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<th><strong>Title</strong></th>
<th>Transitional justice in Timor-Leste: Done and dusted?</th>
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<td><strong>Author(s)</strong></td>
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This thesis discusses a transitional justice framework that is derived from United Nations Secretary-General Kofi Annan’s report *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, published on 3 August 2004. In this report, the Secretary-General promoted an understanding of transitional justice that comprises interlinked judicial and non-judicial mechanisms, a framework in which truth commissions and courts interact. He reiterated the importance of victim-centred approaches to transitional justice, a topic that has received increased attention within the United Nations’ human rights bodies.

From 1999 onwards, the United Nations, through its Transitional Administration in East Timor (UNTAET), created a – so far unique and unprecedented – transitional justice model: a special, internationalised/hybrid court (Serious Crimes Regime) and a truth commission (Commission for Reception, Truth and Reconciliation) to address the legacy of Timor-Leste’s violent past. What was unique and unprecedented about this model was the interlinking referral mechanism between the court and the truth commission. This study elaborates whether this “holistic” or “complementary” approach to transitional justice, promoted by the United Nations, has proven successful towards Timor-Leste’s victims of serious crimes’ right to justice, truth and reparation.

This thesis demonstrates that transitional justice is neither a technical project that is short term in nature, nor is it achieved by bringing “universal” values to a variety of locations. Timor-Leste’s experience confirms that local political negotiations unsettle the view that transitional justice is a normative and apolitical undertaking. Dealing with the past is a dynamic and ongoing process and those responsible for implementing the transitional justice processes need to engage not only with victims but also with local political actors. Otherwise, as Timor-Leste’s experience has shown, “unfinished” processes and the implementation of victims’ rights will come to a frustrating standstill.
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<tr>
<td>APODETI</td>
<td>Timorese Popular Democratic Association (Portuguese: Associação Popular Democrática de Timor)</td>
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<tr>
<td>CAVR</td>
<td>Commission for Reception, Truth and Reconciliation (Portuguese: Comissão de Acolhimento, Verdade e Reconciliação de Timor-Leste)</td>
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<tr>
<td>CIVPOL</td>
<td>UN International Police Mission</td>
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<td>CNRT</td>
<td>National Congress for Timorese Reconstruction (Portuguese: Conselho Nacional de Reconstrução de Timor)</td>
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<td>CoE</td>
<td>UN Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste</td>
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<tr>
<td>CRP</td>
<td>Community Reconciliation Process</td>
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<td>CTF</td>
<td>Commission of Truth and Friendship</td>
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<td>DLU</td>
<td>Defense Lawyers Unit</td>
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<td>PALINTIL</td>
<td>Armed Forces for the National Liberation of East Timor (Portuguese: Forças Armadas da Libertação Nacional de Timor-Leste)</td>
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<tr>
<td>FRETILIN</td>
<td>Revolutionary Front of Independent East Timor (Portuguese: Frente Revolucionária de Timor-Leste Independente)</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<tr>
<td>ICIET</td>
<td>International Commission of Inquiry on East Timor</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the Former Yugoslavia</td>
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<tr>
<td>INTERFET</td>
<td>International Force for East Timor,</td>
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<tr>
<td>Komnas HAM</td>
<td>Indonesian Human Rights Commission (Indonesian: Komisi Nasional Hak Asasi Manusia)</td>
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<tr>
<td>OGP</td>
<td>Office of the General Prosecutor</td>
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<td>SCIT</td>
<td>Serious Crimes Investigation Team</td>
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<tr>
<td>SCU</td>
<td>Serious Crimes Unit</td>
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<tr>
<td>TNI</td>
<td>Indonesian Armed Forces (Portuguese: Tentara Nasional Indonesia)</td>
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<tr>
<td>TRC</td>
<td>South African Truth and Reconciliation Commission</td>
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<tr>
<td>UDT</td>
<td>Timorese Democratic Union (Portuguese: União Democrática Timorense)</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNTAET</td>
<td>UN Transitional Administration for East Timor</td>
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<tr>
<td>UNAMET</td>
<td>United Nations Mission in East Timor</td>
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<tr>
<td>UNMISET</td>
<td>United Nations Mission of Support in East Timor</td>
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UNMIT  UN Integrated Mission in Timor-Leste
UNOTIL  United Nations Office in Timor-Leste
NGO    Non-governmental Organisation
TOR    Terms of Reference for the Commission of Truth and Friendship established by the Republic of Indonesia and the Democratic Republic of Timor-Leste
1. Introduction

“The Secretary-General reiterates his belief that the rights of truth, justice and reparations for victims must be fully respected.”

With this statement, the United Nations Secretary-General commented on the opening of formal talks between the Government of Colombia and local paramilitary forces. It is one of the many occasions in which the right to justice, truth and reparation for victims of serious crimes were advocated for. Evidence for the recognition of these rights can be found in various human rights documents, international and national jurisprudence as well as policy strategies on transitional justice. They mirror how prosecuting war crimes and calling for truth seeking and reparation have become popular in periods of political transition. In this context, the vindication of victims’ rights is by its nature a politicised process. It requires former opponents to negotiate and compromise in favour of the implementation of the universal values of justice, truth and reparation. Despite important efforts towards the implementation of victims’ right to justice, truth and reparation, it seems the life of many of the victims of serious crimes remains unchanged. They continue to suffer from the violence committed against them, to live in poverty, and some even face the recurrence of war.

Timor-Leste’s victims of serious crimes experienced widespread violence, displacement and disruption of social relationships in the period from 1974-1999. Those displaced and persecuted during the conflict are today amongst those living in severe poverty. Relatives of disappeared persons continue to call on the governments of Indonesia and Timor-Leste to search for the whereabouts of their family members. Similarly, victims of torture, rape and other crimes of sexual violence await reparation for their suffering in spite of the various transitional justice mechanisms that were created in post-conflict Timor-Leste. At the centre of this case study therefore lies the question of whether and to what extent these local

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1 “Secretary-General Urges Respect for Ceasefire as Colombia Peace Talks Open”, UN Press Release SG/SM/9400, 2 July 2004.

2 Since independence in 2002, the official name of Timor-Leste is República Democrática de Timor-Leste. Until then, Timor-Leste was often referred to as East Timor. Some quotes included in this thesis may therefore refer to East Timor instead of Timor-Leste.
transitional justice processes were in a position to implement victims’ right to justice, truth and reparation. To elaborate this question, this thesis first sheds light on the characteristics and content of these as described within UN, such as the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines), and explains the challenges resulting from a transitional justice framework that is implemented from above. It discusses why justice, truth, and reparation are complex responses to historical and political problems and why the implementation of victims’ right to justice, truth and reparation has come to a standstill in Timor-Leste.

1.1 Why Timor-Leste as a case study?

In his report on The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies published on 3 August 2004\(^3\), the Secretary-General favoured a transitional justice framework that is “holistic”, incorporating “integrated attention to individual prosecutions, reparations, truth seeking, institutional reform, vetting and dismissals, or an appropriately conceived combination thereof”. He promoted a transitional justice framework in which truth commissions and courts, alongside other mechanisms, interact. In his report, the Secretary-General made reference to “Timor-Leste, [where] the Serious Crimes Unit worked in close conjunction with the Reception, Truth and Reconciliation Commission, as provided for in Regulation No. 2001/10 of the United Nations Transitional Administration in East Timor (UNTAET), which established the Commission’s terms of reference”\(^4\).

Timor-Leste came under UN transitional administration in October 1999. At the time, Timor-Leste found itself at the end of its 25-year occupation, followed by a year of increased violence surrounding the proclamation of independence in August 1999. With the departure of the occupying Indonesian forces, Timor-Leste was considered incapable of governing itself. To overcome this rule of law vacuum, the UN Security Council made use of its extensive powers under Chapter VII of the Charter of the United Nations\(^5\) and the transitional

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\(^4\) Ibid., para. 26.

administrator assumed the overall responsibility for the administration of Timor-Leste. He was entrusted with all legislative and executive powers, including the duties and obligations of sovereign state. Through this extensive mandate, Timor-Leste became a protectorate of the United Nations. The fact that UNTAET replaced local government with UN institutions was regarded as a good starting point for the analysis as to whether the United Nations, via UNTAET, applied and adhered to its own principles and standards developed, established, and promoted within the UN at the time and nowadays.

As the Secretary-General indicated, one of the defining features of Timor-Leste’s experience of dealing with the past has been the co-existence of the internationalised/hybrid court and the truth commission, which was empowered to recommend reparations. UNTAET created a – so far unique and unprecedented – transitional justice model: a special, internationalised (or hybrid) court, the Serious Crimes Regime, and a truth commission, the Commission for Reception, Truth and Reconciliation (Comissão de Acolhimento, Verdade e Reconciliacão de Timor-Leste, CAVR), with the ability to grant (to a very limited extent) and recommend reparation. Whereas trials were inspired by the development of a legalistic response to politically authorised atrocities, the CAVR’s main objective was to heal the wounds of the past through dialogue, testimony and ritual. What was unique and unprecedented about this model was the interlinking referral mechanism between the court and the truth commission. This mechanism connected the work of the Serious Crimes Regime to the CAVR on a statutory basis. This model also seemed to offer fruitful illustrations for identifying synergies between the co-existent and interrelated transitional justice mechanisms and for answering the following questions:

- Were the mandates of the individual transitional justice mechanisms overlapping, complementing, or sometimes even competing in relation to victims’ right to justice, truth and reparation?
- Did the model promoted by the UN undermine or mutually support the outcomes in relation to victims’ right to justice, truth and reparation?

1.2 Victims of serious crimes

The CAVR estimates that during and due to the Indonesian occupation, more than 100,000 persons lost their lives. Approximately 80% of the population are estimated to have been
displaced, a process often accompanied by intimidation, house searches, assaults, arson, destruction of property, arbitrary detention, ill-treatment, rape and torture. Poverty, malnutrition, maternal mortality, and domestic violence were widespread. Escalating violence with kidnapping, rape, and murder of civilians similarly marked the months surrounding the referendum for independence, held in September 1999. Almost two-thirds of the population were displaced during these months; a quarter of a million were forcibly moved across the border into Indonesian territory in West Timor and over 70% of Timor-Leste’s civilian buildings were razed. Today, Timor-Leste’s victim population is largely illiterate, scattered throughout inaccessible mountains with no access to electricity, communication, public transport or a postal system.

When referring to “victims of serious crimes” this study refers to victims of serious crimes under international law. Encompassed in this definition is the notion of victims and that of serious crimes. The 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power defines victims in Articles 1 and 2 as follows:

1. Victims means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

2. […] The term ‘victim’ also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in interventions to assist victims in distress or to prevent victimisation.

The definition of the UN Declaration is identical to the definition of a “victim” used by the CAVR. When using the term “victim” in this thesis, the term will comprise all persons covered by the above definition, including direct victims who themselves suffered harm, as well as secondary victims who suffered harm through the violation of the rights of the direct victim. In most cases, such secondary victims will be dependants or relatives of the injured person.

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As to the violation suffered, this study focuses on victims of serious crimes. The term “serious crimes” is used to refer to grave breaches of the Geneva Conventions of 12 August 1949 and serious violations of the laws and customs applicable in international and non-international armed conflict as well as genocide, crimes against humanity, and other violations of internationally protected human rights that are crimes under international law and/or which international law requires states to penalise (such as torture, enforced disappearance, extrajudicial execution)\(^9\). These are the primary violations leading to victimhood relevant to this thesis.

This focus on victims of serious crimes shall by no means introduce a hierarchy nor exclude victims of “less serious” human rights violations from recognition, if such a differentiation can be justified at all. The focus on victims of serious crimes was rather based on the following consideration: The Serious Crimes Regime, the CAVR, and the proposed national reparations programme all aim to address serious crimes. In the context of Timor-Leste, these include the above mentioned offences committed during the violent conflict of 1999 or during the period of Indonesian occupation. The UN documents promoting the right to justice, truth and reparation, as well, focus on victims of serious crimes. Victims and serious crimes are, mathematically speaking, the “common denominator”. They are the common group, subject to the transitional justice mechanisms implemented to deal with Timor-Leste’s violent past and were therefore regarded as a good starting point for discussion.

However, it should be remembered that a clear distinction between victims and perpetrators does not always correspond with the lived experience of real people. The focus on Timor-Leste’s victims of serious crimes does not want to neglect this reality. For sure, amongst Timor-Leste’s victims are persons who committed themselves (serious) crimes. Yet, this does not exclude the person’s status as a victim of serious crime. Torture is a crime whether the victim is an offender or an innocent child. Victims’ rights resulting from the offences remain the same.

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1.3 Personalisation and individualisation

In order to explain to what extent Timor-Leste’s victims of serious crime saw their rights to justice, truth and reparation implemented, the study elaborates to what degree the processes and outcomes of transitional justice efforts were personalised so that victims could actually perceive justice, truth and reparation. The hypothesis is that the more inclusive and participatory the processes are the more relevant and meaningful they will be to victims. Only by ensuring individualisation and participation\(^\text{10}\) will victims feel recognised and perceive transitional justice efforts as responses to the violations they suffered. Clearly, active victim participation varies depending on the transitional justice process in which it is sought. Within criminal justice processes, it requires that victims and their families are effectively involved in the proceedings and provided with the necessary information relevant to exercising their procedural rights. Meaningful participation in truth seeking requires a platform in which individuals can express their grievances and report on the facts and underlying causes of the violations and abuses that occurred\(^\text{11}\). Similarly, reparations will only be regarded as successful by victims if victims can communicate their needs so that reparations respond to the harm suffered. In all cases, active victim participation requires that duty-bearers design programmes that ensure a maximum of engagement with victims.

1.4 The guarantee of non-recurrence of violence

The right to justice, truth and reparation is often discussed together with the implementation of the guarantee of non-recurrence and reform. This fourth pillar was – “on a preventive basis” – first introduced under this notion by Joinet in his Set of Principles\(^\text{12}\). It emphasises

\(^\text{10}\) Similarly, Lambourne refers to “inreach”, a word she coined to describe the process of obtaining ideas, opinions, and feedback from local populations about their expectations and responses to the transitional justice process; see Wendy Lambourne, “Outreach, Inreach and Civil Society Participation in Transitional Justice”, in Critical Perspectives in Transitional Justice, eds. Nicola Palmer, Phil Clark and Danielle Granville (Cambridge: Intersentia, 2012), 237-238. For the discussion of rights, and not needs and opinions, this study refers to “participation” (in processes) and “individualisation” (of outcomes).


