unforeseen. Increasing TNI actions during 1999 aimed at destroying the independence movement before the referendum demonstrated Indonesia's failure to comply with promises that underpinned the 5 May Agreements.[19] A growing international consensus developed that Indonesian actions in East Timor were intolerable and jeopardized the successful outcome of the vote, particularly the possibility that it would, and be perceived by the international community to be conducted fairly, openly and free of intimidation.[20] However

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17 I am grateful to Professor Dr. Jürgen Rüland, Albert-Ludwigs-Universität, Freiburg im Breisgau for this insight. See also Kingsbury, op. cit., p. 407

18 The international military force, INTERFET (International Force in East Timor) was a multinational force of 22 states under a unified command structure headed by Australia to restore peace and security in East Timor, to protect and support the United Nations Mission in East Timor (UNAMET) in carrying out its tasks and to facilitate humanitarian assistance operations. It was authorised by the Security Council on 15 September 1999. It operated from September 1999–January 2000 and at its peak had 11,000 troops. See Rae, op. cit., p. 59–60. For background of the events which led to the intervention see Ballard, op. cit., p. 64–68

19 The '5 May Agreements' provided for security arrangements for the implementation of the Popular Consultation. They established that Indonesia was to have responsibility for security in East Timor; and President Habibie gave assurances that Indonesia would fulfill its responsibility for law and order and protection of all civilians. See amongst numerous references, Ballard, op. cit., p. 41

20 The announcement of the referendum was met by determined efforts to undermine the process within the Indonesian body politic, which responded largely with consternation to Habibie's proposal, and by increased coordination between the TNI and East Timorese militia. Already in March 1999 Australian intelligence communications established that Indonesia was increasing its military forces, that Indonesian military commanders and militia leaders were working together to destabilize East Timor, and that there was 'no doubt' that the Indonesian military were deceiving the world as to its activities and objectives. These activities and intelligence concerning them continued in April 1999. Atrocities in Liquicia and Suai during this month proved the lie of the impression that Indonesia gave to the outside world that it was acting to reduce tensions – it was incontrovertible that the opposite was the case. See generally Ballard, op. cit., p. 34, 59. See also Kingsbury, op. cit., p. 403–404

the role of any military force remained uncertain until the atrocities after the announcement of the referendum result forced the international community's hand.[21]

As the candidate for the leadership of the intervention force, Australia, for its part, faced a serious policy dilemma. On the one hand, as during the period of the occupation, Australia actively supported the Indonesian government position; it sought to deny and underplay Indonesian atrocities and even supported actions to ensure the success of an autonomy vote.[22] Despite knowledge of Indonesian atrocities from its own intelligence, Australia assisted to cover up the TNI's terror campaign during the whole of the period.[23] Australia knew that the TNI had commenced using the militias as its proxies, however, its then Foreign Minister, Downer, denied this publicly; Australia denied that the TNI was engaged in a proxy war despite numerous reports of its increased military action, and it resisted the formation of a peace-keeping force to monitor the situation.[24] Although by July and August 1999 information indicating potential post referendum violence grew increasingly conclusive[25] the Australian policy of denial of TNI actions continued. Immediately after the post ballot violence the Australian government initially supported the Indonesian position. It excused the conduct of the TNI saying it was only a few 'wild elements'[26] and refused to send troops to quell the violence by arguing that 'Australia could not invade Indonesia'.[27] In the end Australia's covert plan to support Indonesia's occupation of East Timor and allow the military to change the outcome of the ballot

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21 Ballard, op. cit., p. 56

22 Australia supported the TNI's attempts to create an impression that they were necessary to 'prevent civil war' and to reduce international intervention, thereby allowing the status quo to continue and enhance the prospects of a victory for the autonomy proposal. See Fernandes, 2005, op. cit., p. 261, 264

23 ibid., p. 262. This cover up began with its distortion of the Alas massacre in November 1998, the incident that is regarded as the beginning of the militia terror campaign (p. 261).

24 Ibid., p. 263–266. As Fernandes observes, the actions of the Australian government could be interpreted in only one way: it 'would say and do anything to prevent an international peacekeeping presence' (p. 266).

25 This included evidence of an Indonesian so called 'evacuation plan', which set out plans for eradicating East Timor of pro-independence leaders and supporters through 'destruction and deportation'. See Ballard, op. cit., p. 60, fn. 26. See also Kingsbury, op. cit., p. 406, 408

26 Fernandes, 2005, op. cit., p. 267

27 ibid., p. 270

only eventually failed due the outrage of Australian public opinion[28] and union blockades against Indonesian interests in Australia that forced Australia to take action to intervene.[29]

On the other hand, despite this public position, in the face of the increasing intelligence available to it during 1999, Australia was forced to take precautions to ensure that, if the referendum process declined into conflict, some steps were in place to deal with potential violence. In early 1999 it increased the readiness capacity of the military unit stationed in Darwin under the control of General Cosgrove, who was later to lead INTERFET, an action that left little doubt that military forces were anticipated to be needed in the near future.[30] Other readiness actions included increased intelligence operations in East Timor; these provided incontrovertible evidence of TNI complicity, but also importantly, information about Indonesian military unit locations.[31]

The military for its part, despite the public position of the Australian Prime Minister, Howard and Foreign Minister, Downer[32] in the meantime continued to develop plans to deal with possible militia violence. Apart from operations that were aimed at supporting the security of UNAMET and the success of the ballot,[33] this was centred upon 'Operation Spitfire'. This operation, which was an evacuation rather than a peace-keeping plan, had been in the planning process since 11 May 1999 and was developed primarily with the US to evacuate Australian and US citizens, as well as foreign observers from East Timor, should the need arise.[34] This planning provided

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28 Australian public opinion, unlike government policy, had been hostile to Indonesia's human rights abuses in East Timor for a generation, Cotton, op. cit., p. 38. See also Fernandes, 2009, op. cit., p. 206, and Kingsbury, op. cit., p. 408

29 Fernandes, 2005, op. cit., p. 270–73. A powerful opinion was formed that questioned Australia's alliance with the US. This was based on the feebleness of the US response to the violence, that Australia always supported US objectives, and that now neither government was committed to any action. This caused the government to lobby the US to exert pressure on Indonesia, which it did once it realised that the alliance was in jeopardy. The agreement of the US to the intervention was critical for Australia. See Cotton, J., op. cit., p. 42

30 Ballard, op. cit., p. 59

31 ibid., p. 59

32 ibid., p. 60. Despite their knowledge of Indonesian actions Howard and Downer, up to August 1999, ignored the intelligence and preferred to rely on Indonesian government's announcements that they would control events. The problem with this position was that Habibie's requests to the TNI to reign in the militia and restore order were ignored – in fact the opposite occurred, see Kingsbury, op. cit., p. 404