\(^\text{12}\) Louis Joinet was appointed Special Rapporteur of the Sub-Commission on the Question of the Impunity of Perpetrators of Violations of Human Rights; his report was submitted pursuant to sub-commission decision 1996/119, (E/CN.4/Sub.2/1997/20/Rev.1) to the Commission on Human Rights. The Commission on Human Rights endorsed his set of
the need to disband armed groups, to repeal emergency laws and to remove officials from office who were involved in serious crimes. Measures in this regard include the process of disarmament, demobilisation, and reintegration for armed groups as well as lustration, vetting, and other administrative procedures for the reform of state institutions. Although the guarantee of non-recurrence is of particular importance, efforts undertaken by the UN in Timor-Leste in relation to justice and security sector reform are not discussed within this thesis. This study will exclusively focus on the right to justice, truth and reparation for victims of serious crime. The decision to exclude a discussion of the implementation of the guarantee of non-recurrence was taken in light of the enormity of UNTAET’s mandate under Chapter VII of the Charter of the United Nations. This mandate included, amongst other tasks, the establishment of an effective administration, strengthening the independence of the judiciary, support for capacity-building, and ad interim the execution of all state functions. Nonetheless, the guarantee of non-recurrence will be discussed indirectly, as it affects and depends on the victims’ right to justice, truth and reparation.

1.5 Outline and methodology

Within the following discussion, an important distinction should be made between victims’ rights and victims’ needs. The focus of this study is not on transitional justice processes or mechanisms that arise as a response to the explicit needs of victims - defined by victims themselves. Needs, unlike rights, are the product of culture and context and are local in nature. The definition of needs would have required population-based research, including broad consultation with victims or their representatives on all levels of this research, none of which was possible during this study. Rather, the study wants to focus on the rights promoted in international human rights documents and to identify whether there is evidence in the transitional justice mechanisms implemented in Timor-Leste for the realisation of these rights.
Rights are by definition universal and entail a moral and legal claim to entitlements. These are of interest here.

The theoretical discussion will therefore begin by deriving definitions of the right to justice, truth and reparation for victims of serious crimes from UN resolutions, reports, and current transitional justice literature. Each of these rights will be discussed from a victim or rights holder perspective, followed by a discussion of the obligations the right to justice, truth and reparation impose on states and the international community willing to promote their recognition. Their concurrent promotion will lead to the justification of a “complementary” or “holistic approach” to transitional justice.

Before assessing Timor-Leste’s transitional justice processes, an outline will be given of the history of Timor-Leste and its conflict. This will include an overview of the times of Portuguese colonialism, the Indonesian occupation, and the violence surrounding the referendum in 1999, as well as Timor-Leste’s current political situation. The study will then narrow its focus on the transitional justice mechanisms implemented in Timor-Leste, namely, the Serious Crimes Regime as well as the Commission for Truth and Reception (CAVR). Both will be assessed in relation to their processes and outcomes achieved in regard to the victim’s right to justice, truth and reparation. To provide a complete picture of the transitional justice efforts, the Commission for Truth and Friendship (CTF) created through a bilateral agreement between the Government of Timor-Leste and Indonesia, as well as the Indonesian Ad Hoc Human Rights Court, will briefly be discussed.

The last main chapter will discuss whether and how the UN, local government, and communal authorities (suco-level) – as duty-bearers – implemented the victims’ right to justice, truth and reparation. Within this analysis, the role of the UN in promoting its own values and standards will be emphasised, asking whether the processes meet the standards and requirements promoted by the very same institution that created them (top-down approach) or if they follow their own specific agendas. Within this chapter, findings will, to a certain extent, rely on population-based outcome assessments. Such assessments depend on field research that included survey samples, testimonies and recorded opinions that are simultaneously individual and majoritarian\textsuperscript{15}. They allow determining the perceptions of a population and

reveal the expectations of those most affected by the violations or of the general population of a state in transition. Of particular significance for this research will be the studies and findings of Lia Kent, who conducted interviews on victims’ perceptions of the transitional justice processes in Timor-Leste since 2004, as well as of Simon Robins, who focused his study on the needs of families of the missing in Timor-Leste. Before its inclusion, any research was pre-assessed in relation to its methodology and reliability.

This thesis is based on two consecutive research phases. It started with a descriptive phase, during which the unique conflict of Timor-Leste was mapped in all its aspects, including the transitional justice efforts undertaken to address serious crimes. To fully encompass the history of the conflict, the study included the role of Indonesia, which had occupied Timor-Leste for over 25 years and is the country’s closest neighbour. This deepened the understanding of the crimes and the criminology of serious crimes and human rights abuses. The study then put the main focus on the ongoing developments in relation to the victims’ right to justice, truth and reparation. Here, it was examined how Timor-Leste, members of the international community, and the UN dealt with the past (general policies and concrete mechanisms), based on an intensive literature study on transitional justice, including documents relating to transitional justice developments, i.e., official parliamentary documents, journals and newspaper clippings.

Within a consecutive explorative phase, individual semi-structured interviews were conducted in September 2011. Respondents included UN employees working in Timor-Leste for UNMIT’s Human Rights and Transitional Justice Section, UNMIT’s Serious Crimes Investigation Team, a local politician for FRETILIN, as well as one national commissioner of the CAVR. The aim of these interviews was to evaluate the findings made during the descriptive phase, to comprehend stakeholders’ reasoning behind certain opinions, and to obtain information on the experience of and expectations and prospects for justice, truth and reparation. These interviews do not form part of this thesis; rather, they were used indirectly to evaluate and assess the findings included here.
2. Transitional justice

The last century witnessed two heinous World Wars, an uncountable number of regional and intra-state conflicts, and the horrendous genocides of Rwanda and on the territory of the Former Yugoslavia. Wars moved away from territoriality and increased in the intensity and brutality of the warfare. Each of the conflicts reflects history and a particular social and cultural divide. Alongside and provoked by these many conflicts and their subsequent periods of transition an academic field of conflict studies and of the transition from violence to peace developed. Transitional justice first emerged under this name in the 1980s and 1990s. It was mainly concerned with how to respond to the political changes in Latin America and Eastern Europe and to the increasing demands for justice. At the time, human rights activists and others wanted to address the systematic abuses by former regimes without endangering the political transformations that were underway. During this period, transitional justice became increasingly involved with the human rights movement and the development of human rights institutions. Since the end of the Cold War, transitional justice scholarship has studied various new institutions, approaches and processes. What was first known as a narrow discipline revolving around individual guilt and, soon after, truth seeking, has now developed into a broad field of scholarship including on transnational democratic state-building, rule of law promotion, and post-conflict peace building. Today, transitional justice is a well-established field of study, subject to a range of disciplines, including law, criminology, political science, psychology, sociology, anthropology, cultural studies, development studies, economics, education, ethics, history, philosophy, and theology. It is, broadly speaking, understood to comprise both “a sphere of practice or activity and a sphere of academic knowledge, with a praxis relationship between the two”. This connection to practice and activity brings various scholars together and demands that the field react to the many challenges provoked by conflict.


In the immediate aftermath of WW II, calls for accountability were dominant in post-conflict justice responses. However, the experience of the Nuremberg and Tokyo tribunals soon highlighted that trials are by nature restricted to deciding on the contribution of the perpetrator to the crime and challenged by the questions on how to apply the international legal system. To be in line with criminal procedures, trials are necessarily focused on specific individuals and confined to personalised definitions of guilty or not through adversarial processes. In addition, the pursuit of criminal justice in the aftermath of war faces major obstacles in recuperating evidence and material witnesses to meet the rigorous requirements of a fair trial in a court of law. Adhering to these strict requirements is particularly difficult in a context in which the rule of law has broken down during conflict or crisis and in which the local judicial system remains dysfunctional. Towards the end of the 1970s, those critical to criminal justice in the aftermath of violent conflict increasingly argued that many aspects relevant to societies in transition remain out of the scope of criminal justice. Strong support emerged for approaches that went beyond judicial processes and individualised findings. In particular, within the South American post-authoritarian settings marked by large-scale disappearances, knowing what had happened to relatives was of utmost priority to the families of the disappeared. Calls increased for transitional justice mechanisms that allowed for background information which explained comprehensively the root causes of mass atrocities.


Aspects of collective and social responsibility became of increased importance. The most prominent means used to investigate institutional and societal conditions that enabled mass atrocities through non-judicial and non-punitive (but still denunciative) forms are truth commissions or face-to-face mediation between victims and offenders, often based on local traditions of conflict resolution. Both are considered victim-centred and have earned respect as indispensable means for the establishment of deep-rooted and lasting peace and are nowadays regarded as credible and essential means to complement criminal trials. To date, they are well established and elaborated within transitional justice theory and regarded as valuable approaches to addressing crimes under international criminal law, including genocide, crimes against humanity, war crimes, torture, and other gross human rights abuses.

Today, transitional justice theory is founded on a framework that interlinks accountability mechanisms with other measures that contribute to achieving “transitional justice”, such as truth commissions, reparations programmes and programmes of broader social repair and reconstruction. In this context, “justice” must be understood broadly as justice beyond retributive criminal justice delivered through criminal trials and restorative justice. Its focus is on repairing past harm and it involves bringing about reconciliation among those most

affected by that harm. It is not a “special form of justice” but a strategy for “achieving justice” in times of transition.

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3. The right to justice, truth and reparation

The transitional justice framework evaluated within this study is derived from UN Secretary-General Kofi Annan’s report *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, published on 3 August 2004. In this report, the Secretary-General promoted an understanding of transitional justice that comprises interlinked judicial and non-judicial mechanisms. He also confirmed the growing interest within on behalf of the UN in “holistic” responses to gross and massive human rights’ violations, comprising judicial and non-judicial, retributive and restorative justice mechanisms. With a focus on the fight against impunity, the rights of the victims, and the needs of a society as a whole, he concluded that justice, peace and democracy are not mutually exclusive objectives, rather mutually reinforcing imperatives. If peace-building and long-term reconciliation are to come about, attention needs to be given to other approaches than punishment and retribution. He continued by remarking that, in his view, transitional justice comprises “the full range of processes and mechanisms” associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice, and achieve reconciliation. He specified that such processes and mechanisms may be both judicial and non-judicial by nature and of differing levels of international involvement (or none at all) if they provide for individual prosecutions, reparations, truth seeking, institutional reform, vetting and dismissals, or a combination thereof. Focusing on one or another institution, or ignoring civil society or victims, would not be effective. In order to describe the interaction and interdependence within his framework, he highlighted that “the justice sector must be comprehensive in its attention to all of its interdependent institutions, sensitive to the needs of key groups and mindful of the need for complementarity between transitional justice mechanisms”.

Based on this report, three characteristics of transitional justice are of relevance to this study. First, the Secretary-General emphasises victims and the importance of victim-centred

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35 Ibid., p. 4.

36 Ibid., Preamble.
approaches. Secondly, he demands justice, truth and reparation in relation to victimisation. Thirdly, he promotes a transitional justice framework that comprises judicial and non-judicial mechanisms that complement each other. Translated into the context of Timor-Leste, this framework would require complementary mechanisms that address victimhood and aim to achieve justice, truth and reparation for the victimisation suffered.

The Secretary-General derives the normative foundation for this framework from “the Charter of the United Nations itself, together with the four pillars of the modern international legal system: international human rights law; international humanitarian law; international criminal law; and international refugee law”\(^{37}\). These include a wealth of United Nations’ human rights and criminal justice standards adopted under the auspices of the United Nations. They are universally applicable and should allow moral and legal claims to entitlements.

The Secretary-General’s report was also strongly influenced by the work of Joinet and Bassiouni. Joinet proposed to the General Assembly his *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*\(^{38}\) (Joinet Principles), which he developed since 1985. His study was one of the first to promote what the Secretary-General referred to as “complementarity”: parallel processes necessary to counteract impunity, namely: i) the right to know; ii) the right to justice; iii) the right to reparation; and iv) the guarantee of non-recurrence\(^{39}\). He proposed the following processes that confront the atrocities of the past through the following judicial and quasi-judicial measures:

1. Trials in all forms – civil or criminal, national or international, domestic, foreign or hybrid
2. Fact-finding bodies, including truth commissions or other similar national or international investigative bodies
3. Reparations in the form of compensation, symbolic reparation, restitution or rehabilitation
4. Justice reforms – including legal and constitutional reforms, and the removal from public positions through vetting or lustration

Orentlicher, who was appointed in 2004 independent expert for this purpose by the UN Commission of Human Rights, updated the Joinet Principles in 2005. Her report was

\(^{37}\) Ibid.


\(^{39}\) Ibid., para. 16.
published the same year the Special Panels for Serious Crimes at the Dili District Court closed its doors. It resulted in the *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity* (Orentlicher Principles), endorsed by the UN Commission on Human Rights at its 61st session.\(^{40}\)

Similarly, the UN Commission on Human Rights adopted a first version of the later “Basic Principles and Guidelines” in 2000.\(^{41}\) This early version of the “Basic Principles and Guidelines” was drafted by Special Rapporteur Cherif Bassiouni, who was appointed by the UN Commission on Human Rights to continue preparatory work towards draft principles and guidelines by Van Boven.\(^{42}\) The aim was to elaborate and deepen the understanding of victim-oriented processes at the local, national and international levels.\(^{43}\) Both reports by Bassiouni led to the UN General Assembly’s adoption of the “Basic Principles and Guidelines” in December 2005 and can be regarded as a means of affirming human solidarity with and compassion for victims of violations of international human rights and humanitarian law.\(^{44}\) The adoption of the “Basic Principles and Guidelines” in 2005 reflects more than 15 years of work of the Commission on Human Rights in developing victims’ rights and is a tangible indication of the importance of the topic. It reflected the search for a better understanding of transitional justice, an elaboration of ways of dealing with the past, and responded to a climate of improved human rights awareness. It aimed at combating impunity and strengthening


victims’ rights to redress and reparation\textsuperscript{46}. The “Basic Principles and Guidelines” list various types of reparations states should provide victims of international human rights and humanitarian law violations. In addition, it requires states to verify the facts and fully and publicly disclose the truth to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim, witnesses, or others, and to deliver judicial or administrative sanctions against persons responsible for the violations.

Both the “Joinet Principles” and “Basic Principles and Guidelines” place victims at the centre of transitional justice mechanisms. This approach was confirmed and put forward in 2010 in the UN \textit{Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice}\textsuperscript{47}. With this note, an extended edition of the Secretary-General’s 2004 report, the full range of judicial and non-judicial processes and measures – including truth seeking, prosecution initiatives, reparations programmes, institutional reform including vetting processes, or an appropriately conceived combination thereof\textsuperscript{48} – are promoted to underline the importance of the national context and the views of its stakeholders, primarily victims\textsuperscript{49}. The aim must be to ensure the centrality of victims in the design and implementation of transitional justice processes and mechanisms\textsuperscript{50}. It re-emphasised that only if participation and consultation of victims is guaranteed will this allow transitional justice efforts to reach deep into the lives of ordinary people, with positive effect\textsuperscript{51}.

To highlight the importance of transitional justice and victim-centred approaches, the UN General Assembly adopted Resolution 18/7, in which it decided to appoint a special rapporteur on the promotion of truth, justice, reparation and the guarantees of non-recurrence

\begin{itemize}
\item United Nations, \textit{Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice}, March 2010
\item Ibid., Principle 6.
\end{itemize}
in October 2011. In his second annual report to the General Assembly, the Special Rapporteur took a clear stand on the importance of victims as right-bearers. He explicitly called for truth-telling mechanisms that provide a forum for acknowledgement by the state of victims’ experiences and of responsibility for violations and abuses, for prosecutions that affirm that the violation of the rights of others shall be punished, and for reparations that signal that the state takes violations of rights sufficiently seriously as to mobilise resources.