33 Fernandes, 2005, op. cit., p. 265 and Fernandes, 2009, op. cit., p. 223

34 Ballard, op. cit., p. 60. This Australian evacuation plan fitted in perfectly with Indonesian military strategy. If it lost the ballot, the military surmised that they would have to move

the grounding for the marshalling of Australian troops as early as 26 August and the extensive military assisted evacuation from East Timor that followed from 6–14 September.[35] This military readiness, and the preparedness to use it, provided a foundation for the INTERFET intervention that followed.[36]

This dilemma for Australian policy played itself out in domestic and foreign politics. The leadership of the intervention was a 'watershed event' for Australian foreign and defence policy.[37] Its strong, principled actions were applauded domestically and internationally (but for some neighboring states, notably Malaysia), and greatly enhanced the government's domestic standing. More importantly, it marked a critical change in regional policy; Australia's willingness to use force signified a virtual end of the policy of 'regional engagement' which had defined its East Asian policy up to this point, and replaced it with one that was based on a clearer sense of Australian national interest and values.[38] On the other hand however, the intervention and with it the new policy of a continuing security commitment to East Timor,[39] led to a serious deterioration in its relationship with Indonesia and demonstrated the veneer of its long standing public appeasement of Indonesian conduct. The intervention has still not been forgotten or forgiven by Indonesia.[40]

Unaccountability and injustice

The atrocities of the Indonesian military and its proxy militias only ceased, and a semblance of security and order was restored, with the arrival and intervention of INTERFET.[41] With the immediate situation calmed, the

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rapidly to reverse the result by attacking the civilian population and removing it across the border. With the foreign observers gone this could be achieved without witnesses, Fernandes, 2005, op. cit., p. 265, 267–68, and Fernandes, 2009, p. 223

35 For detail of the implementation and scope of Operation Spitfire see Ballard, op. cit., p. 71–73 and also Fernandes, 2005, p. 267–68

36 For detailed account of the preparation for and instigation of INTERFET see Ballard, op. cit., p. 69–83

37 Cotton, op. cit., p. 37

38 ibid., p. 38–41

39 ibid., p. 40–41. See also Department of Foreign Affairs and Trade, *East Timor in Transition 1998–2000: An Australian Policy Challenge*. Canberra: Commonwealth of Australia, 2001

40 Zajec, op. cit., p. 7; See also Cotton, op. cit., p. 37

41 Cumes, G., 'Murder as a Crime against Humanity in International Law: Choice of Law and Prosecution of Murder in East Timor', *European Journal of Crime, Criminal Law and Criminal Justice,* Vol. 11/1 (2003), p. 41. For a detailed account of INTERFET'S operations and stabilization of East Timor see Ballard, op. cit., p. 84–104

international community established a number of enquiries into the September violence. All of these concluded that the violence was planned and executed by the leadership of the Indonesian security forces at the highest levels. The strategy was manifested by gross violations of human rights and the creation of a climate of impunity in which military personnel and East Timorese militia groups were encouraged to commit abhorrent acts against civilians who were perceived to be supporters of East Timorese independence. All of the enquiries recommended the establishment of an international criminal tribunal to deal with the perpetrators of the violence.

Despite these findings, which effectively provided the international community with direct knowledge of Indonesian sponsored atrocities, the United Nations (UN) Security Council decided against an international tribunal modelled on its then existing international tribunal models (the ICTY and ICTR).[42] Instead it decided that domestic prosecutions and criminal trials would be conducted in both East Timor and Indonesia through two internationally sponsored criminal tribunals, the Special Panel for Serious Crimes (SPSC, referred to as the 'Special Panel') and the Indonesian Human Rights Court (IHRC). These criminal tribunals were to exercise concurrent but independent jurisdiction over the human rights crimes committed in East Timor. The effect was that the same crimes could be dealt with in an international hybrid tribunal, the SPSC,[43] and a purely domestic tribunal, the IHRC. Shortly afterwards another layer of investigation was added to this, the Commission for Reception, Truth and Reconciliation (CAVR), and later again the Commission of Truth and Friendship (CTF).[44]

Both the SPSC and the IHRC failed to fulfil the goals that were hoped of them.[45] The mandate of the SPSC ended on 20 May 2005 without adequate explanation from the Security Council. Despite having completed over 50 trials and indicting a large number of accused, the SPSC was,

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42 This is elaborated below.

43 The SPSC was established as a mixed or hybrid criminal court. It had international and domestic jurisdiction, applied international and domestic law and was composed of national and international judges, prosecutors and defenders.

44 These are not dealt with in detail in this article. During the course of establishment of the SPSC and the IHRC UNTAET also established a truth commission, the CAVR (the *Commissao de Acolhimento, Verdade e Reconcilicao de TL* (CAVR), (Commission for Reception, Truth and Reconciliation); its mandate ran concurrently with the tribunals. Established on 13 July 2001, it commenced operations in February 2002 and reported in 2006. A later Commission, the Commission of Truth and Friendship (CTF) was established by agreement between Indonesia and Timor-Leste in 2006. Its goal was to establish and deal with institutional responsibility. It completed it's enquires in October 2007 and reported in July 2008.

45 This is elaborated below.

throughout the time of its operation, hindered by systems administration failure, inadequate international support[46] and the intransigence of the Indonesian authorities in providing the necessary cooperation to allow it to function effectively. The main class of persons convicted in the tribunal consisted of relatively low level defendants including Timorese militia and Indonesian military. The majority however were mostly 'impoverished illiterate, (Timorese) farmers who perpetrated single acts of violence ... under orders of the militias and the TNI".[47] No high level Indonesian military leaders were taken into custody or dealt with by trial. The result is that perpetrators who had the greatest responsibility for organising and sanctioning the 1999 atrocities remained outside of East Timor and immune from any sanction. This blatant injustice was made worse because the IHRC did not prosecute these persons and the East Timor government had no political will to push for their extradition to East Timor.

The trials in the IHRC which began in March 2002 were completed in August 2003. Six of the 18 accused who were tried were convicted however all eventually had their convictions overturned on appeal. The last successful appeal was that of the militia leader Eurico Guterres. Although on 13 March 2006 the Indonesian Supreme Court confirmed his conviction and sentence of 10 years imprisonment for crimes against humanity, in a further appeal in April 2008 it reversed this decision and set the conviction and sentence aside. The result is that not one of the 18 defendants who were brought before the IHRC remains convicted of any offences. This is despite an investigation and report by the National Human Rights Commission of Indonesia[48] and the known atrocities linked to the accused brought before the Indonesian court system. In the end therefore the process did not result in the successful prosecution of anyone.

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46 Australia, with the US and UK failed to provide adequate resources and good management for the SPSC or to put multilateral pressure on Indonesia. The consequence was that these states distanced themselves from the process of ensuring justice and accountability for the atrocities. See Stanley, op. cit., p. 107, 110

47 See Cohen, D., *Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor*. Honolulu: East-West Center, 2006, p 108. See also Rae, op. cit., p. 165

48 Known as the KPP HAM report. The National Human Rights Commission of Indonesia appointed a special commission of enquiry into the violence and identified 33 individuals responsible for crimes against humanity. The commission report was issued on 31 January 2000. The work and report of the Commission demonstrates the significance of an independent enquiry by a non-criminal, investigative body within the Indonesian legal system. Its recommendations however were largely ignored in the eventual establishment of the IHRC.

For the victims of the Indonesian atrocities in East Timor the failure of the international criminal tribunals, and especially the premature closure of the SPSC with the willing endorsement of the East Timor authorities, amounted to a failure of the justice process. Perpetrators remained free and a climate of impunity and unaccountability prevailed. A UN Assessment Mission which visited Timor-Leste in mid 2006 found that the demand for justice and accountability for the serious crimes committed in 1999 remained a fundamental issue in the lives of many Timorese.[49] The legacy of the Indonesian occupation included a 'gulf of understanding' that separated East Timor people depending on how they dealt with the occupation, as resistance fighters, in exile or as residents of occupied villages.[50] This finding reflects a critical effect of the criminal tribunals, namely the failure to provide a process of genuine accountability for the brutality inflicted on innocent civilians and a process in which the East Timorese people could reconcile the differences between them. This failure of justice has contributed to the lack of faith in justice institutions in present day Timor-Leste.[51]

The failure of restoration and the role of Australia

The failure of justice, together with other important social factors within post-conflict East Timor, had the result that ordinary East Timorese who were the main victims of the Indonesian occupation felt excluded from the heralded desirability and benefits of independence. These factors: long term displacement and homelessness, absence of or long delayed compensation for loss of property, and a volatile combination of rapid population growth, lack of domestic industries and chronic unemployment especially among young people in the main urban areas,[52] can be associated with, even if not

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49 *Report of the Secretary-General on Timor-Leste Pursuant to Security Council Resolution 1690*, S/2006/628. New York: United Nations Security Council, 8 August 2006, para. 76

50 ibid., para. 31. See also Rae, op. cit., p. 114

51 See also Stanley, op. cit., p. 108. This is not elaborated here. See generally *Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the Period from 27 January to 20 August 2007)*, S/2007/513. New York: United Nations Security Council, 28 August 2007 at para. 22, and *Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the Period from 8 January to 8 July 2008)*, S/2008/501. New York: United Nations Security Council, 29 July 2008 at para. 34. The result has been a loss of willingness by victims to prosecute through the formal justice system and an increased use of the traditional justice systems of the chiefs, Stanley, op. cit., p. 138–39.

52 Rae, op. cit., 102–03

exclusively,[53] the approach of the international community including the UN to restoration measures in East Timor. The indifference with which the international community dealt with its justice responsibilities through the criminal tribunals typifies this approach.

In general, the emphasis of the UN and international community in post conflict East Timor was to stabilize the situation rather than to facilitate long-term advancement.[54] Where economic and commercial activities were targeted, international state building measures and interventions were used by 3rd party states to bolster their own strategic, political and economic interests. These tended not to reflect the interests of the East Timorese population whose needs and capacities were generally ignored or disregarded.[55] The result was the imposition of western models and institutions of statehood rather than those that reflected social, cultural and traditional structures of East Timorese society. The exclusion of local participation and input led to a marginalization of local structures, needs and capacities and the result in many cases was the creation of unsustainable, weak and poorly functioning institutions.[56]

The consequence of this approach has been that socioeconomic development in East Timor has been marginal and poor. Despite vast amounts of aid since 1999 East Timor has not experienced reasonable economic growth; basic services such as electricity, water, sanitation and transportation are inadequate and general housing, health and welfare conditions are very poor.[57] The effect of this is seen in the entrenchment of inequalities, financial and economic dependency, increased economic and social insecurity and for many, extreme poverty.[58]

Australia, amongst other participants in post conflict East Timor has had an integral role in this process. With other international actors including particularly the UN and World Bank, Australia has engaged in a process which has embedded dominant relations of power into newly constituted structures within East Timor.[59] This role of Australia reflects its broader economic position in its region and particularly the South Pacific. In these mostly underdeveloped small island states (which well describes East

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53 The responsibility of the East Timorese themselves is noted by Christalis, I., *East Timor: A Nation's Bitter Dawn* (2nd ed.). London / New York: Zed Books, 2009, p. 312

54 Rae, op. cit., p. 101

55 Stanley, op. cit., p. 142, 148, 154

56 ibid., p. 148

57 Rae, op. cit., p. 102–03

58 Stanley, op. cit., p. 155

59 ibid., p. 140–42, 149, 155

Timor) Australia wields overwhelming economic, cultural and political power.[60]

Australia's economic interests have been a major factor in relations with East Timor after independence. This is most obviously demonstrated in the dispute between Australia and East Timor concerning international maritime boundaries and the possession of, and lucrative income from, the oil and gas fields in the Timor Sea that Australia negotiated with Indonesia during the occupation.[61] Australia has been anything but the international guardian of East Timor interests. Before independence it withdrew from the International Court of Justice so that it could not be subject to its jurisdiction and afterwards 'bullied'[62] East Timor into accepting a minor share of the income and control of these resources. As a consequence Australia took a disproportionate share of the financial benefit of the natural resources of the area, although subsequent treaties in May 2005 created a fairer agreement with East Timor.[63] Corollary issues of substantial economic significance such as the construction and location of processing facilities continue to have an economic impact on East Timor. Its opposition to this Australian policy has been met by a 'trimming' of development aid by Australia, a form of 'economic punishment'.[64] Therefore although Australia has provided substantial development aid to East Timor since 1999,[65] this is substantially offset in Australian budgetary terms by the enormous income from oil and gas.[66]

Structural injustice and internal conflict

The role of Australia typifies the approach of the international community towards East Timor; it contributed to the development of factors that cumulatively created conditions that intensified social divisions within East Timor. An effect was that tensions between the East Timorese during the post conflict period remained unresolved and underlying problems and

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60 Zajec, op. cit., p. 6

61 See above at n. 12

62 Rae, op. cit., p. 107

63 ibid., p. 106–07

64 Stanley, op. cit., p. 143

65 This has included significant AusAid (the Australian international aid agency) assistance in law and justice programs. For example in early 2008 AusAid participated in 3 major programs: a justice facility program which was to provide A $28 million over 5 years, support for an ongoing UN Development Program (UNDP) justice program for training and development of core actors in the justice system including the prosecutors office and prisons, and a justice for the poor program dealing with access to justice.