He thereby re-iterated his call of 2012 that it is indispensable that transitional justice measures seek to recognise that the victim is the holder of rights.

These developments highlight how the transitional justice framework promoted by the UN is strongly influenced by its human rights bodies. These bodies converted the fundamental understanding of human rights, including victims’ rights, into the transitional justice framework. If human rights have been seriously violated during times of conflict, these violations need to be re-balanced through justice, truth and reparation, which imply a duty of the state and of those responding to the violations, despite the sometimes contradictory political exigencies of restoring order after violence or repression. The introduction of human rights theory into transitional justice can also be regarded as resulting from a strategy for depoliticising transitional justice in contexts that have been characterised by intensive and persistent conflict. From a human rights perspective, such depoliticisation is required to

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52 UN General Assembly, Special Rapporteur on the Promotion of Truth, Justice, Reparation and the Guarantees of Non-recurrence, Resolution adopted by the Human Rights Council, UN Doc. A/HCR/RES/18/7, 13 October 2011, para. 1. The tasks of the Special Rapporteur include, amongst other things, gathering relevant information on national situations, including normative frameworks, national practices and experiences relating to the promotion of truth, justice and reparation in addressing serious violations of humanitarian law. Pablo de Greiff (Colombia) was appointed Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on 1 May 2012.


54 Ibid., para. 38.

55 UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence to the Human Rights Council, UN Doc. A/HRC/21/46, 9 August 2012, para. 29; Statement by UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Observaciones Preliminares del Relator Especial para la Promoción de la Verdad, la Justicia, la Reparación y las Garantías de no Repetición, Pablo de Greiff, Al Concluir su Visita Oficial a España, 3 February 2014.

establish the legitimacy of transitional justice institutions as well as their integrity in an environment of divided political factions\textsuperscript{57}.

Within this conceptual framework of transitional justice, the rights of individuals to justice, truth and reparation correspond to duties of the states under international human rights and humanitarian law. Through trials, states fulfil their obligation to investigate and punish the perpetrators of human rights violations and enable victims their right to justice, truth and effective remedy. Truth commissions are a means by which states implement their duty to investigate, to identify perpetrators and provide a means to victims, their families and the wider society to realise their right to truth. By providing restitution and compensation, states fulfil their obligations as regards the victim’s right to reparation\textsuperscript{58}. But what are the contents of these rights and which are the concrete obligations of the states?


3.1 The right to justice

Justice is generally speaking a necessary and appropriate response to wrongdoing. Based on the Kantian categorical imperative to punish every violation of law, criminal justice is often described as a backward-looking theory. The underlying idea is that wrongs must be denounced and those who perpetrate them punished proportionally to the seriousness of the transgression. The greater the percentages of wrongs that are punished the more justice is achieved. Within the context of crimes under international criminal law, the offence is perceived as an offence to a specific society as a whole and in the case of core international crimes to the fundamental values of the international community. This thesis favours a justification of punishment that is based on the idea of respecting humanity and maintaining a moral community. It also calls for criminal justice in the aftermath of violent conflict that is dialogical in that the community enters into a moral dialogue with the offender, in order to communicate to him the social condemnation of the harm done. The idea is thereby to strengthen rather than undermine the offender’s links to the rest of the community and convince him or her that there are important reasons to obey the law.

For several decades, the Nuremberg trials stood as an interesting but nevertheless isolated occurrence. Calls for international criminal justice were revived by the UN General Assembly in late 1989. Since then, the use of international judicial institutions to hold accountable those who are accused of perpetrating atrocities has burgeoned. The UN has taken enormous steps to bring criminal violators of international criminal law to trial, not in order to divide societies but to re-establish the rule of law and bring about peace and reconciliation. The

crimes for which offenders are convicted by international tribunals are considered qualitatively more serious than their domestic counterparts as they affect more individuals and their effects on the communities in which they occur are far deeper and more lasting. They are extreme acts of violence committed by large groups of persons, typically under the leadership of dictatorial governments or equally ruthless opposition groups, as a result of political conflict.

3.1.1 The duty to prosecute

In light of the legacy of the WW II war crimes tribunals, early interpretation of international human rights law concluded that prosecutions are solely a duty of the state to the public, not corresponding to an individual right to justice. Early decisions remained silent on whether states’ violation of the duty to prosecute gave rise to an independent violation of individual rights. In 1988, the Inter-American Court of Human Rights in the Velásquez-Rodríguez case was the first to articulate the duty to prevent, investigate and punish human rights violations alongside the state’s separate duty to make moral and material reparations to individual victims. Within current international criminal law, the duty to prosecute crimes using international and regional legal instruments as well as international customary law is now understood as non-derogable. According to the Columbian Constitutional Court, justice is the antithesis to impunity. The UN Commission on Human Rights meanwhile recognised that states must prosecute or extradite perpetrators, including accomplices, of international crimes such as genocide, crimes against humanity, war crimes, and torture in accordance with their international obligations in order to bring them to justice. Based on the principle of “universal jurisdiction”, states can exercise jurisdiction even in cases where neither the victim nor the perpetrator is of the nationality of the state (active and passive personality principle).

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66 See, e.g., Viviana Gallardo et al., Inter-American Court of Human Rights, Advisory Opinion G 101/81, 15 July 1981.
68 Gustavo Gallón y Otros [18 May 2006] Sentencia C-370/2006, Expediente D-6032 (Colombian Constitutional Court), para. 4.9.11.4, defines the right to justice “como aquel que en cada caso concreto proscribe la impunidad”.
and the crime has not been committed on the territory of the state if permitted under national law. Universal jurisdiction is justified by an understanding that crimes of a certain severity (those with *jus cogens* status) provoke an obligation *erga omnes* to undertake measures to support criminal investigation leading to the identification and punishment of those responsible.\(^70\)

Correspondingly, human rights practice and jurisprudence supported the view that the identification, prosecution, and punishment of wrongdoers are imperative remedies in the aftermath of gross human rights violations.\(^71\) As responses to human rights violations, the prosecution and the punishment of human rights offenders were considered to be general measures for protecting human rights. Prompt and impartial investigations of violations of human rights and international humanitarian law need to be carried out to ensure that those responsible for serious crimes under international law are brought to justice. Those who committed human rights violations, or ordered others to do so, should be punished in courts of law or, at a minimum, publicly confess. It was argued that there can be no just and lasting reconciliation without an effective response to the need for justice.

Today, the duty to prosecute is generally applicable to “serious crimes under international law”, which encompass grave breaches of the Geneva Conventions of 12 August 1949, and the Additional Protocol I and II, and other violations of international humanitarian and human rights law that constitute crimes under international law. These include – besides genocide – crimes against humanity and other violations of internationally protected human rights, such as torture, enforced disappearance, extrajudicial execution, and slavery.\(^72\) The UN Human

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Rights Committee, in its General Comment 31, meanwhile identified “positive obligations” of the State in Article 2 (1) ICCPR and called for “appropriate measures or […] due diligence to prevent, punish, investigate or redress the harm caused” through violations of the ICCPR\(^\text{73}\) committed by state organs and private persons or entities\(^\text{74}\).

### 3.1.2 Victims’ right to justice

Since the 1980s, jurisprudence began to discuss the refusal of states to comply with their duty to prosecute and the consequences thereof. At the same time, emerging attention to victims within ordinary criminal justice systems, the specialisation of research in the field of victimology\(^\text{75}\), and lobbying for victim’s rights at the United Nations and within intergovernmental organisations increased. UN organs and other UN sponsored fora\(^\text{76}\) began to consider victim-focused international programmes and standards. One of the early reflections of this approach is the adoption by the UN General Assembly of the Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power\(^\text{77}\). The declaration includes provisions on restitution to victims by the offender, victim compensation from the state, and assistance toward recovery, and creates standards on victims’ access to justice and fair treatment by the police, prosecutors, and courts\(^\text{78}\). It mirrors the collective will of the international community to restore the balance between the fundamental rights of suspects with the rights and interests of victims. The declaration formed the basis for the provisions of subsequently adopted UN international instruments pertaining to human rights or international criminal law. Since then, scholars and practitioners have devoted increasing attention to the rights and interests of victims in the context of criminal proceedings. Victims’ right to justice

\(^{73}\) Violations of the ICCPR explicitly include deprivation of life and liberty, torture, slavery, disappearances (Art. 6-10 ICCPR).


\(^{75}\) Leading to the creation of the World Society of Victimology in 1979 following the Third International Symposium on Victimology.

\(^{76}\) The Fifth UN Congress for the Prevention of Crime held in 1975, the Sixth UN Congress for the Prevention of Crime in 1980, and the Seventh UN Congress for the Prevention of Crime in 1985, which included issues affecting victims as priority discussion points.


\(^{78}\) Ibid., paras. 4-18.
and in particular their right to a fair and effective remedy have been elaborated in jurisprudence and human rights case law, findings of supervisory bodies, and UN sponsored studies. International norms have begun to require or urge states to grant victims meaningful ways of participation in the criminal process. These norms prescribe, for example, that states establish review mechanisms to limit the prosecutors’ decision not to prosecute, to allow victim input into the collection of evidence, and to grant victims the opportunity to participate in the trial by permitting them to introduce evidence and cross-examine witnesses or to act as private prosecutors. In addition, it has been recognised that to exercise their right to justice victims need to be kept informed about the criminal proceedings taking place and consequently have the right to request information about the investigation or trial and to seek access to relevant documents to ensure their meaningful participation.

Prosecution thereby developed into a necessity to enforce victims’ right to justice and remedy by making perpetrators accountable for their past action. It was called for in the interests of the individual victim. Victims do not only want to know what happened and who was responsible for their suffering, they also want to secure a certain degree of punishment for those who are responsible for perpetrating the crimes for which they suffered harm. Victims explained that the process of redress and the attainment of justice are critical to the healing of individual victims, as well as their families, societies and nations. Within this victim-perpetrator dynamic, victims’ right to justice was understood as a right to criminal justice which entailed participatory rights in the process of responding to a (international) criminal offence the particular victim suffered. Hence, victims needed to be given the

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82 Prosecutor v. Katanga/Chui, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008 (ICC-01/04–01/07), para. 38

opportunity to ensure that their oppressors stand trial. In particular, the trials held in Latin America were a response to the large number of political prisoners in the dictatorial regimes. The amnesties that were previously provided were increasingly regarded as perpetuating impunity in favour of the military dictatorships. Many victim organisations were founded to ensure victim participation, and to ensure that justice was done and that those responsible for core crimes were put to trial. With their calls for prosecution and participation in criminal proceedings, victims sought to end the practices of impunity that protected perpetrators from punishment for the violent crimes committed or condoned by states against them. Even when the law did not prescribe victim participation, victims demanded participation and the ability to make evidentiary requests during the investigation of a crime. Victims also sought independent prosecutorial powers to press charges or to participate in the trial by introducing evidence or cross-examining witnesses. These calls were accepted by the Inter-American Court of Human Rights, when it argued that if states were to leave an offense unpunished, they would ultimately be violating their duty to guarantee the free and full exercise of the rights of all persons under their jurisdiction and recognised a justiciable right to justice for victims of serious crimes.

Meanwhile, many international and regional human rights documents prescribe common standards for the treatment of victims in criminal process to promote justice for victims of crime. According to the “Joinet Principles”, for example, every state should guarantee supplementary procedural rules to allow victims to be admitted as civil plaintiffs in criminal

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proceedings or, if the public authorities fail to do so, to institute proceedings themselves. The Principles affirm a growing understanding that victims have a legitimate interest in the prosecution and punishment of human rights offenders. Similarly, the Orentlicher Principles recognise in Part III the right to justice as an individual right, without which there can be no effective remedy against the pernicious effects of impunity. They promote an understanding of the right to justice as a right of victims, their families, and heirs “to institute proceedings, on either an individual or a collective basis, particularly as parties civiles or as persons conducting private prosecutions in states whose law of criminal procedure recognizes these procedures”. 

3.1.3 Victim participation in criminal tribunals

The last 60 years witnessed a variety of national and international courts trying cases of mass victimisation and gross and systematic violation of human rights. In particular, reports about massacres of thousands of civilians, rape and torture in detention camps, and the suffering of those hundreds of thousands expelled from their homes on the territory of former Yugoslavia spurred the international community into action. While violence was still on-going, the Security Council decided that it would establish an international tribunal for persons responsible for these crimes in order to bring to justice those responsible, provide effective redress for the violations committed, halt the commission of further atrocities, and contribute to the restoration and maintenance of peace in the region. Just a year later, the second international tribunal, the International Criminal Tribunal for Rwanda (ICTR), was created through Resolution 955 of 8 November 1994. The ICTR was established for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law during the Rwandan genocide, which led to the death of 800,000 persons. The tribunals

93 On 25 May 1993, the UN Security Council passed Resolution 827, formally establishing the International Criminal Tribunal for the former Yugoslavia (ICTY).
94 For details on the establishment of both international criminal tribunals, see William A. Schabas, The UN International Criminal Tribunals. The Former Yugoslavia, Rwanda and Sierra Leone (Cambridge: Cambridge University Press, 2008).
thereby aimed to follow the Nuremberg precedent in affirming the individual responsibility of persons at the highest political and military level. Main focus was on the bringing perpetrators to account. Due to the large number of victims, the individualisation of victims’ right to justice was only possible to a limited extent. Both tribunals developed and introduced various methods to hear witnesses while at the same time safeguarding the protection of victims and their families. They both had special victim and witness sections, as well as technological protective measures in the courtroom, including voice and image distortion, protective screens, pseudonyms, and closed-circuit television, or held closed sessions. Nevertheless, participation of victims in these processes was limited. Only sparse consideration and limited space was given to ensuring victim engagement other than as prosecution witnesses. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the ICTR had only limited powers to deal with victim reparations (and these proved hard to invoke) and both institutions were frequently criticised for a range of failures concerning their treatment of victims during the conduct of their trials, in particular of victims of sexual violence.

3.1.3.1 Hybrid or internationalised tribunals

Hybrid courts, also called internationalised courts, function using both local and international judges and prosecutors and apply a mix of international and local laws. The idea behind the internationalised/hybrid tribunals was that in countries in which the national judicial system had broken down or was not capable of administering justice without prejudice, the international community could provide assistance to overcome political and nationalistic demands of local authorities. Through the nomination of nationals of the country to the tribunals, a certain degree of local ownership would be guaranteed, as well as familiarity with

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the mentality, language, etc., of the accused\textsuperscript{99}. Both locality and the combination of national and international staff were regarded as advantageous to the pursuit of justice and to encouraging public debate within the local society on the atrocities and the facts surrounding and enabling them\textsuperscript{100}. The Special Panels for Serious Crimes, established within the Dili District Court to bring to trial those responsible for having committed serious crimes during Timor’s struggle for independence, is the earliest example of such a hybrid institution. The hope at the time was that through its location within the capital of Timor-Leste, the court would be better equipped to host local views and deal with almost inevitable linguistic and cultural barriers\textsuperscript{101}. The hope was that the introduction of some degree of internationality would enhance objectivity and legitimacy and ensure that activities were carried out in accordance with internationally recognised human rights standards\textsuperscript{102}.

Meanwhile, the term “hybrid” court stands for five more jurisdictions: the internationalised panels in the Special Court for Sierra Leone (2000), the courts of Kosovo (2000), the Extraordinary Chambers Regime for the prosecution of the Khmer Rouge (2003), the Special War Crimes Chamber in Bosnia-Herzegovina (2005), and the Special Tribunal for Lebanon (2007)\textsuperscript{103}. These courts all vary in relation to the degree of local ownership and integration of national laws\textsuperscript{104}. Consequently, their forms and ability to include victims in the process vary depending on the statutes of the courts.

\textsuperscript{100} Frederike Hofmann-van de Poll, A Quest for Accountability: The Effects of International Criminal Tribunals and Courts on Impunity (Berlin: Wissenschaftlicher Verlag Berlin, 2011), 51.
\textsuperscript{104} For details on local ownership and cooperation between the courts and local governments see Elizabeth M. Bruch, “Hybrid Courts: Examining Hybridity through a Post-Colonial Lens”, Boston University International Law Journal 28 (2010): 1-38.
3.1.3.2 The International Criminal Court

The history of negotiations leading to the incorporation of the Rome Statute of the International Criminal Court in 1998 demonstrates the continuous and strong desire on the part of the international community to hold perpetrators of grave crimes accountable for their actions. The development towards an international criminal court began as early as 1948. At the time, discussion of the Convention on the Prevention and Punishment of the Crime of Genocide\(^{105}\) led to the inclusion of its Article IV, which mentions an ‘international penal tribunal’ that is to “have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”\(^{106}\). The International Criminal Court (ICC) as it currently stands\(^{107}\) has jurisdiction over war crimes, crimes against humanity, and genocide in cases in which states are unwilling or unable to initiate criminal proceedings. The statute reflects a new blueprint for the principle of complementarity between the ICC and national jurisdictions, striking a balance between state sovereignty and an effective and credible ICC\(^{108}\).

One of the primary achievements of the Rome Statute (and its subsidiary rules and regulations) is the recognition of the rights of victims to both participate in proceedings and pursue reparations before the ICC\(^{109}\): It provides victims with a “voice in the proceedings” and regards them as distinct participants from the prosecution. Participation of victims includes their right to make representations at the sentencing hearing in regard to reparations\(^{110}\). The importance of victim participation in ICC proceedings was re-affirmed in *Prosecutor v. Katanga/Chui*. In this proceeding, Judge Steiner held that the interests extend to securing a certain degree of punishment for those who are responsible for perpetrating the

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\(^{105}\) Adopted by Resolution 260 (III) A of the UN General Assembly on 9 December 1948, and entered into force on 12 January 1951.


\(^{107}\) The Rome Conference led to the adoption of the Courts Statute (the Rome Statute) on 17 July 1998.

\(^{108}\) Primacy was given to criminal investigation and prosecution based on the territoriality or active personality principle; see in relation to this Sharon A. Williams and William A. Schabas in *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article*, ed. Otto Triffterer (Munich: Beck, 2008), Art. 17, paras. 8-20.


crimes. Victims’ interest in the identification, prosecution and punishment of those who have victimised them were described as at “the root of the well-established right to justice for victims of serious violations of human rights which international human rights bodies have differentiated from the victims’ right to reparations”\textsuperscript{111}.

3.1.4 Conclusion

The victim’s right to justice has become interwoven with the duty to prosecute those who have committed serious crimes\textsuperscript{112}. Various criminal justice mechanisms implemented locally or internationally meanwhile aim to ensure victims’ right to justice. However, due to their required level of intensity and accuracy, trials will always remain relatively limited in terms of the crimes investigated and number of persons prosecuted\textsuperscript{113}. With the focus on evidence against the perpetrator, criminal proceedings will always leave certain crimes and the victimisation resulting therefrom unaddressed. Consequently, the right to justice of these victims will remain \textit{in concreto} undelivered or unrealised. For these victims, trials may be no more than a frustrating attempt to prosecute or punish those responsible for the harm they suffered. However, what remains is a symbolic effect resulting from criminal proceedings, the sentencing practice, and the mere existence of the court. Moreover, the public process developing alongside the court and its findings is often a first step for victims to receive recognition of their suffering, a prerequisite to continue daily life with trust in their neighbours and community\textsuperscript{114}.

\textsuperscript{111} Prosecutor v. Katanga/Chui, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008 (ICC-01/04–01/07), paras. 38-39.
\textsuperscript{114} William A. Schabas, \textit{An Introduction to the International Criminal Court} (Cambridge: Cambridge University Press, 2011), 164.
3.2 The right to truth

The South African Truth and Reconciliation Commission made a distinction between four different notions of truth. It referred to forensic, factual or evidential truth, mirrored in the evidence obtained and corroborated through a reliable and strict criminal procedure. It identified a notion of personal and narrative truth, which is reflected in the many stories that individuals told about their experience under apartheid. It identified a form of social or dialogue truth, established through interaction, discussion, and debate, an overtly and explicitly political construction shaping the direction of transition. In addition, it can be a healing or restorative truth in that it places facts and their meaning within a context of human relationships\(^{115}\).

To victims of serious crimes, knowing the truth is of particular importance as they seek to know what happened, why the crime was committed, and who committed the crime. Learning what happened is crucially important if violence was orchestrated through a clandestine state apparatus. Victims want to know what happened so that they can identify those responsible and know whether they remain in a position of power within the state. In cases in which the direct victim did not survive the violation, family members often consider the uncertainty of what may have happened to their loved ones as more painful than the truth itself. The truth has therefore been described as an alleviation of suffering, a vindication of memory, and a means to encourage the state to confront and take responsibility for its past\(^{116}\).

3.2.1 Content of the right to truth

The discussions on the content of the right to truth first emerged in the context of the disappearance of persons on a systematic basis, in which relatives sought information about missing persons. In this context of enforced disappearance family members wanted to know if their missing relatives were dead, how they died, or where their remains were buried. This led to the elaboration and identification of a right to the truth by various national courts\(^{117}\) and

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\(^{117}\) E.g. Constitutional Court of Colombia, Judgements of 20 January 2003, Case T-249/03 and C-228 of 3 April 2002; Constitutional Tribunal of Peru, Judgement of 18 March 2004, Case 2488-2002-HC/TC; Supreme Court of the Nation.
international organs, such as the UN Working Group on Enforced or Involuntary Disappearances\textsuperscript{118} and the UN Commission on Human Rights/Human Rights Council\textsuperscript{119}. In particular, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights were at the forefront of developing jurisprudence on the right to truth of the victim, his or her next of kin, and the whole of society\textsuperscript{120}. The bodies dealing with the phenomenon first progressively drew upon the right to truth in order to uphold and vindicate other fundamental human rights, such as the right of access to justice and to an effective remedy and reparation. The underlying belief was that when truth becomes known and publicly recognised, this often sets in motion other sanctions against the perpetrator, reparations for victims, and institutional change. The Inter-American Court of Human Rights therefore recognised a direct correlation between the state denying victims access to justice in criminal trials and their right to learn the truth\textsuperscript{121}. Consequently, it held that the right to truth “is subsumed in the right of the victim or his next of kin to obtain clarification of the facts relating to the violations and the corresponding responsibilities from the competent state organs, through the investigation and prosecution”\textsuperscript{122}. In a more recent judgement, it framed the right to truth in the form of a positive state obligation, stressing that “the next of kin of the victims and society as a whole must be informed of everything that has happened in connection with the said violations”\textsuperscript{123}.

\textsuperscript{121} See also Castillo Páez v. Peru, Judgement on reparations, 27 November 1998, Inter-Am. Ct. H.R. (Ser. C) No. 43 (1998), paras. 105-106.
\textsuperscript{123} Myrna Mack Chang v. Guatemala, Inter-American Court of Human Rights, 25 November 2013 (Merits, Reparations and Costs), para. 274.
Meanwhile, several UN statements\textsuperscript{124} and human rights documents have confirmed and extensively discussed the existence of a right to truth. The Orentlicher Principles of 2005, for example, promote an understanding of the right to truth according to which victims and their families have the imprescriptible right to know the truth concerning gross human rights violations and serious crimes under international law irrespective of any legal proceedings\textsuperscript{125}. Principle 24 further provides that “victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations”. Similarly, the “Basic Principles and Guidelines”\textsuperscript{126} affirmed that victims are entitled to seek and obtain information on the causes leading to their victimisation, the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law, in order to learn the truth concerning these violations.

The UN Commission on Human Rights explicitly commissioned a study to determine the scope and content of the right to truth\textsuperscript{127}. It concluded that the right to the truth regarding gross human rights violations, violations of international humanitarian law, and international crimes is an inalienable and autonomous right of victims, their relatives, and the wider society that should be considered as a non-derogable right and not be subject to limitations. It involves knowing the full and complete truth of the violation, including the circumstances in which the violations took place, as well as the reasons for it and who participated in it\textsuperscript{128}. The study lends support to the argument that the right to truth is a fundamental, emerging principle.


\textsuperscript{126} UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Resolution 60/147, UN Doc. A/RES/60/147, 16 December 2005, Preamble.


\textsuperscript{128} Ibid., Summary.
of international human rights law and a central means of addressing a legacy of abuse\textsuperscript{129}. It is of crucial importance to contribute to ending impunity and to promote and protect human rights\textsuperscript{130}. Meanwhile, the International Convention for the Protection of All Persons from Enforced Disappearances contains the most precise enunciation of a binding “right to truth”\textsuperscript{131}. The convention, which entered into force on 23 December 2010, explicitly states that “each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person”\textsuperscript{132}. In the same year, in the study by the Office of the UN High Commissioner for Human Rights on the right to truth, the High Commissioner recognised that the right to truth entitles the victim, his or her relatives, and the public at large to seek and obtain all relevant information concerning the commission of the alleged violation\textsuperscript{133}. Since its publication, several Human Rights Resolutions have confirmed the importance of the right to truth for victims of serious crimes: their right to know the truth about the violations suffered, including the identity of the perpetrators and the causes, facts, and circumstances in which the violation took place\textsuperscript{134}.

In its general comment on the right to truth, the Working Group on Enforced Disappearances recognised that the right to truth is an autonomous collective and individual right to know the fate or whereabouts of the victim. It is an absolute right, not subject to any limitations or derogations\textsuperscript{135}. In relation to the right to truth as a collective right, the European Court of


\textsuperscript{131} The right to truth is also included in Articles 32 and 33 of the 1977 Additional Protocol I to the Geneva Conventions of 1949. According to these, families of victims have a right to know the fate of their relatives.


Human Rights was of the opinion that the right to truth is not only for victims and their families but a right of the general public as well\textsuperscript{136}.

\subsection*{3.2.2 Duties of the state resulting from the right to truth}

According to the Working Group on Enforced Disappearances, the state’s obligations in regard to the right to truth are mainly procedural. They comprise a duty to investigate the whereabouts of the victim and to continue such investigation as long as the fate of the victim remains unclarified\textsuperscript{137}. During the investigation, the right to truth imposes on the state the obligation to let any interested person know the concrete steps taken to clarify the fate and whereabouts of the person and to provide full access to archives\textsuperscript{138}. In addition, states are obliged to provide full protection to witnesses, relatives, judges, and other participants in any investigation\textsuperscript{139}. This general duty to provide information to victims and relatives has also been recognised by international courts and restated in policy papers and resolutions passed by the UN and other inter-governmental institutions since the late 1980s\textsuperscript{140}. According to these, states have to provide as much information as possible and make them public. Today, Article 13 of the International Convention for the Protection of all Persons from Enforced Disappearances codifies the obligation of the state to provide information to victims of serious crimes and their relatives.

Uncovering the truth is an immensely important exercise for individuals wishing to know what has happened to their loved ones. In addition, for an emerging democratic state,

\begin{footnotesize}
\textsuperscript{136} El-Masri v. The Former Yugoslav Republic of Macedonia (n° 39630/09), European Court of Human Rights, 13 December 2012, para. 191: The Court emphasises “the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened”.

\textsuperscript{137} The Working Group regards this as an absolute obligation to take all necessary steps to find the person, but there is no absolute obligation of result; UN Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances to the Human Rights Council, General Comment on the Right to Truth, UN Doc. A/HRC/16/48, 26 January 2011, para. 4.

\textsuperscript{138} On the importance of archives in relation to the right to truth (and the right to justice) see UN Human Rights Council, Annual Report of The United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, Right to the Truth, UN Doc. 12/19, 21 August 2009.

\textsuperscript{139} UN Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances to the Human Rights Council, General Comment on the right to truth, UN Doc. A/HRC/16/48, 26 January 2011, paras. 4-5.

\textsuperscript{140} For jurisprudence on the right to truth see Mark Freeman, Truth Commissions and Procedural Fairness (Cambridge: Cambridge University Press, 2006), 7-9.
\end{footnotesize}
unearthing the truth has become increasingly important to clarify the systematic patterns of gross human rights violations that were structurally enabled in the past. Both are for many societies a first step required to come to some form of acknowledgment of and to reconstruct a collective memory of the past. From this differentiation between the individual and the collective level of truth, Joinet and Orentlicher derive two different obligations of the state from the victims’ right to truth. The first concerns the duty to investigate and provide information to the (individual) victim on specific incidents, as described above. In addition, Joinet derives a “duty to remember” on the part of the state in order “to be forearmed against the perversions of history that go under the name of revisionism or negationism”. For the history of oppression is part of a people’s national heritage and as such must be preserved. Individual suffering was translated into collective suffering and the right to truth expanded to a “collective right”. Orentlicher, when updating the “Joinet Principles”, also highlighted these two different aspects of the right to the truth. She specified that for victims and families, the right entails an obligation of the state to provide specific information about the circumstances in which the serious violation of the victim’s human rights occurred, as well as the fate of the victim. As a collective right, the right to the truth imposes an obligation on the state to disclose information about the circumstances and reasons that led to “massive or systematic violations”.