66 Stanley, op. cit., p. 142–44

disenchantment festered. This increased the vulnerability of East Timor society to social and political cleavages and led to the creation of a fragile social and security situation[67] and the conditions of social and political conflict.[68] The effect of the failure of the international tribunals only served to highlight and exacerbate the fundamental entrenchment of structural injustice that pervaded this condition of East Timorese society.[69]

The volatile post-conflict situation in East Timor needed only a trigger to be ignited. This was ultimately provided by political incompetence and manipulation; the consequence was renewed conflict and violence in East Timor which manifested itself in what has become known as the 'crisis' of 2006–07. This violence represented a resurfacing of divisions that pre-dated 1999 but were exacerbated by it and the failure of the political leadership which, not merely did not deal with it, but whether inadvertently or not, aggravated it. The crisis commenced in its most violent phase with a period of serious civil violence in April–May 2006.[70] During this period of significant violence and instability in Timor-Leste, centred mainly in Dili and the eastern regions, 38 people were killed. The widespread civil unrest continued into June and then in an abated form until September 2006. During this time the overall security situation remained volatile. Occasional spikes of violence continued into 2007 when food shortages (February) and conflict in the internally displaced persons camps (March) led to attacks on government buildings and vehicles, looting of rice warehouses, arson and property damage and some killings in which international security forces (ISF) were involved.[71] The violence led to the destruction of 2,200 homes and 1,600 damaged as well as to the displacement of 150,000 people.

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67 Rae, op. cit., p. 102–03

68 Stanley, op. cit., p. 135, 154–55

69 ibid., p. 152, 155

70 ibid., p. 137–38; Rae, op. cit., p. 98; Christalis, op. cit., p. 290–305

71 The Prime Minister Alkatiri had requested foreign troops to pacify the situation and assist in the capture of Alfredo Reinado, the former Commander of the Military Police in Dili, who had established an armed group opposed to the government. Australia was the largest of a contingent comprising New Zealand, Portuguese and Malaysian forces, known as the International Stabilisation Force (ISF). In several clashes Australian commandos killed East Timor police and later in 2007 in direct clashes with Reinado's group Australian soldiers killed several of Reinado's supporters. This and other actions, such as cutting trees to assist as road blocks served to poison Timorese attitudes towards Australia's presence whilst highlighting Reinado's position for many as a national hero. This was demonstrated by anti-Australia graffiti, threatening statements and calls for Australian soldiers to withdraw. The Reinado affair 'solidified an already growing anti-Australia sentiment'. See Rae, op. cit., 99–100

The effect of the crisis was to paralyse East Timor society. People endured a repetition of the fear that they had suffered during the worst periods of the Indonesian occupation. The small gains that had been made in the intervening years were largely set aside; especially economic activity which had been in expansionary phase before the violence was severely hampered.[72] This affected general prosperity and confidence, and infrastructural capacity development in essential services was severely set back.

The crisis continued with episodes of violence leading up to the presidential election on 20 May 2007 and the parliamentary elections on 30 June 2007. The general success of the way in which the elections were held and received helped to abate the situation although the underlying factors still remained in place. However, on 11 February 2008 the President Jose Ramos-Horta was seriously wounded in an attempted assassination at his home and the Prime Minister, Xanana Gusmao's convoy (which was in a different location indicating separate coordinated attacks) was fired on. Alfredo Reinado[73] was killed in the attack at Ramos-Horta's residence. The attacks led to a state of siege, and emergency law was imposed, the conditions of which included a curfew, restrictions on public gatherings, and increased police powers. This situation continued until May 2008.[74]

With the phasing out of strict law and order and the death of Reinado the situation of volatility has gradually abated since 2008; the fear that epitomised the crisis has receded and ordinary life has started to re-establish itself. In present day Timor-Leste although tensions remain the fear of violence is less tangible. The people now go about their life with a sense of greater ease, but remain uncertain of what might happen – it is said that normalcy is the exception in Timor-Leste. In commenting on the events of February and the state of siege of 2008 Xanana Gusmao has stated that there was now a comprehensive awareness that confrontation between opposed factions in Timor-Leste has to stop; only in this way can Timor-Leste become stable and the trauma of the past be dealt with. This, he says can only be ensured through the effective operation and cohesiveness of state institutions.[75]

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72 Asian Development Bank, *Asian Development Outlook 2007: Growth amid Change (19th ed.)*. Hong Kong: Asian Development Bank, 2007, p. 249. The report adds that weak infrastructure and utility services add to the difficulties of economic progress (p. 251).

73 See above at n. 71

74 See Christalis, op. cit., p. 310–12. Australian troop numbers were also increased, but the largely stable if still fragile situation led to a de-escalation of their numbers and the security presence generally by April 2009, see Rae, op. cit., p. 101

75 Interview with Xanana Gusmao, Asia Focus, Australian Broadcasting Commission, 31 August 2008

Criminal tribunals as a forum for human rights atrocities – the East Timor experience

The decision to establish a dual system of criminal tribunals to deal with human rights violations in East Timor was driven by the then contemporary political and economic forces within the international community.[76]

The already existing criminal tribunal models noted above, the ICTY and the ICTR, were international tribunals authorised under Chapter VII of the UN Charter and received funding as an assessed share of the UN budget. The substantial financial and logistical costs of running these tribunals caused the international community to reflect on other alternative tribunal mechanisms. By October 1999, when Security Council members were under pressure to put into place effective tribunal mechanisms for the East Timor atrocities, a sense of donor or tribunal 'fatigue' had developed which created resistance to establishing tribunals that were financed in the same way as the ICTY and the ICTR and which would operate according to the same legal standards.[77]

This position of the international community was in hindsight fortuitous for Indonesia's interests. As a result of its known organisation of the post consultation atrocities Indonesia came under intense international pressure to deal with the perpetrators of the violations. However it responded by relying on the principle of sovereignty – that as a sovereign state it should be allowed to investigate and prosecute its nationals who were responsible for atrocities committed in its territory. It promised that it would not allow impunity for those responsible and that it would prosecute according to the recommendations of its Commission for Human Rights report.[78] These promises were, in the international climate of the time, sufficient to persuade the UN that the most pragmatic way to proceed was to adopt a 'dual track' process of criminal accountability.[79]

The tribunals and emergent transitional justice

This decision of the international community reflected several emerging trends in international criminal justice, which continue to be relevant for

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[76] Roper, S.D / Barria, L.A., *Designing Criminal Tribunals: Sovereignty and International Concerns in the Protection of Human Rights*. Aldershot: Ashgate Publishing, 2006, p. 51

[77] ibid., p. 61; See also Kerr, R. / Mobekk, E., *Peace and Justice: Seeking Accountability after War*. Cambridge: Polity Press, 2007, p. 31–32, 80, 85

[78] The KPP HAM report, see above at n. 48

[79] Othman, M.C., *Accountability for International Humanitarian Violations: The Case of Rwanda and East Timor*. Berlin / Heidelberg: Springer, 2005, p. 149

contemporary considerations of criminal tribunals as justice mechanisms in post-conflict states.

A major factor in the decision for the East Timor criminal tribunals and in contemporary international criminal justice is economic considerations, namely the cost effectiveness of a criminal tribunal system of justice. National courts were, and currently are, viewed as a more cost effective means for dealing with international crimes. Indeed, the movement toward a purely national process continues to be seen as an appropriate vehicle for reducing the international financial burden of international criminal justice, and is favoured at the expense of promoting the establishment of an international justice system.

Secondly, national courts reflected an emergent new model of dealing with international crime. With the creation of the International Criminal Court (the ICC), a new model for dealing with international crimes was developed, namely that the presumptive forum for the trial of international crimes is the national courts of the state where the violence occurred. There are two advantages to this model. Firstly, domestic courts are part of the national system of administration of justice and represent a localization of the justice process rather than one which is imposed 'from above'. Secondly domestic courts are located where the violence happened.[80] They are not distant to the events that are to be investigated and prosecuted, and therefore cannot be subjected to the critique of being foreign, remote, and culturally inappropriate to local sensibilities.

This localisation of process in turn fosters domestic ownership and responsibility of the accountability process, an element of transitional justice that is more broadly incorporated in the concept of 'peace building from below'. Trials within states where atrocities occurred more clearly bring home to domestic populations the offences that were committed during the violence and foster a local demand and desire to take responsibility for ensuring accountability for the violations. This ground is based on the thinking that generally informs the discourse on local participation, ownership and control of transitional justice mechanisms – the notion of transitional justice from below or 'track 2 diplomacy'. This ground is important not just in itself. Domestic ownership of accountability also represents a measure of avoiding the 'victor's justice' critique of imposed accountability measures, which has resulted in the sense of, if not anger and resentment, at least

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[80] See generally Ambos, K., 'Prosecuting International Crimes at the National and International Level: Between Justice and *Realpolitik*', in Kaleck, W. et al. (eds), *International Prosecution of Human Rights Crimes*. Berlin / Heidelberg / New York: Springer, 2007, p. 64–65. See also Rae, op. cit., p. 164

disinterest and even apathy of the general population to an imposed trial process.[81]

The third major factor underpinning the decision was that local tribunals are, and continue to be, seen as part of the transitional justice process which helps to develop and foster a rule of law culture. They are part of, and support, the process of transitional justice generally and, it was argued, would do so for East Timor. The establishment of a criminal trial process located within East Timor would, it was hoped, help to establish and embed democratic structures of governance and the rule of law.[82] This argument recognises that a criminal court is one component of broader transitional justice mechanisms in post-conflict states. Other transitional justice mechanisms, especially truth commissions, which might be established and operated domestically, can complement the criminal tribunal method of dealing with perpetrators and this can assist both to operate more effectively. The rationale is that domestic criminal tribunals established to deal with some perpetrators might encourage the establishment of complementary transitional justice institutions which deal holistically with the justice issues of the post-conflict state, rather than separate and discrete agencies which have little or nothing to do with each other. The establishment of the CAVR as a domestic investigative body in Timor-Leste supported these arguments.[83]

Political compromise, international justice and international criminal law

At a broader level of analysis, the experiences of the creation and form of the SPSC and the IHRC, shows that as judicial institutions they represented a political compromise within the international community about issues of sovereignty, finance and authority.[84]

In creating international criminal tribunals the international community and host states balance financial needs and the protection of state sovereignty with the need to prosecute individuals.[85] Differences in the institutional design, nature, and powers of criminal tribunals are based on political and financial concerns and not necessarily on considerations of how best to

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81 See Kerr / Mobekk, op. cit., p. 80, 120–22

82 Thakur, R., 'Dealing with Guilt beyond Crime: The Strained Quality of Universal Justice', in Thakur, R. / Malcontent, P. (eds), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States*. Tokyo: United Nations University Press, 2004, p. 280

83 See above at n. 44

84 Roper / Barria, op. cit., p. 2

85 ibid., p. 93

provide justice to victims. Thus the creation and form of international criminal tribunals reflects a constant struggle within the international community of how to provide justice for individuals and war-torn societies within the reality of international politics.[86] Seen within this framework, the Special Panel and the IHRC represented a compromise between the international community and the individual states in which they were established – a compromise with regard to their organisational structure, legal and investigative powers, funding, resources and strength of international support and commitment.

Political influence in the creation of international criminal tribunals is a derivative of the politics of war crimes trials and of international criminal law. The result is a 'politics of compromise' between liberal cosmopolitanism and 'illiberal particularism', a form of 'romantic nationalism'. The former demands positivist regularities of law – procedural justice, equality before the law, the rule of law and tolerance of adversaries – the latter emphasizes 'procedural anti-formalism', collective guilt, national prerogatives and exemplary justice for offenders.[87] There is a constant struggle between the requirement of the international (the cosmopolitan) – the need and desire to promote international values and standards, and competing demands of the local (the metropolitan) – the need to deal with problems and resolve issues according to values and standards that deviate from internationalist, liberalist and cosmopolitan norms. As Simpson puts it, '(i)nternational tribunality and cosmopolitan justice are conditioned or qualified by the claims of local space, national self-assertion, group identity, sovereign prerogative and hegemonic imperative'. This hybrid nature of international justice is exemplified in the very nature of the mixed courts themselves – 'hybrid' courts.[88]

This 'perpetual negotiation between the claims of the cosmopolitan and the needs of the local' in international justice[89] reflects an abiding concern of international criminal law since its inception about the question of 'place'. This is a question of the space in which international law operates and its location within that space, and this is always a political act. It reflects competing political contestation of place in international criminal law

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86 ibid., p. 26. See also Kerr / Mobekk, op. cit., p. 34, 40

87 Simpson, G., *Law, War and Crime: War Crimes Trials and the Reinvention of International Law*. Cambridge: Polity Press, 2007, p. 12, 24

88 ibid., p. 52

89 ibid., p. 53

between the international and the municipal, as well as in the form and mode of procedure by which international crime is determined.[90]

With respect to the criminal tribunals for East Timor this contest between the cosmopolitan and the municipal played itself out in the decision to create the IHRC. This amounted to a decision to move the design and responsibility for determination of international criminal offences completely away from either an international or hybrid model, to a purely domestic model. The critical point of international criminal tribunals is that they represent a transfer of state sovereignty to international authorities and a retreat of the concept of sovereignty in international law. Thus the removal or limitation of national sovereignty is the very thing that the creation of a system of international criminal tribunals aims to erode. The paradoxical effect of the decision with respect to the IHRC was to reverse the trend of international criminal law towards universalism and conversely to restore prominence to the doctrine of national sovereignty.

Criminal tribunals as 'peace and justice' mechanisms

The 'space' of international law and the international political culture in which criminal tribunals operate raises another broad issue that is relevant to the consideration of the East Timor tribunals. This lies in the essentially problematic role of criminal tribunals as organs that are established to provide both peace and justice in post-conflict states. Peace and justice are very broad but inherently distinguishable concepts. A linkage between them exists through a political framework that adopts an approach to peace by including a 'justice' process within the overall framework of the peace process. However the means of doing this are extremely wide and subject to extensive argument about the form that this 'justice' should take, such as whether it should be retributive and punitive or restorative and rehabilitative or a combination of these. The various ways in which the relationship between peace and justice may constitute themselves permit a role for criminal tribunals as just one part of this broad process. However this is essentially a justice role and its characteristics and functions link it more strongly to this limb of the process of peace and justice than to a 'peace' function.