Processes to enable this collective right to truth reach from public trials to the disclosure of state documents, the proper management of archives, and the ensuring of public access to information. Most prominent, post-conflict countries sought to implement the right to truth by establishing truth commissions or commissions of inquiry. Both pursue as a core activity


the collection of statements from victims and witnesses, the organisation of public hearings and other awareness programmes, and the publication of a final report outlining the commissions’ findings and recommendations.\textsuperscript{145} The aim is to elucidate contextual and structural elements of the violence, the historical underpinnings, and the role of various social and governmental institutions and thereby offer an opportunity to delve more deeply into collective truths.\textsuperscript{146} In addition, truth-seeking mechanisms will reveal narrative and dialogic truths, as well as factual and evidential truths, by operating at both the community and the individual level. The Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence therefore concluded that in the aftermath of repression or conflict the right to truth should be understood as requiring states to establish institutions, mechanisms, and procedures that are capable of leading to the revelation of the truth, which is seen as a process of seeking information and facts about what has actually taken place, in order to contribute to the fight against impunity, to the reinstatement of the rule of law, and ultimately to reconciliation.\textsuperscript{147}

3.2.3 Victim participation and individualisation of the right to truth

Trials take a primarily perpetrator-centred approach to gathering and conveying truth. Victim participation is confined by the strict rules of procedure applicable to the trial. Establishing the truth has been presented as a by-product of international criminal proceedings rather than as an objective. Sometimes, judges even refused to address issues that were of historical importance but irrelevant for the purpose of a determination of criminal liability.\textsuperscript{148} Nevertheless, engaging in truth seeking is an immensely important exercise for individuals wishing to know what happened to their loved ones. To be able to give statements, sometimes even in public, to make the personal story known, and to add to the overall aim of the search


for truth, is for many victims the most participatory way of contributing to and experiencing transitional justice. This centrality of the victim demonstrates the influence of restorative justice theory. Countries emerging from violent conflict therefore more and more opt for mediation and/or traditional conflict resolution mechanisms to enable victims to participate in truth seeking and the broader transitional justice process. Such mechanisms fulfil their truth-seeking function primarily through statements taking from victims, witnesses, and, where possible, perpetrators. This enables those directly affected by the violations of the past to play a central role in the truth-seeking process. At the heart of these truth-seeking processes lies their ability to provide a forum for victims to give testimony and thereby feel involved in the peace-building process. For participating individuals as well as the society as a whole, these processes provide a first step to come to some form of acknowledgment and reconstruction of an individual and collective memory of the past. Sharing experiences of trauma can translate into collective experiences, and thus into political formations. Ideally, through this bottom-up approach, individual knowledge about what actually happened is incorporated into wider public acknowledgement.

3.2.4 Truth-seeking methods

The ways in which states comply with their duties resulting from the right to truth vary from statement taking to access to documents, exhumation of mass graves, and all sorts of inquiries. These methods establish the facts surrounding violations, prevent the

disappearance of evidence and thereby ascertain the truth\textsuperscript{154}. The most prominent means, besides criminal trials, of adhering to victims’ right to truth in the wake of conflict is the creation of a truth commission. The truths in which the truth commissions are interested are generally not those produced by professional historians, forensic archaeologists, and likeminded professionals. They are instead those of victims and their community. Through community or local level (grassroots) initiatives, truth commissions can guarantee widespread inclusion and personalisation and educate the public about the individual human impact of past crimes\textsuperscript{155}. Truth commissions thereby play an important role in redefining the individual’s place in society.

As to the composition and mandate of the truth commission, as Bisset rightly points out, there is no such thing as the typical truth commission. Due to the particularities of the conflict, each truth commission established to date has operated differently and with varying degrees of success\textsuperscript{156}. However, by analysing the work of truth commissions, Hayner and Freeman established common characteristics of these bodies. Both, more or less, agreed that truth commissions’ main characteristics include 1) to investigate and report on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict, and to 2) make recommendations for redress and future prevention\textsuperscript{157}.

Commissions of Inquiry and other fact-finding mechanisms similarly seek to unravel the truth behind allegations of past human rights abuses, but generally operate under a more narrowly defined mandate. Which mechanism is chosen depends a lot on the level of conflict and timing. Commissions of Inquiry can be event-specific, thematic, socio-historical, and


institutional\textsuperscript{158}. Generally, Commissions of Inquiry and fact-finding mechanisms are used in the immediate aftermath of a conflict to preserve evidence, assess the \textit{status quo}, and decide on further transitional proceedings. Fact-finding commissions are usually created by the UN Human Rights Council as an outcome of its special sessions. The reports of these commissions have produced a solid basis for establishing the fact of human rights violations and have provided sound recommendations for accountability and prevention of further violations. In some cases, consecutive truth commissions can benefit from these prior human rights investigations\textsuperscript{159}. Due to continuous inactivity, the international Humanitarian Fact-Finding Commission remains widely unknown. It is a permanent body available to the international community to investigate violations of international humanitarian law\textsuperscript{160}.

The various truth commissions created worldwide have confirmed their ability to place victims at the heart of their processes. One of the earliest examples thereof is the Argentinean National Commission on the Disappearance of Persons (\textit{Comisión Nacional sobre la Desaparición de Personas}), which was established in December 1983 and became widely known and appreciated for its investigation into the fate of those who disappeared during Argentina’s seven-year military regime\textsuperscript{161}. It was in a position to unearth unexpectedly detailed information about the perpetrators and architects of the injustice\textsuperscript{162}. Chaired by the well-respected author Ernesto Sabato, the commission soon gained broad recognition and support\textsuperscript{163}. It visited detention centres, clandestine cemeteries, and police facilities, and interest in giving testimony, even by those living in exile, was immense. The commission was portrayed positively in the television and daily press, and its final report “Nunca Mas” turned...
into a national best-selling book\textsuperscript{164}. The commission’s success, primarily due to its outreach work and inclusive approach, inspired various subsequent commissions.

The South African Truth and Reconciliation Commission (TRC) focused on gross violations of human rights committed with a political motive during the apartheid era. Unlike previous truth commissions, the South African TRC had the ability to grant amnesty under certain conditions. The TRC was the first truth commission that functioned parallel to a determined criminal justice system, willing to prosecute those who participated in the conflict. This generated a welcome and sufficiently strong side-effect: it spurred on many perpetrators – mainly whites – to work with or even appear before the South African TRC. Those taking part in the TRC preferred public exposure and shame to the risk of being held liable in a criminal court\textsuperscript{165}.

The South African TRC’s success in engaging victims and the perpetrators clearly resulted from its extensive public hearings and outreach. Both have become a role model for other truth commissions willing to apply a victim-centred approach. After the South African TRC, the idea of a truth commission holding public, victim-centred hearings became the norm. This was true for the truth commissions that followed in Ghana, Sierra Leone, Peru, Timor-Leste, Morocco, and Paraguay\textsuperscript{166}.

\section*{3.2.5 Conclusion}

What is important for the further discussion is that the right to truth can be realised within both criminal proceedings and mechanisms designed explicitly for truth seeking. Whereas in criminal proceedings, it is an effort aimed at clarifying the fate of individual victims and identifying those responsible for those violations, broader truth-seeking efforts aim at understanding comprehensively root causes, circumstances, factors, context, and motives of countrywide situations of repression and/or violence. Beyond the rights of the individual, the


\textsuperscript{166} Mark Freeman, \textit{Truth Commissions and Procedural Fairness} (Cambridge: Cambridge University Press, 2006), 24-25.
right to truth includes a societal or collective right to truth, both for the society’s own sake and to avoid the future recurrence of particular violations or structures enabling them.

The experience of the CAVR will confirm that enabling victims to give statements in order to thereby make the personal story known and to add to the process of establishing the truth, is for many victims the most participatory way of contributing to and experiencing transitional justice. In addition, the legacy of the CAVR highlights its importance to society and its strengths to call for justice and reparation.
3.3 The right to reparation

In order to understand the term “reparations” it is important to be aware of the two different contexts in which the term is used. The first context is the juridical one, in which the term “reparations” is used in a broad sense to refer to all measures that may be employed to redress various types of harm suffered because of certain crimes or infringement of other rights. The second context in which the term “reparations” is frequently used is in the design of programmes, i.e. coordinated sets of reparative measures. Here, “reparations” refers to attempts to provide benefits directly to victims, in most cases based on national legislation outside legal proceedings.

Within legal proceedings, reparation can either be sought directly from the offender or, in the case of human rights violations, from the state. Granting reparation through civil or criminal proceedings is a long-known and well-established form of repairing the harm done by the offender to the victim. Today, it forms an integral part of most criminal proceedings and is contained in the ICC’s pursuit of justice. In most jurisdictions, reparations can be initiated at the police or prosecution level and, at best, results in a court order providing financial compensation or restitution to victims. As a response to the crime committed, the aim is that the restitution provided repairs – as much as possible – the harm suffered by the victim. In this context, receiving reparations will depend on the evidence at hand and to some extent on the willingness of the defendant to share and confirm the information gathered.

In the aftermath of mass violence, once-off payments – granted by court order – provide limited capacity for the victim to overcome his or her losses. It may allow covering urgent and immediate consequences of the violation, but leaves victims extremely vulnerable to further psychological and financial suffering. In addition, due to the high level of victimisation and destruction, individual reparation claims are difficult to pursue. They also fail to address states as those responsible for state-sponsored or political crimes.

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167 The term “reparations” will be used in relation to attempts to provide benefits directly to victims; “reparation” will be used to describe what is sought through reparations, a state in which victims feel an adequate response to their suffering has been achieved.


169 Ibid., 452.
In post-conflict settings, access to reparation is therefore more and more divorced from court proceedings. Other forms of reparation are considered, in most cases based on national legislation. The aim is to provide victims with long-term support for medical and psychological treatment, re-integration, and education to overcome the legacy of intense violence and the results of segregations and discrimination\textsuperscript{170}.

3.3.1 The content of the right to reparation

The right to reparation and its content differs depending on the context in which it is discussed. Within criminal proceedings, the right to reparation will be closely linked to national procedural and participatory rights in order to enable victims to specify and clarify individual (or in the case of the ICC: collective) claims for reparation. By oversimplifying the concept of reparation, Freeman highlights:

If A wrongfully harms B, then, in the absence of overriding considerations, A should compensate B for the wrong. If I wrongfully (deliberately or negligently) damage your property, then I should repair it, or replace it with its equivalent, or pay you equivalent financial compensation, and perhaps I should pay you some additional compensation for the inconvenience and other non-material harms that my act has caused you. Such wrongful acts damage just relations between the parties, and justice seems to require that the wrongdoer should repair the damage. The obligation to make reparation thus seems to follow from basic ideas of justice, wrongdoing and unjustified harm. Since gross human rights abuses are extreme wrongs, they would seem to give rise to strong obligations of reparation\textsuperscript{171}.

Since the judgement of the Inter-American Court of Human Rights in Velásquez-Rodríguez, a new legal paradigm of justice was introduced for human rights violations. The judgement held that even in cases where punishment was unavailable, other legal responsibilities were owed to the victims in the form of reparations\textsuperscript{172}. This understanding of a right to reparation


\textsuperscript{172} See, e.g., Velasquez Rodriguez v. Honduras, Inter-American Court of Human Rights, Judgement of 29 July 1988, Case No. 4, Inter-Am. Ct. H.R. (Ser. C) No. 4, para. 166-179.
resulted from the development of international human rights law. With the development of human rights law came the awareness of a blind spot in international law: a failure to address the harm suffered by individuals within states at the hands of their own governments or other citizens. Individuals were given a voice in order to claim reparations for the harm imposed on them by their own states. \(^{173}\)

The right to reparation meanwhile forms an integral part of international human rights law, international criminal law, and international humanitarian law. It is referred to as “effective remedies”\(^{174}\), “an enforceable right to compensation”\(^{175}\), “fair and adequate compensation including the means for as full rehabilitation as possible”\(^{176}\), or “just and adequate reparation or satisfaction for any damage suffered”\(^{177}\). Similarly, Article 19 of the International Convention for the Protection of all Persons from Enforced Disappearances prescribes that “victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible.”\(^{178}\) The right to reparation has developed into a justiciable right of victims of serious crimes at the national and international level\(^{179}\). Recently, the ICC confirmed that various international and domestic instruments acknowledge the right of victims to receive reparations, together with an obligation of rectification that is imposed on those who are responsible for causing damage\(^{180}\). The court was of the opinion that reparations fulfil two main purposes that are enshrined in the court’s statute: they oblige those responsible for


\(^{174}\) Art. 8 of the Universal Declaration of Human Rights.

\(^{175}\) Art. 9 of the International Covenant on Civil and Political Rights; Article 91 of Additional Protocol I to the Geneva Conventions.

\(^{176}\) Art. 14 of the Convention against Torture and Other Cruel and Inhuman and Other Disregarding Treatment or Punishment (1984).

\(^{177}\) Art. 6 of the International Convention on the Elimination of All Forms of Racial Discrimination.


\(^{180}\) Prosecutor v. Thomas Lubanga Dyilo, Decision Establishing the Principles and Procedures to be applied to Reparations, Case No. ICC-01/04-01/06, 7 August 2012, para. 23.
serious crimes to repair the harm they caused to the victims and they enable the Chamber to ensure that offenders are held accountable for their acts.

3.3.2 Duty of the state to provide reparation

With the recognition of the right to reparation as an individual right against the offender, those who are liable for the harm suffered have a duty to enforce domestic judgements for reparation in accordance with domestic law or fulfil victims’ right to reparation through other means. To date, most international conventions involve the obligation of states to provide reparation, through either criminal proceedings or national laws on reparation. Article 14 of the Convention against Torture and Other Cruel and Inhuman and Other Disregarding Treatment or Punishment imposes on its parties the obligation to ensure in the legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation. The Convention regards it as the legal duty of the state to provide individuals who are victims with a remedy within the domestic systems of law\textsuperscript{181}. With respect to international humanitarian law, the principle of states as duty bearers for reparations is recognised as customary international law, partly codified in Article 91 of Additional Protocol I to the Geneva Conventions\textsuperscript{182}. It is indirectly entailed in the Geneva Conventions, according to which states cannot absolve themselves or another High Contracting Party of any liability incurred in respect of grave breaches\textsuperscript{183}. The duty to provide reparation for violations of international humanitarian law is also explicitly referred to in Article 38 of the Second Protocol to the Hague Convention for the Protection of Cultural Property of 1999. However, based on Article 91 of Additional Protocol I to the Geneva Conventions as well as on the conventions themselves, individuals can take no legal actions against states unwilling to provide reparation.


\textsuperscript{182} Art. 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, states: “A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces”.

\textsuperscript{183} First Geneva Convention, Article 51; Second Geneva Convention, Article 52; Third Geneva Convention, Article 131; Fourth Geneva Convention, Article 148.
In the context of mass violence, states began to consider broader and more inclusive means of providing reparation. States thereby seek to assure that victims receive adequate reparation for the harm suffered, either through enabling individual legal proceedings or through a national law on reparation. History’s most sweeping compensatory effort to date has been Germany’s payments under the programme of indemnification for the material damages to Jewish individuals and to the Jewish people. Following an agreement between the government of Israel, the Jewish Claims Conference and the government of Germany in 1953, Germany agreed to pay USD 3 billion to the state of Israel and 450 million to the Jewish Claims Conference. In addition, the agreement envisaged a national law under which Germany was to provide compensation. Until 2011, Germany expended more than USD 46,726 billion under the Federal Indemnification Laws (Bundesentschädigungsgesetz) which entered into force on 1 October 1953.