Peace might be effected without 'justice', and particularly the essentially retributive form of justice that is the norm of the criminal tribunals.[91] Once there is peace, whether it will be sustainable or durable depends not

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90 ibid., p. 30–44

91 See for example Stanley, op. cit., p. 133, 'Truth and criminal justice cannot, by themselves, provide peace'.

just on the fact of a criminal tribunals process of the human rights violations committed during the conflict, but, amongst several other factors, on the nature and form of the justice system that is established (or not) in the post conflict state following a peace. A credible criminal justice system as a part of a broader legal and justice system that is founded on rule of law processes and values provides a foundation, with other factors, of a sustainable peace; it establishes a framework for dealing with conflict as a dispute resolution process through legal institutions (that may be formal or informal) that require a solution to the dispute in law, rather than through the use of power, force, elite influence or some other mechanisms that lie 'beyond-law'.

It is at this level, as an institutional element of an ongoing peace process, that criminal tribunals have an important role. To give them a role as a facilitator of 'peace' is to misunderstand the essential nature of the conflict in which there has been human rights violations. This is essentially political conflict, rather than criminal conflict or mere criminality. Its resolution is regulated in the first instance by politics, not by a criminal process. This understanding of what lies below the surface of internal conflict assists to explain why the creation of international criminal tribunals is seen to be a 'political' compromise: the issue is one of politics, not just criminality, and the compromises and negotiations are conducted at the political level. Justice becomes an issue when the question of what is to be done about the atrocities committed during the conflict is addressed; although this may be part of a peace process, it need not be and often has a role that post-dates a peace.[92]

The construction of criminal tribunals, an essentially justice strategy, which is to also have a peace function, requires fundamental compromises about what the tribunal is to do, how it is to operate, who controls it and provides resources and ultimately to whom it is accountable. These are essentially political questions. If they are to result in a tribunal that operates independently according to law, they require that the political power that oversees these issues ensures that the tribunal operates within a rule of law and separation of powers environment, even if this is modified to some extent to take account of the values that inform the cultural and social milieu of the tribunal's location. In the situation of the SPSC and the IHRC this did not happen.

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[92] It may be part of the peace process if the peace negotiations address it, but where there is a stalemate in the conflict, this is less likely than the situation of a complete subjugation of one side by the other.

The failure of the East Timor criminal tribunals

The political compromises and ambivalence of international war crimes politics which fashioned the decisions concerning the SPSC and IHRC undermined the prospects of success of either institution. It was inevitable in the environment in which decisions were made about them that they would fail.

The SPSC: the ambivalence of the international community

In relation to the SPSC the compromises manifested themselves in the ambivalent political commitment of the UN and international community to the support and realisation of the criminal tribunal process, and in the irresolute approach to a prosecution strategy that could be focussed on dealing with those perpetrators with the greatest responsibility.

From the beginning the UN mandate[93] was beset by severe institutional deficiencies which affected the whole of its work including the undermining of the SPSC in several critical elements. There were significant problems with respect to financial support and resources, proper staff recruitment and training, proper case management, transcription services, witness protection systems, evidence-gathering, and inequality of resources and support for defence teams compared to prosecution services. All of these problems hampered the carrying out and legitimacy of the whole investigation, prosecution, trial and appeal process. This seriously affected the overall legitimacy of the SPSC as a successful process in which there could be meaningful accountability.[94]

The net effect of these deficiencies was that UNTEAT was not given adequate resources and appropriate expertise to enable it to do the complex work it was required to do in what were by their nature logistically difficult, politically sensitive circumstances. At the core of all the problems was the failure by the UN to ensure proper leadership, a clear mandate, political will, and clear ownership of the process from the very beginning.[95] This amounted, according to Cohen, to a 'massive institutional failure of the UN to create a judicial enterprise worthy of the values and standards that the UN represents'.[96]

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93 At this time the mandate was undertaken by the UN Transitional Administration for East Timor (UNTAET).

94 Cumes, op. cit., p. 489–90. See also amongst several references Stanley, op. cit., p. 91–97 and Rae, op. cit., p. 161–162

95 Cohen, op. cit., p. 3

96 ibid., p. 6

There were a number of practical effects of these failures. The Serious Crimes Investigation Unit (SCU) was not able to carry out its functions at a level which met appropriate standards and this affected the capacity and standard of prosecutorial work.[97] On the other side, defence representation was inadequate, a situation which continued even after the commencement of a Defence Lawyers Unit (DLU). This was due to both failure to provide proper resources to defence teams and the general incompetence or inexperience of personnel (local and international) who were engaged in defence work.

At the level of prosecution policy a critical problem was the initial failure to target 'those with the greatest responsibility' and to make these persons the focus of accountability for the violations. The issue here was who would be the main perpetrators who were dealt with by the process: the 'little fish' who followed orders and commands or the 'big fish' who co-ordinated and gave them.[98]

Although it took some time to develop, the SCU adopted a prosecution strategy which sought to identify what became known as 'priority cases' with a view to holding those with the greatest responsibility accountable for the violations.[99] These cases were to focus on major incidents of atrocities that occurred in 1999 where there were identifiable perpetrators ascertained particularly by evidence of co-perpetration. Following some difficulties in its breadth and focus, eventually a strategy was developed which focussed investigations on persons who organised, ordered, instigated or otherwise aided in the planning, preparation, and execution of atrocities.

A direct result of this was to focus investigations on high-level suspects in Indonesia. This led directly to the filing of an indictment against General Wiranto, the former Defence Minister and Commander of the Armed Forces of Indonesia, and seven others, on 24 February 2003.

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97 As Minow, op. cit., p. 122, notes, in the field of international criminal tribunals prosecutorial decisions are 'deeply influenced by resources and cooperation with other power centres over matters such as arrests and investigations'.

98 For comment on the debate of prosecuting 'those with the greatest responsibility' as opposed to establishing the accountability of 'foot soldiers' in a step-by-step approach leading eventually to that of generals see also Weiss, P., 'Preface', in Kaleck, W. et al. (eds), *International Prosecution of Human Rights Crimes*, Berlin / Heidelberg / New York: Springer, 2007, p. vi. See also reference to Lobel, J., 2003, *Success without Victory*, which argues that even if in the 'real world' the chances of successful prosecution may be diminished, this is not of itself a reason for not bringing a prosecution if 'convinced of the rightness of one's cause', p. vi

99 Cumes, op. cit., p. 488

The Wiranto indictment

The political interference with the prosecutorial process that followed these developments is indicative of the inherent difficulties that lie beneath the surface of international criminal law noted above.

Indonesia responded to the presentation of the Wiranto indictment by accusing the UN of politically motivated conduct.[100] This was received with embarrassment by the UN which issued a declaration that the indictment was the work of the Timor-Leste prosecution service. This was technically correct; the SCU operated under the Office of the General Prosecutor in Timor-Leste. For its part however the indictment was opposed by the Timor-Leste Prosecutor General and his reaction to it led to an almost complete breakdown of cooperation between his office and the SCU; an effect which sealed the fate of the attempt to exert international pressure against the indictees.

More than this however, the indictment was also opposed by senior East Timor government elite including the then East Timor President and Foreign Minister. The political responses at this time reflected the hostility toward the SPSC process that had already developed. Xanana Gusmao said at the time, it 'would not be in the national interest to realise a judicial process of this nature in Timor-Leste'.[101] Subsequently at a photo-shoot with the then Indonesian president Megawati Sukarnoputri, he hugged Wiranto and commented on the 'determination' and 'political courage' of the IHRC.[102] Gusmao's view of the SPSC is that it undermined the prospects of reconciliation between East Timor and Indonesia.[103] This view of the process and the failure by the East Timor elite to support it happened despite their awareness that East Timor lacked any semblance of infrastructure to be able to undertake any criminal prosecutions. This meant that if the UN process failed, the whole East Timor part of the accountability process would also fail.

Despite this political interference in the prosecutorial process the SCU issued an arrest warrant against Wiranto on 10 May 2004. Nothing however has come of it, and never will. Indonesia stated it would ignore the warrant

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100 Stanley, E., 'The Political Economy of Transitional Justice in Timor-Leste', in McEvoy, K. / McGregor, L. (eds), *Transitional Justice from below: Grassroots Activism and the Struggle for Change*. Oxford / Portland: Hart Publishing, 2008, p. 177

101 Kerr & Mobekk, op. cit., p. 86

102 Stanley (2008), op. cit., p. 178

103 Roper & Barria, op. cit., p. 95; Kerr & Mobekk, op. cit., p. 111

as it is "degrading and offensive" to the Indonesian state.[104] Timor-Leste has no intention to pursue it, and the Commission of Truth and Friendship process has merely given another layer of political feathering to these attitudes.

The IHRC: the absence of the rule of law and the role of the military

With respect to the IHRC the compromise made by the UN was to allow Indonesia to have complete responsibility and control of the criminal tribunals process knowing what it should have about the nature and form of the Indonesian political and military domination of legal and justice institutions, the absence of a functional rule of law and separation of powers within the Indonesian political system of the time,[105] and the influence that all this would have on the judicial and legal process.

It is important to appreciate that the IHRC was not established as an international criminal tribunal. It came about because of the insistence of the international community, and it was referred to as the 'International Criminal Tribunal for Jakarta', but in fact it operated independently. The UN had no influence on what it did, even if it wanted to. This lack of influence and distanced relationship between the UN and Indonesian authorities was reflected in the general political interference in the work of the UN by Indonesia during the period of the operation of the IHRC and the SPSC. At an overtly state political level, Indonesia refused to assist the UN in its attempts to provide accountability through the Special Panel and did nothing to ensure its own process was transparent and accountable.[106] International prosecution is heavily dependent on cooperation with centres of power and resources that can be provided by them.[107] The result of Indonesia's refusal to cooperate with the UN was that the majority of those who were indicted in East Timor of serious crimes by the SPSC, whether East Timorese or Indonesian, have not and never will be returned to Timor-Leste for trial.

The failure of the IHRC was in addition to, but a separate issue to Indonesia's failure to cooperate with the UN. The failings of the IHRC are attributable to different factors to those of the SPSC. They are associated with political, institutional and cultural norms embedded within the Indone-

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104 Beigbeder, Y., *International Justice against Impunity: Progress and New Challenges*. Boston / Leiden: Martinus Nijhoff Publishers, 2005, p. 140

105 See Hosen, N., *Sharia & Constitutional Reform in Indonesia*. Singapore: Institute of Southeast Asian Studies, 2007, p. 139

106 Othman, op. cit., p. 128–135.

107 Minow, op. cit., p. 122

sian justice and political system of the time.[108] These norms meant that even before it commenced hearings the IHRC had been paralysed as an investigatory and judicial institution.

An important factor which influenced the work of the IHRC and the attitude of prosecutors and judges lies in the dominant role of the military in the then existing institutional and political fabric of Indonesian political and social life.[109] The military represented, and continues to be, an elevated, powerful institution in Indonesian society and has enjoyed a culture of impunity that permeates the entire judicial process. This has historical roots. The military was politicised during Suharto's regime with key cabinet posts, including particularly the Attorney-General and Minister of Defence, being allocated to the military. Suharto's political party, Golkar, was composed of military officers and military support was critical in maintaining political power. This was the situation in 1999 despite Suharto's recent removal from power.

This militarisation of government portfolios contributed to a culture that permeated legal institutions.[110] The Attorney-General's office and the public prosecution service were founded, and operate upon, the basis of a military culture which inculcated military values of loyalty and discipline to the state above impartial, technical legal and prosecutorial work. In other words, the values and goals of state policy were given greater precedence than values of the law and justice. The result was that the main role of these offices was to enforce government policy rather than independently uphold the law as an independent impartial institution. The effect was that at the time of the operation of the IHRC there was a general absence of any rule of law culture within the Indonesian justice system. Instead prosecution practice was characterized by deference to military demands, resulting in a system of hierarchical control, and an absence of independent accountability to law. Human rights cases within this system represented a challenge to this political and military order. However the prevailing attitude of the prosecution service meant that there was no institutional commitment and motivation to deal with such cases as deserving of special attention; there was no moral conviction in the prosecution of human rights cases because there was no institutional sense that in doing so they were prosecuting 'real crimes'.

This culture explains much of the practice of the prosecution in the IHRC. It reflected the commonly adopted view within the Indonesian body

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[108] Cumes, op. cit., p. 494

[109] This paper aims only to give a brief perspective of this complex area of analysis.

[110] See especially Cohen, D., *Intended to Fail: The Trials before the Ad Hoc Human Rights Court in Jakarta*. New York: International Centre for Transitional Justice, 2003, p. 54

politic that the violence in East Timor arose from actions of the pro-independence forces, corroborated by UN deceit, which gave rise to a civil war. This revisionist version of the violence maintained that spontaneous, random clashes led to a conflict between opposing armed, but unorganised groups, in which the military played no particular organising role. All that the military did was to respond appropriately to a serious law and order conflict with the intention of defending and maintaining peace. This view reflected a widely held view in Indonesia that no extraordinary crimes were committed in East Timor, and of a perception of the violence which was at odds not only with the findings of international enquiries, but also the report of the Indonesian Commission for Human Rights.[111] This approach to the conflict directly influenced the motivation of prosecutors and the way in which cases were framed and presented.

The effect of this institutional culture upon the approach towards, and the actual conduct of the trials was that the IHRC could not provide an independent adjudication of human rights cases.[112] This underpins the core underlying problem of the cases: the absence of the necessary political will to prosecute the cases independently and to accept the outcome of the legal process. A political context in which the administration of justice could function with legitimacy and independence did not exist. Ultimate responsibility for this system and with it the failure of the IHRC process lies accordingly with the Indonesian political and military elite.[113]

Conclusion

Lessons from the failure of the tribunals

The experience of the East Timor and Indonesian criminal tribunals demonstrates important issues and lessons about the nature and role of international criminal tribunals, and with it the role of criminal law, as transitional justice mechanisms in the restoration of post conflict states.[114] Critically it also illustrates the enduring effects of the failure of these institutions.