3.3.3 Participation and individualisation of the right to reparation

Within criminal proceedings, the right to reparation requires that victims participate in the process, are given the opportunity to deliver evidence in relation to the harm suffered, and are consulted on the amount of reparation (in most cases some kind of compensation) sought. Participatory rights differ in national legislations as does the threshold to hold an offender liable to reparation. Most national jurisdictions will have victim assistance units, providing victims with support or even representation to overcome legal challenges in seeking reparation. Within international criminal procedural law, the Rome Statute provides victims with incorporated participatory rights to ensure and enhance individual and collective reparation claims including restitution, compensation, and rehabilitation. In addition, the ICC established a Trust Fund for Victims to provide victims and their communities with

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184 The Claims Conference had the task of negotiating with the German government a program of indemnification for the material damages to Jewish individuals and to the Jewish people caused by Germany through the Holocaust, for further information see http://www.claimscon.org/
185 Bundesministerium für Finanzen, Entschädigungen von NS-Unrecht: Regelungen zur Wiedergutmachung, November 2012.
186 See e.g. Art. 68 of the Rome Statute of the International Criminal Court and Art. 97 (1) of the Rules of Procedure and Evidence of the International Criminal Court.
187 Art. 75 of the Rome Statute of the International Criminal Court.
financial reparations. The Trust Fund for Victims can use “other resources” (other resources than those of the offender) for the benefit of victims and thereby provide support for the benefit of victims regardless of court-ordered reparations.

In relation to national reparations programmes, the UN established certain criteria to promote victim participation in the design and implementation of reparation programmes. Instead of uniform responses across countries, the aim shall be to find responses that are nationally specific and decided nationally. In order to find such responses, national consultations on reparation shall include the local population and reflect its wishes. Only victims can provide valuable information to identify the context-specific characteristics of the violations suffered and to define fair and appropriate reparation measures. Consequently, the reparations to be provided will differ in each situation and should reflect a bottom-up information and victim consultation.

National reparations programmes aim to provide reparations independently from criminal proceedings against the perpetrator. In this context, victim participation is much broader than within criminal proceedings. Victims need to be given a voice beginning with defining victims and beneficiaries, through debate of the laws in parliament, until the actual provision of reparations to victims. If reparation schemes are based on the findings of truth commissions, victim participation will be required already during the truth-seeking process. Many post-conflict societies face massive difficulties in the process leading to national reparations schemes. Deciding who is to be regarded as a victim and eligible for reparation will provoke a vocal public debate. In the aftermath of political and state-sponsored crime, this debate will inevitably lead to a politicisation of victimhood. Due to limited resources, these debates will involve questions on whether to include for recognition victims of all sides.

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188 Ibid., Art. 79.
of the conflict and victim competition. Ideally, the process will avoid those with the fewest means being the ones left aside and excluded from the following reparations process.

3.3.4 Reparations through criminal proceedings: International tribunals and the ICC

Neither the ICTY nor the ICTR were designed to grant reparation themselves, neither through a court order nor through an independent procedure. Rather, the Rules of Procedure and Evidence of the ICTY and ICTR both required in Rule 106 that the judgement finding an accused guilty of a crime causing injury to a victim be transmitted to the authorities of the state concerned. It was then up to the victim to make a claim, on the basis of the obtained judgement, but pursuant to the relevant national legislation, in a national court or other competent body. Under the Rome Statute, Article 75(1) gives the chambers a broad discretion to establish the principles that are to be applied to reparations for victims, including determining the scope and extent of any damage, loss, and injury they experienced. Reparations may be provided through two means: either the court orders a convicted person to make reparations to the victim and/or it makes an order for reparations that employs the funds available in the Victims Trust Fund. On 7 August 2012, the ICC Trial Chamber I held the courts’ first decision establishing the principles and procedures to be applied to reparations. It held that reparations can be directed at particular individuals, as well as contribute more broadly to the communities that were affected. It thereby confirmed its understanding that reparations can be provided for individual as well as collective direct and indirect victims.


193 The only reference to restitution can be found in Article 24(3) of the Statute of the ICTY (mirrored by Article 23(3) of the Statute of the ICTR), which states: “[I]n addition to imprisonment, the Trial Chamber may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owner”.


195 Prosecutor v. Thomas Lubanga Dyilo, Decision establishing the principles and procedures to be applied to reparations, Case No. ICC-01/04-01/06, 7 August 2012.

196 Ibid., para. 179.

197 Ibid., para. 194.
3.3.5 Reparations through national reparations programmes

National reparations programmes generally result from the findings of truth commissions. With testimony and the evidence at hand, truth commissions have a clear vision of the number of victims, the violations suffered, as well as the continuous reality attached hereto. They can thus provide a strong basis for establishing who should be entitled to reparations and in which form. Hence, their final reports generally include clear and detailed propositions for national reparations schemes. The aim is to respond with a law that is effective and expeditious and that complements truth seeking by providing concrete remedies to victims. Despite concrete recommendations, many states are struggling with just and inclusive legislation or the implementation of reparations. Those responsible for defining individualised benefits are confronted with basic and far-reaching choices that must be made. Should financial contributions be made or rather services be offered to those who suffered? How is it possible to quantify the loss of a loved one or severe physical injury? Should all victims receive equal compensation or should compensation vary depending on the intensity of suffering?¹⁹⁸

At the implementation level, national reparation programmes often come to a standstill and lead to unsatisfactory outcomes. In particular, if there is a direct relation between the violations calling for reparation and the coalitions in power, reparations schemes are difficult to create and debating a law on reparations and financing reparations have been extremely difficult. Chile, for example, opted for a reparations programme that granted pensions, educational benefits, and exemptions from military service to the families of those killed or disappeared. It failed to extend compensation to the thousands who were wrongfully detained and tortured but who survived their ordeals. In other cases, reparations schemes are overridden by external factors. Argentina’s reparations scheme resulted from a recommendation made by the Comisión Nacional sobre la Desaparición de Personas in 1984. The commission called on norms to be enacted that provide economic assistance and then reparative measures to the children and/or families of disappeared. A series of laws was passed soon after, in 1984 and 1985, enabling victims to seek compensation¹⁹⁹. What was created is an example where an inclusive law was agreed on covering a broad group of recipients, providing compensation not only for deaths and disappearances but also for

unlawful detentions and torture. However, with the financial crisis of 2002, payments had to be stopped in 2002.

3.3.6 Forms of reparation

The “Basic Principles and Guidelines” refer to restitution, compensation, rehabilitation, satisfaction and guarantees of non-recurrence as groups of reparation. Which form of reparation should be provided depends on the context in which it is sought. At best, those considering a national reparations programme will make use of combinations of the various forms and means of reparation. Providing an overarching framework will allow them to respond to the various needs and claims for justice for past violations arising in the aftermath of conflict. According to the “Basic Principles and Guidelines”, restitution, e.g., refers to restoring the status quo ante for the victim, hence reflects the original meaning of the principle of restitutio in integrum. The idea is to re-establish, if possible, the original situation before the violation took place. This can include the restoration of liberty, the enjoyment of human rights, identity, and family life, the return to one's place of residence, the restoration of employment and the return of property. The aim is to neutralise the consequences of the violation suffered and prevent perpetrators from enjoying any benefit they may have derived from the offence. Whereas this concept is easily facilitated to cover material damage, it will fail to cover for the loss of a family member or harm through sexual violence.

Compensation is the most prominent and dominant form of reparation provided by states, through either court proceedings or national reparation laws. It refers to monetary payments that seek to compensate in proportion to the specific harm suffered by the victim, i.e., through the quantification of the losses incurred. Due to the nature of international crimes, such quantification is per se difficult to undertake. In current scholarship, compensation generally

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applies to material and immaterial damages, such as lost opportunities (including employment, education, and social benefits), loss of earnings (including loss of earning potential), moral damages, costs required for legal or expert assistance (including medicine and medical services, and psychological and social services)\textsuperscript{203}. The means by which compensation is provided is usually a court order. Some post-conflict countries established compensation bodies (commissions or tribunals) subsequently to a truth commission, deciding on reparation based on files or information forwarded by a truth commission\textsuperscript{204}. Rehabilitation refers to measures providing social, medical, psychological, or legal services to overcome short-term or long-term injuries. Its aim is to assist victims in the recovery from serious physical or psychological harm in the wake of a violation. It includes all future medical and clinical treatment to care for the victim’s short and long-term injuries. Rehabilitation thereby covers more than compensation for past medical expenses and can also include covering legal and social services\textsuperscript{205}.

Some argue that guarantees of non-reoccurrence or truth seeking should be considered as reparations, as well as the cessation of violations, verification of facts, and full public disclosure of the truth\textsuperscript{206}. In this conception, a truth commission could itself be considered as a form of reparation. However, such a broad understanding of reparation blurs the concept of responding to the specific harms and damages suffered. When analysing the reparations implemented in Timor-Leste in the following chapter, this thesis does not regard truth seeking as a form of reparation. Similarly, it will not consider institutional reform or development aid provided by the international community in Timor-Leste (or even Indonesia during its occupation) as a form of reparation. Both do not provide redress of a specific harm done to specific victims.

\textsuperscript{203} Ibid., 452.
\textsuperscript{204} Mark Freeman, \textit{Truth Commissions and Procedural Fairness} (Cambridge: Cambridge University Press, 2006), 63.
3.3.7 Conclusion

In Timor-Leste, nearly all families underwent some form of victimisation during the 25 years of occupation and the following struggle for independence. Its victims suffer from unimaginable losses in the form of the loss of a family member, sexual violence, brutal forms of torture, displacement, or persecution. In all these cases reparation will always remain a modest response, an attempt to repair the harm done. No reparation will ever repair the loss of a family member or the impact of sexual violence. Repairing in this context requires that states ensure the legal means to claim reparation (from the offender) while at the same time implementing reparation schemes that enable reparation for those victims whose perpetrators will never stand trial. In times of transition, reparations can be a strong indicator of political acknowledgement and a commitment to provide redress through specifically defined measures for victims and their families. This delivers important symbolic value by signalling the state's assumption of responsibility for past wrongs and acknowledgement of victims' suffering. Even if it does not repair the harm suffered, taking victims’ right to reparation seriously will relieve some of the pain and some of the consequences of the crimes committed.\(^{207}\)

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3.4 Complementarity

The complementarity of the right to justice, truth, and reparation has so far been mainly practised between truth commissions and courts. In these settings, truth commissions have preceded criminal trials or truth commissions and courts have interacted simultaneously. In Argentina, the truth commission provided information gathered to the prosecutorial authorities\textsuperscript{208}, or in the case of Peru, the Truth and Reconciliation Commission actively constructed cases to be presented to prosecuting authorities\textsuperscript{209}. The Truth and Reconciliation Commission of Sierra Leone interacted with the hybrid Special Court for Sierra Leone on an \textit{ad hoc} basis\textsuperscript{210}, whereas the CAVR and the Serious Crimes Regime, discussed below in detail, interacted on a statutory basis. In analysing these settings, four approaches have developed within transitional justice theory that differ immensely in the relationship they favour amongst the transitional justice mechanisms. Olsen, Payne and Reiter describe these four approaches as a maximalist approach, a minimalist approach, a moderate approach and a holistic approach\textsuperscript{211}. The maximalist approach advocates for a justice imperative that enjoys supremacy over all other transitional justice efforts. It puts focus on justice and demands strict accountability by addressing past atrocities through trials. The maximalist approach contends that a failure to prosecute results in a culture of impunity, erodes the rule of law, and encourages vigilante justice. This approach responds to moral, political, and legal imperatives as its basis for advocating prosecutions. The duty to prosecute cannot be abrogated for strategic or political purposes. This approach requires democracies to bring authoritarian forces under control and through prosecution lay the foundation for the rule of law\textsuperscript{212}. This approach strenuously opposes amnesties, because they fail to meet obligations under international law. A maximalist approach recognises the potential value of truth commissions


and other forms of restorative justice in dealing with the past, but not as a substitute for retributive justice.

Those who follow a so-called minimalist approach question the deterrent effect of trials in the post-conflict context. Holding perpetrators accountable would maintain rather than reconcile dividing factions within society and thereby jeopardise the fragile transition. It is argued that in the few instances where conviction has been obtained for large-scale, state-sponsored massacres, it has been secured only at the apparent price of troubling departures from settled law and principles. Hence, supporters of the minimalist approach consider amnesties as a valuable solution to strengthen democracy and long-term political change.\textsuperscript{213}

The moderate approach aims to find a middle ground between the maximalist promotion of accountability through prosecution and the minimalist endorsement of amnesties and respect for political constraints by endorsing truth commissions as alternatives to criminal trials. For those favouring a moderate approach, truth commissions are not a second-best alternative to criminal trials. Instead, they are a form better suited to prevent future violence, document past atrocities, and condemn human rights violations and promote a “different kind of justice.”\textsuperscript{214} The moderate approach therefore follows modesty in the promise of trials and emphasises the duty to promote reconciliation, to hold the authoritarian regime accountable, and to restore the dignity of victims.\textsuperscript{215} It does not reject punishment but holds the view that punishment ought not to be the goal of justice. It thereby challenges the duty to prosecute and offers a restorative justice alternative.

The last approach to transitional justice, the holistic approach, differs from the moderate approach in that it does not give primacy to truth seeking or any other transitional justice mechanism. Within this approach, transitional justice processes are regarded as complementing each other and not as alternatives to each other. This multiple – or holistic – approach is favoured by the UN Secretary-General in his 2004 report on transitional justice.


\textsuperscript{215} Martha Minow, \textit{Between Vengeance and Forgiveness. Facing History after Genocide and Mass Violence} (Boston, Beacon Press, 1998), 88.
and the rule of law\textsuperscript{216}. Meanwhile, the Special Rapporteur on the promotion of truth, justice and reparation on several occasions confirmed this approach promoted by the UN\textsuperscript{217}, as did several resolutions adopted by the UN Human Rights Council\textsuperscript{218}. According to the Special Rapporteur, measures of truth seeking, justice initiatives, reparation and guarantees of non-recurrence need to be applied in a manner that they “complement and do not exclude each other”. Only then are they likely to strengthen the rule of law based on firm human rights foundations\textsuperscript{219}. With reference to the right to truth, he argues that despite its importance, truth cannot be a substitute for justice and reparation and recalls that there are abiding national and international obligations concerning each measure. He also recalls that transitional justice mechanisms work best “when designed and implemented in a comprehensive fashion rather than in isolation from one another”\textsuperscript{220}.