The success of criminal tribunals in host states depends on the extent to which the host state and the international community are genuinely committed to addressing violations of international law through the creation of the tribunal. The host state has to be committed to making the criminal tribunal

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[111] See above at n. 48

[112] Cohen (2003), op. cit., p. 54; See also Stanley, op. cit., p. 97–102

[113] Cohen (2003), op. cit., p. 55

[114] See Stanley, op. cit., p. 152–158

succeed. This must be demonstrated by the political elite of state and put into place by reinforcement of the notion that criminal tribunals are important institutions that provide a site for accountability for atrocities, for contesting a culture of impunity, and as vehicles for promoting the rule of law. It is the responsibility of the political elite to ensure that tribunals are seen as special forums for dealing with the suffering of victims of human rights violations. In both East Timor and Indonesia there was no political elite support for the criminal tribunal process. In these circumstances the rule of law process that criminal trials were meant to exemplify was undermined and the process failed.

This leadership role of the political elite needs to be founded on respect for a legal culture that is based on, as a minimum, an institutional rule of law fabric in the host state where the criminal tribunal operates. The absence of a legal culture that promotes and sustains basic rule of law values, at least to the extent that the law is recognized as an independent institution that operates as the final arbiter of guilt or innocence of an accused, will inevitably lead to the undermining a criminal tribunal process. This is particularly so if it is a completely domestic criminal tribunal. The existence of such a legal culture is an essential requirement for the establishment of a tribunal which is set up to address human rights violations in a host state. The conduct of the political elite in East Timor and Indonesia and their interference in the independence of the prosecution and judicial processes reflects the absence of a rule of law culture in East Timor and Indonesia that could have sustained the criminal tribunal process. This has had wider disconcerting effects. It demonstrates a disregard for the role of law as an institution for dealing with criminal violations. This in turn erodes prospects for the development of legal, judicial, policing and correctional institutions within these states which are founded on a rule of law and separation of powers culture.

As far as the UN and the international community is concerned, the East Timor criminal tribunals demonstrate that the compromises involved in achieving the consensus necessary for the decision about intervention can undermine the judicial effectiveness of tribunals as a tool of accountability, and ultimately the quest for justice under international law. This is particularly so where offenders retain political power within the host state or remain outside the reach of international prosecution because of the host state's refusal to uphold its international obligations. This demonstrates the need for the UN and the international community to be clear about the purpose and goals as well as the nature and quality of criminal tribunals that it establishes as transitional justice mechanisms. If there are to be criminal tribunals their aims and goals should be clearly made known and sufficient

funding, resources and infrastructural support must be made available for these goals to be achieved. It is clear that international criminal tribunals have to be well financed and resourced. Further however there must be a political determination to carry through these processes according to conventions of the operation of criminal law in the face of the inevitable political interference that will arise by doing so. Domestic criminal law systems contain widely different versions of criminal law and procedure standards, however this is not so of international criminal justice and criminal law which operates according to the standards of the rule of law and separation of powers. This means that there has to be a separation of legislative, executive and judicial decision-making. The decision to prosecute or not must be free of political interference, and judicial decisions must be made according to law, and if so made, be respected as such rather than merely an impediment to achieving a broader political and executive goal. If the international community is serious about domestic prosecutions of international crimes it has to ensure that these mechanisms are in place before it hands over responsibility for them, and it that it retains a supervisory and regulatory role in the trial process.

The consequences of tribunal failure: the 'fragile peace'

Failure which compromises as to these matters facilitate gives rise to a risk of the failing of the whole criminal tribunal enterprise. The result is that the process fails to serve its purposes of justice and reconciliation, alienates society and calls into question the commitment of the international community.[115] This is not merely a failure in itself but it has severe repercussions for the post conflict state in which it occurs. The failure of justice can become an underlying cause for ongoing conflict. Although it is not the only factor that has contributed to the internal conflict in Timor-Leste since its independence and its continuing fragile peace, the failure of the criminal tribunals in both East Timor and Indonesia has had a significant role in this by helping to set in place a culture of impunity, unaccountability and unresolved grievances.

With the aid of hindsight it is clear that the criminal tribunals were never going to bring about peace within the political, economic, social and cultural situation of Timor-Leste. Peace has had to be negotiated and settled externally with Indonesia as a matter of state relations, and this is a political process, not a legal and criminal process. Peace within Timor-Leste depends upon the establishment of an institutional social order founded on the rule of

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[115] Roper / Barria, op. cit., p. 94. See also Stanley, op. cit., p. 152–155

law, or at least a credible model of it which reflects East Timorese values, and the legitimacy of state institutions through community consent and acceptance which provide for a functioning political, economic and social infrastructure. A functioning justice system of which the criminal law is a part has a critical role in this broader framework.

The failure of the criminal tribunals has contributed to instability in Timor-Leste by permitting a culture of impunity and unaccountability to develop and continue. This fostered instability and the potential for conflict, but most critically, it fostered a political and cultural milieu in which conflict would not be resolved through the use of law, but rather through the use of power and personal influence.[116] It fostered in other words a fragile peace, a peace that was subject to failure. The criminal tribunals did not deliver a legal justice and this is their essential failing. They were set up to do this as part of a broad peace initiative, and in this sense their success was meant to contribute to the peace. They were given a role that was, in hindsight, unachievable and this elevation of what could reasonably have been expected of them, by misusing their essentially justice role as part of a peace initiative expectation, exacerbated the consequences of their failure. They have not delivered justice and because this justice was to be a part of the peace, the result has been to contribute to instability.

Despite the ending of the violence of 1999 and some form of peace, East Timor is a deeply traumatized society[117] and serious obstacles inhibit its prosperity; decades of under-development, dubiously motivated international assistance, the legacy of conflict, and continuing mutual mistrust by opposing factions have formed a foundation for structural poverty which permeates East Timor society and institutions.[118] The continuing fragile peace in Timor-Leste could be addressed by a functioning institutional infrastructure that provided essential services to the community including legal and justice services. The absence or weakness of this infrastructure fosters instability. At the level of law and justice this instability is manifested in the absence of a properly functioning law and order system[119] and in political interference in the system that exists. Whether criminal tribunals which deal with human rights violations should, or could operate within such a system depends on the system's capacities. Presently in Timor-Leste capacity is very poor. To impose the standards, ideas and expectations of international criminal tribunals upon such a system given the fragility of East Timor

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[116] The influence of 'personalities', see Christalis, op. cit., p. 311

[117] ibid., p. 313

[118] Rae, op. cit., p. 106

[119] See above at n. 51

society is asking for failure – again. It is this social and political condition of Timor-Leste that remains an enduring legacy of President Habibie's decision.

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