This holistic approach to transitional justice is also favoured within this thesis. It rejects a single approach giving preference to criminal justice, truth seeking or reparation. It aims to combine an equal promotion of the right to justice, truth and reparation, and restorative justice principles. One of the arguments for its promotion is that the large number of victims makes a single approach favouring truth seeking or amnesties over trials inutile. The limitations of criminal justice, combined with weak state institutions, requires states – or in the case of Timor-Leste, those replacing state authority – to apply multiple approaches holistically in order to deal with the violent past in its particular aspects. Victims’ rights require multiple and compassionate responses from the international community, the state, and the victims’ own communities. While restoring the infrastructure and revealing the truth of what has happened


\textsuperscript{219} Statement by the UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, \textit{Tunisia: UN Expert Calls on Human Rights to be at the Heart of a Transitional Justice Process owned by the Entire Society}, 16 November 2012.

will be important, the law needs to reassert its legitimacy, a task that requires some form of retributive justice. In addition, true victim empowerment will require restorative practices. Only when applied in combination will restorative and retributive justice both serve necessary but different purposes in regard to the rights of individual victims and offenders. At the same time, they will be able to target those at the top of the chain of command, communicating a symbolic message with broader impact and bridging the divide between individual rights and macro needs. The holistic approach favoured here is therefore more of a transitional justice framework, as it refers to a broader network of “complementary” relationships among (criminal) justice, truth and reparation. The emphasis is on the importance of designing a combination of mechanisms that fit the particular post-conflict context and its complexity. This requires transitional justice mechanisms to address a range of experiences and contemporary realities.


3.5 Conclusion

Overall, we are to recognise three different but complementary rights, each varying in content and in the corresponding duties of the state. The right to justice developed from the duty to prosecute. Its main characteristic is the right of victims to have the violation they suffered investigated into and, if possible, to see their perpetrators brought to justice. It is a right closely linked to the right to truth, access to justice as well as participatory rights so that victims can oversee and influence criminal proceedings. The right to truth developed out of the right to justice. In early jurisprudence on the right to truth, it was argued that only through information and knowledge of the violations and the corresponding responsibilities could victims instigate and influence criminal proceedings corresponding to their right to justice. Hence, victims must be entitled to seek information from the state. Once this right was established, it was soon realised that knowledge of individual incidents provides limited account of state-orchestrated and systematic crimes. The right to truth was therefore expanded from an individual to a collective right. With the emergence of the right to truth as a collective right came increased attention to truth commissions as inclusive victim-centred processes. These bodies gave detailed descriptions of how and by whom the crimes were committed but also created an overview of the number of victims and the violation suffered. Based on their record of the conflict, truth commissions were in a position to formulate who should be entitled to reparation.

If states implement multiple mechanisms to fulfil their duties in relation to the right to justice, truth and reparation (as in Timor-Leste), this will necessarily lead to an overlap – if not tension – between the operations of prosecutorial bodies, truth commissions, and national reparations programmes. How states coordinate their efforts to ensure the right to justice, truth and reparation and manage their potentially overlapping mandates raises a range of questions. The following case study aims to identify and assess these questions and to highlight the importance of a concurrent but complementary promotion of the right to justice, truth and reparation.
Responses to international crimes will depend on the unique background, demands, and differing circumstances of the transitional society in question. A balance needs to be found for legitimate claims for justice, truth and reparation for victims, in a way that avoids a relapse into conflict while consolidating long-term peace. Ideally, transitional justice efforts provide long-term transformative processes. They therefore need to be flexible and mirror the political, historical, and cultural realities. As regards Timor-Leste, this requires transitional justice mechanisms to be closely connected to the discussion of victimisation during Timor-Leste’s period of internal conflict, the following 25 years of Indonesian occupation, and the explosion of violence in 1999, finally leading to independence. During these periods, violence was committed predominantly in the form militia against militia, with varying degrees of Indonesian state control. Geographic accessibility, ethnic or religious makeup, and political affiliations also determine the forms and extent of victimhood.

Timor-Leste is the most recent independent country in the Asia-Pacific region. It formally declared independence on 20 May 2002. It is a poor and predominantly rural state and, more than ten years after independence, adequate housing is still out of reach for many Timorese. It is estimated that more than half of the population (~ 1.1 Million) live in poor housing conditions, having no access to clean water and sanitation and using firewood as their primary source of energy. Electricity remains available only in the two biggest cities, Dili and Baucau, and nearby neighbourhoods. Probably less than 10% of the population have access to mobile phones, there is no general telephone infrastructure, and probably between 25% and 30% of the population have access to a radio. Due to the limited availability of electricity, there is virtually no television. Roads and bridges are very poor and travel is difficult. Most of Timor-Leste’s population (80%) are earning subsistence from the land they grow fruits and

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vegetables on. Due to Timor-Leste’s extreme vegetation and climate, options for agriculture are limited, leading to 42% of the population living below the national poverty line (USD 0.55 per day), and 20% of the population has an insecure food supply\(^{226}\). As Kent summarises, UNTAET’s state-building rhetoric accentuated the notions of empowerment, development, and human rights, and depicted international donors and international economic organisations as essentially charitable. At the same time, UNTAET embedded a free market model of development that promoted private expansion, foreign investment, and export-oriented production of goods. This model made living conditions more difficult by raising the costs of basic goods instead of increasing food security in rural areas\(^{227}\).

Timor-Leste experiences a significant demographic “youth bulge”, due to an average life expectancy of 57 years. It is estimated that 40% of the Timorese population is less than 14 years of age\(^ {228}\). 50% of adults are literate\(^ {229}\), and even by 2012 less than half of the children who reach school age enrol in grade one. Less than a third of these remain enrolled until grade nine. Those children that attend school face crowded classrooms in poor physical conditions, with the necessary supplies and materials unavailable. To get to school, boys and girls living in rural areas sometimes need to walk for hours or are dependent on limited means of transportation. For persons with disabilities services are basically unavailable\(^ {230}\).

4.1 The colonial era

Before European colonial powers first reached the island of Timor, it was split into autonomous kingdoms, called rai, in the West and East. Each of the kingdoms consisted of small-scale chieftainships with leaders called luirai (kings), who ruled an area with several princedoms (sucos), each of which comprising several towns (or knua)\(^ {231}\). It was a time when


\(^{229}\) UNDP-UNEP, Poverty-Environment Initiative, PEI Country Fact Sheet on Timor-Leste.


\(^{231}\) Common Country Assessment (CCA) by the UN Country Team East Timor (2000), Building Blocks for a Nation, p. 20.
political structures were ritually highly complex, founded on the belief that the *liurai* have spiritual powers that are passed on through the generations. Portuguese and Dutch sandalwood and spice traders as well as missionaries were the first to make western contact with Timor in the early 16th century. The first Portuguese began to settle on the island in 1533, and from 1586 on the eastern *rai* came under Portuguese administration. In the course of the subsequent colonial consolidation, most kings (*liurais*) were ultimately disempowered and the *sucos* merged into the newly created colonial administrative units. By 1642, the power of the Wehale kingdom was overcome by the colonial power and in 1701 Timor-Leste formally became a Portuguese colony. While at first the formal authority of the *liurais* remained intact and rituals and administrative authority became integrated into the Portuguese system of colonial administration, the creation of large-scale coffee plantations temporarily reduced the political influence and dissolved the governing structures of the *liurai*. It was not until the early 20th century that other powers began to show interest in Timor-Leste’s untouched resources. Japan and Australia both started to show a rival interest in Timor-Leste’s oil reserves, ultimately leading to the deployment of Australian troops in Dutch West Timor in December 1941 to slow down the Japanese forward movement. In response, Japan made simultaneous attacks on Kupang and Dili and after a few days gained control over West Timor. After an ongoing battle against the Australian-Dutch forces, the Japanese established control over the whole island from early 1943 onwards. With the end of WW II and the capitulation of Japan in 1945, Australia took over control on an interim basis, before handing the eastern part of the island back to the Portuguese authorities and the western part back to the Dutch colonialists. Shortly thereafter, Indonesia proclaimed its independence, arguing that the territory of Indonesia consisted of the entire western Dutch colony of Timor. In the aftermath of WW II, the eastern part of the island, formally still under Portuguese rule, experienced its worst neglect. Food was scarce and there was no state education provided beyond elementary school. By 1960, less than 10,000 Timorese had received primary education.

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232 In 1859, the western part of Timor came under the rule of the Netherlands (as part of the Netherlands East Indies).


Within Timor-Leste’s harsh natural conditions, people tried to maintain their agricultural, self-sufficient existence in small mountain villages.

Due to the various take-overs and the absence of broader administrative structures, traditional rulers regained importance. Communities, locally called sucos, began to play an important role throughout Timor’s long history of foreign rule. Small communities were at the centre and the foundation of social environments to identify with. Through Portuguese colonial influence over the eastern half of the island of Timor, the authority of the liurais (kings) who ruled the Timorese micro-kingdoms remained largely intact until the early 20th century. In 1911, the Portuguese consolidated their rule over the province by incorporating the sucos (integrated clusters of hamlets) of the territory into sixty administrative pastas (cantons). These became the new interface between the colonial administration and the largely intact administrative systems of the sucos. On the suco level (village level), it were the liurais that maintained legitimacy of local rule.

4.2 Internal conflict of 1974-1975

New hope for Timor-Leste arose when on 25 April 1974 young left-leaning officers launched a military coup in Portugal. Through this coup, a non-communist government replaced Portugal’s fascist regime (Carnation Revolution, Revolução dos Cravos). The change of government in Europe also triggered political activity in Portuguese Timor, leading indigenous political movements to enter into heated debate. Provoked by this debate, three new political parties appeared on the Timorese political landscape: 1) the Association of Timorese Social Democrats (which later became the Revolutionary Front of Independent East Timor, FRETILIN), which was aligned towards adopting a socialist doctrine and sought

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241 Translated into English: Revolutionary Front for an Independent East Timor.
independence\textsuperscript{242}; 2) the Timorese Democratic Union (UDT), who initially favoured independence but with close ties to Portugal; 3) the Timorese Popular Democratic Association (APODETI), whose main pledge was integration with Indonesia and who were openly supported by Indonesia\textsuperscript{243}.

In early 1975, scattered elections for local \textit{liurai} were held as part of FRETILIN’s decolonisation strategy. The conditions under which the elections were held made a precise count impossible; still, FRETILIN claimed to have won the elections. The elections did not end the struggle for political dominance and increased the divide between FRETILIN and UDT\textsuperscript{244}. An outburst of violence between the UDT and FRETILIN, including the latter’s military branch FALINTIL (Forces of the National Liberation of East Timor), resulted in more than 2,000 deaths and was accompanied by widespread arbitrary detention and torture\textsuperscript{245}.

On 1 June 1975, APODETI presented a declaration to the Indonesian consul in Dili. The declaration proposed the reintegration of Portuguese Timor with West Timor and declared Portuguese Timor the 27\textsuperscript{th} province of Indonesia. On 11 August 1975, UDT, in support of integration with Indonesia, launched a pre-emptive armed attack upon FRETILIN. FRETILIN launched a counter-attack through its Armed Forces for the National Liberation of East Timor (FALINTIL). Within 24 hours, 150 persons were killed, amongst them 20 randomly selected women\textsuperscript{246}. The participating forces in this short but intense period of civil war had little previous experience or discipline. Timorese factions were responsible for significant human rights violations against other Timorese\textsuperscript{247}. Legally, this period is qualified as non-

\textsuperscript{242} As its membership became bolder in its demands for freedom, the ASDT changed its name to FRETILIN and demanded independence from Portugal. In the course of time, FRETILIN’s ideology developed a more communist outlook. This, at the height of the Cold War, alarmed many anti-Communist countries.


\textsuperscript{244} Geoffrey Robinson, \textit{‘If you leave us here, we will die’: How Genocide Was Stopped in East Timor} (Princeton: Princeton University Press, 2010), 31-34.


\textsuperscript{246} Elisabeth Schöndorf, \textit{Against the Odds. Successful UN Peace Operations - A Theoretical Argument and Two Cases}, Baden-Baden: Nomos, 2011), 244.

international armed conflict between FRETILIN and UDT. Military operations took place on a significant scale between the 1,500 UDT and 2,000 FRETILIN/FALINTIL personnel. Both sides relied on the use of mortars and artillery, causing around 400 deaths in the main fighting in the capital Dili alone. Active hostilities came to an end after FRETILIN defeated the pro-Indonesian UDT forces in Dili by the end of August 1975 and pushed UDT forces across the border into West Timor.²⁴⁸

4.3 Indonesian invasion of October 1975

Covert military operations by Indonesian forces had been underway inside Portuguese Timor from July 1975 onwards, disguised as support for the UDT. When Indonesian forces crossed into Portuguese Timor in October 1975 with the intention of assuming control over the territory, this marked the beginning of an international armed conflict, to which the 1949 Geneva Conventions accordingly applied. The invasion was followed by the overt use of military force, including naval and artillery bombardment, tanks, and helicopters, on a significant scale by thousands of Indonesian troops. They enabled joint attacks on Balibo, Maliana, and Palaka on 16 October 1975 by three Indonesian Special Forces teams and two companies of regular para-commandos, in addition to Timorese militias.²⁴⁹ Although the Portuguese administration and its forces had withdrawn to the island of Atauro as a result of civil conflict between competing East Timorese forces from mid-August 1975, it had never renounced its sovereign claim over the territory of Portuguese Timor. Indonesian forces intervened militarily on Portuguese territory, without Portugal’s consent, but with the intention of taking military control of that territory to the exclusion of the proper Portuguese authorities. Under international humanitarian law, Portugal and Indonesia are therefore regarded as parties to the conflict.²⁵⁰ The seriousness and scale of fighting between Indonesia

²⁴⁹ Militia groups have a long history in Timor-Leste and their use can be traced back to Portuguese administrators and the Australian forces during WW II. For an in-depth discussion, see Elisabeth Stanley, Torture, Truth and Justice. The Case of Timor-Leste (London: Routledge, 2008), 81.
²⁵⁰ On the other hand, FRETILIN and its armed wing FALINTIL do not qualify as participants in an international armed conflict. As they existed for the purpose of terminating Portugal’s control over Portuguese Timor, they were certainly not an irregular combatant force acting under the control of, or connected with, a State Party to the conflict within the scope of article 4(2) of the 1949 Third Geneva Convention.
and FRETILIN indicate that the violence was of sufficient intensity and duration to be qualified as a (parallel and potentially concurrent) non-international armed conflict.\(^{251}\)

In the midst of violence, on 28 November 1975, FRETILIN made a unilateral declaration of independence of the Democratic Republic of East Timor. However, FRETILIN never managed to establish administrative control, as only nine days later, on 7 December 1975, Indonesia increased its presence on the territory with a military force of 25,000 soldiers (the so-called Operasi Kommodo). An estimated 2,000 persons lost their lives in combat, hundreds of political prisoners were executed, and tens of thousands of civilians were displaced to West Timor. In May 1976, Indonesia installed a puppet provisional government of East Timor and the so-called “People’s Assembly”, both selected by Indonesian intelligence. On 17 July 1976, East Timor officially became the 27th province of the Republic of Indonesia. However, there is no evidence that the international community recognised the occupation and subsequent annexation of Timor-Leste. Immediate United Nations Security Council and General Assembly resolutions\(^{253}\) rather confirm that Portugal remained the “administering power” in Portuguese Timor.\(^{254}\)

Between late 1975 and early 1978, FRETILIN and FALINTIL were able to maintain control over interior regions of the country, in which a significant part of the population was sheltered. When by February 1979 the last resistance zone (bases de apoio) fell, Indonesia declared Timor-Leste as pacified.\(^{255}\) To maintain control and power, the territory was heavily administered in the following years by Indonesian military and civilian authorities. Within the tight net of governance, there was little space for Timor-Leste’s aspirations or culture. Indonesian techniques of rule were deliberately divisive.\(^{256}\) What followed was a period of greatest humanitarian tragedy. The CAVR report described the situation as follows:\(^{257}\)

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\(^{254}\) The conflict therefore continues to be qualified as an international armed conflict between Portugal and Indonesia. The 1949 Geneva Conventions remain applicable, which will be relevant for the prosecution of grave breaches.


After many months of life constantly on the move to evade attack, and with food sources destroyed by the Indonesian military, people were in a very vulnerable condition when they surrendered. They were held in transit camps, with inadequate food and medical relief. […] Following the relocation of the population to resettlement camps, the Indonesian military priority of security placed tight controls on civilians’ movement and so limited their capacity to farm and to grow food, resulting in further starvation, death and misery on a large scale.

At the time, most of the human rights violations remained unknown. The Indonesian government ensured that little information of what was taking place became known. The territory was generally kept closed to outsiders and the Timorese were unable to exercise their right to self-determination, to participate in legitimate political activities, or to travel or speak freely. This tactic was successful until 12 November 1991. On this day, Indonesian forces shot into a crowd of people gathered at Santa Cruz cemetery in Dili for the funeral of a youth killed by the Indonesian forces. In this attack on the civilian population, 271 persons were shot or beaten to death and 362 more injured. The massacre was secretly filmed by international journalists and later broadcast all over the world. With the conflict in international media attention, an ideological shift within the international community began in regard to what was once a supportive attitude towards Indonesia’s rule over Timor-Leste. Following the recorded killings, the massacre also formed the basis for increased national unity within resistance and hastened the rise of the civilian clandestine movement.

During the occupation, the Indonesian government resettled close to 80% of the population, a tactic used to keep the population from their villages, ostensibly so that they could not provide support to the guerrillas. Displacement was accompanied by rape, murder, and disappearance. The centrepiece of the Indonesian strategy was a strategy of selective detention, interrogation, and torture. Trained civilians (rakyat terlatih or ratih), Timorese civilians who supported Indonesian forces, gathered intelligence and played a significant role.

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261 The International Committee of the Red Cross (ICRC) counted approximately 2,300 missing persons in the period from 1975 to 1999.
in intimidating pro-independence supporters. The aim of such military campaigns was to separate ordinary people from the resistance. This form of warfare along with covert intelligence operations was used to portray the violence as a conflict among Timorese factions themselves, which required Indonesia to rule the troubled nation. This subtle means of warfare enabled Indonesia to deny its culpability and to justify its continued military interventions. The success of structural violence was strikingly evident in the widespread poverty, malnutrition, maternal mortality, illiteracy, and domestic violence that were prominent features of the occupied state. Towards the end of 1998, and coinciding with the increased momentum towards finding a political solution to the East Timor question, several new and more militant paramilitary groups were formed. Together with the earlier groupings, these militias are alleged to have actively targeted pro-independence supporters through intimidation, house searches, assaults, widespread arson, destruction of property, arbitrary detention, ill-treatment, rape, and unlawful killing.

4.4 The referendum of 1999

Successive talks between Indonesia and Portugal, initiated by the Secretaries-General since 1982, resulted in a set of agreements signed in New York on 5 May 1999. The two governments entrusted the Secretary-General with organising and conducting a “popular consultation” in order to ascertain whether the East Timorese people accepted a special autonomy within the unitary Republic of Indonesia or rather wanted an independent state. To carry out the consultation (also referred to as the ballot), the Security Council authorised the establishment of the interim United Nations Mission in East Timor (UNAMET). Shortly after the announcement to hold the referendum, pro-Indonesian paramilitary groups committed massacres in Liquiçá (06 April 1999; at least 30 persons were killed) and Cailaco (12 and 13 April 1999; six persons were abducted, tortured, and finally killed in front of

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mourners). On 17 April 1999, at least 11 people were killed during an attack on 140 people sheltering in the home of independence figure Manuel Carrascalao in Dili.\textsuperscript{266}

The referendum itself was held on 30 August 1999. It revealed a clear majority (78.5\%) in favour of independence, rejecting the alternative offer of being an autonomous province within Indonesia.\textsuperscript{267} In anticipation of the result, Indonesian security forces unleashed militias upon the population. Within hours after the announcement of the result, an already violent situation escalated dramatically throughout East Timor, with kidnapping, rape, and murder of civilians, along with burning and destruction of military installations and civilian residences by pro-Jakarta militiamen. It is estimated that the entire population was one way or another directly or indirectly affected by the violence, intimidation, or destruction. In the following month, Indonesian military, in conjunction with its Timorese militia proxies, unleashed a wave of terror against the Timorese people. Almost two thirds of the population were displaced; a quarter of a million were forcibly moved across the border into Indonesian territory in West Timor; thousands were murdered and raped; and over 70 \% of Timor-Leste’s civilian buildings were razed.

From early 1999 until the arrival of International Force for East Timor (INTERFET) on 25 October 1999, members of the Indonesian Armed Forces (TNI) and members of the Indonesian Police Force orchestrated widespread and systematic attacks. They were supported by approximately 25 pro-Indonesian armed civilian and paramilitary groups, consisting of “East Timorese” that operated alongside Indonesian armed forces in East Timor. Thousands of East Timorese thereby participated in the liberation movement through militia activities and played a key role in the orgy of violence unleashed on post-referendum East Timor in 1999. Estimates on the number of civilians killed during the time of occupation and 1999 are vague. The CAVR estimated that the overall conflict-related civilian deaths amount to 100,000 to 200,000 civilians. It attributes 57.6\% of the fatal violations to the Indonesian army and police and 32.3\% to their local auxiliaries.\textsuperscript{268}

\textsuperscript{266} Hamish McDonald, “Masters of Terror: The Indonesian Findings”, in Masters of Terror: Indonesia's Military and Violence in East Timor, eds. Richard Tanter, Desmond Ball and Jerry van Klinken (Lanham, MD: Rowman & Littlefield, 2006), 19.


4.5 The United Nations Transitional Administration for East Timor (UNTAET)

On 15 September 1999, the Security Council agreed on Resolution No. 1264/1999, in which the Security Council condemned all acts of violence in Timor-Leste, called for their immediate end, and demanded that those responsible for such acts be brought to justice. Under Chapter VII of the United Nations Charter, the Security Council authorised the establishment of a multinational force to restore peace and security in Timor-Leste, to protect and support UNAMET in carrying out its tasks, and to facilitate humanitarian assistance operations. To achieve these aims, an Australian-led international force INTERFET was deployed in Timor-Leste on 20 September 1999. With the arrival of the international forces, Indonesia withdrew its presence from Timor-Leste. In doing so, it also brought home any civil service that was present on the territory. The collapse of government administration and the physical destruction of government buildings and facilities, a consequence of Indonesia’s “scorched earth and destruction policy”, meant the state had ceased to exist. To overcome this rule of law gap, the UN Security Council introduced the United Nations Transitional Administration in East Timor (UNTAET), which was endowed with overall responsibility for the administration of East Timor and the power to exercise all legislative and executive authority, including the administration of justice. Accordingly, the newly established UN administrator had to play a major role in re-establishing the institutional infrastructure and national judiciary. Legal challenges were complex and involved various activities. The first essential concern was to clarify which law was applicable and by which method existing legislation had to be amended. UNTAET passed Regulation 1999/1, UNTAET/REG/1999/1 of 27 November 1999, pursuant to the authority given to it under UN Security Council resolution 1272 (1999) of 25 October 1999, in order to decide on the applicable law. On 3 December 1999 it agreed on UNTAET Regulation 1999/3, UNTAET/REG/1999/3 On the Establishment of a Transitional Judicial Service Commission, which gave the Transitional Administrator the authority to appoint judicial authorities. UNTAET was created following the structure of UNMIK, the United Nations Interim Administration Mission in Kosovo, a mission that was likewise unprecedented in both its scope and its structural complexity. UNMIK was responsible for the development of democratic and autonomous self-


government, the reconstruction of key infrastructure, as well as the establishment of a credible
system of law and order to address the considerable number of crimes committed during the
war and to curb the rapidly rising civil disorder.\textsuperscript{272}

Beyond creating judicial bodies, UNTAET’s tasks were far reaching. They comprised
managing the initial post-conflict humanitarian emergency of a mainly homeless population,
starting the groundwork for developing basic state infrastructure, disarming FALINTIL, the
resistance guerrilla force, overseeing relations with Indonesia, and facilitating the return of
the large numbers of displaced people still in camps in West Timor. The UN established an
integrated, multi-dimensional peacekeeping operation: Once established, UNTAET comprised
a governance and public administration component, a civilian police component of up to
1,640 civilian police, and an armed United Nations peacekeeping force. On top of all this,
there was what Reiger calls a “moral imperative” for the UN to make some arrangement
towards justice.\textsuperscript{273} Voices soon emerged stressing that without any prospect of criminal
accountability, violence was most likely to re-occur, and that the development of Timor-Leste
would be impaired. The population was pessimistic regarding the capacity of the UN
International Police Mission (CIVPOL) to maintain law and order and to repatriate thousands
of civilians. There was also concern that a failure to deal with criminality might have long-
term implications for regional stability and for perceptions about the ability of the United
Nations to ensure due process in cases of international crime.\textsuperscript{274}

On 14 April 2002, Xanana Gusmão was appointed first president of Timor-Leste and on 20
May 2002 the interim National Congress for Timorese Reconstruction (Portuguese: Conselho
Nacional de Reconstrução de Timor, CNRT) was transformed into the National Parliament of
the Democratic Republic of Timor-Leste. The new government was composed primarily of
the same cabinet members that comprised the pre-independence Council of Ministers. To
adapt its functions and ensure the security and stability of the nascent state, the UN introduced

\textsuperscript{272} Taru Kuosmanen, *Bringing Justice Closer – Hybrid Courts in Post-Conflict Societies* (Helsinki, Erik Castrén Institute
Research Reports 22/2007), 55.


\textsuperscript{275} Xanana Gusmão is Prime Minister of Timor-Leste since 8 August 2007.
a new interim mission (United Nations Mission of Support in East Timor, UNMISET), following UN Security Council Resolution 2002/1410\(^{276}\).  

5. Transitional justice mechanisms dealing with Timor-Leste’s past

The aim in this chapter is to give an overview of the different transitional justice mechanisms implemented in Timor-Leste by the UN or local authorities as well as in Indonesia in relation to the offences committed between 1974 and 1999. This overview will only include a description of the transitional justice processes that are considered relevant in relation to the victim’s right to justice, truth and reparation and the fulfilment of the corresponding “state” obligations. Hence, the description of the processes will not be exhaustive. It will not include the extensive efforts undertaken by the UN in relation to security sector reform, it will not address the various programmes instigated to deal with IDPs and their return, and it will not address local practices of memorisation that were undertaken outside the UN transitional justice agenda. Rather, the discussion aims to provide the reader with an overview of the relevant transitional justice efforts undertaken. It commences with a description of the Serious Crimes Regime, consisting of the Special Panels at the Dili District Court and their prosecutorial counterpart, the Serious Crimes Unit, as well as its successor, the Serious Crimes Investigation Team. This will be followed by a short summary of the processes held at the Indonesian Ad Hoc Human Rights Court. The discussion will then elaborate the structure and methods used by the two truth commissions, the Commission for Truth and Reconciliation and the International Commission for Truth and Friendship.

5.1 Timor-Leste’s Serious Crimes Regime

In international criminal law there evolved an understanding that regime change has no bearing on the state’s international obligations to investigate international crimes. Accordingly, if the previous government failed to discharge its duty to punish atrocious crimes, its successor remains bound to fulfil the obligation. Fulfilling this obligation is a particular challenge for successor states – or in the case of Timor-Leste: transitional administrations – that find themselves inheriting weak administrative and judicial institutions. Implementing international law is generally not on the priority list of the political agenda and

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faces immense legal challenges. Moreover, institutions are confronted with factual and practical challenges, foremost with how to deal with the thousands of perpetrators that participated in the violent conflict and how to address the high number of victims seeking justice. In addition, repressive forces of the past will aim to weaken judicial institutions – if existent – and object to criminal investigation.\(^{278}\)

When the UN began to establish its transitional administration in September 1999, governing structures and the state apparatus had broken down and CIVPOL had to deal with thousands of detainees in interim accommodation. During this period, a small group of Australian military police began to collect evidence almost immediately after INTERFET arrived in September 1999. One of the earliest records of UN commitment to investigate the atrocities committed on the territory can be found in the UN Commission on Human Rights’ Resolution 1999/S-4/1.\(^{279}\) This resolution resulted from a special session on the human rights situation in Timor-Leste, held from 23 to 27 September 1999 – immediately after the eruption of violence during the referendum. It condemned the widespread, systematic and gross violations of human rights and international humanitarian law in Timor-Leste, the widespread violations and abuses of the right to life, personal security, physical integrity, and the right to property, as well as the activities of the militias in terrorising the population. The resolution requested thematic rapporteurs to carry out missions to Timor-Leste and report on their findings to the Human Rights Commission.\(^{280}\) It further called on the Secretary-General to establish an international commission of inquiry to collect information on possible human rights violations and other acts, which might constitute breaches of international humanitarian law, and to provide the Secretary-General with its conclusions and recommendations for future action.

Subsequently, in October 1999, three Special Rapporteurs departed for Timor-Leste.\(^{281}\) After intensive gathering of evidence, the Rapporteurs recommended the creation of an


\(^{280}\) The requested thematic rapporteur comprised the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Representative of the Secretary-General on internally displaced persons, the Special Rapporteur on the question of torture, the Special Rapporteur on violence against women, its causes and consequences, and the Working Group on Enforced or Involuntary Disappearances.

\(^{281}\) The Special Rapporteur on extra-judicial, summary or arbitrary executions, Ms Asma Jahangir; the Special
international criminal tribunal to respond to the serious crimes committed against the people of Timor-Leste. In light of the rule of law vacuum yet to be overcome in Timor-Leste, the Rapporteurs called for the following:

The record of impunity for human rights crimes committed by Indonesia's armed forces in East Timor over almost a quarter of a century cannot instil confidence in their ability to ensure a proper accounting. Nor, given the formal and informal influence wielded by the armed forces in Indonesia's political structure, can there, at this stage, be confidence that the new Government, acting in the best of faith, will be able to render that accounting. The investigative forces will need to feed into a system which ensures that those responsible are brought to justice. The same factors that argue for international investigation argue similarly for an international judicial process. [...] Unless, in a matter of months, the steps taken by the Government of Indonesia to investigate TNI involvement in the past year's atrocities bear fruit, both in the way of credible clarification of the facts and the bringing to justice of the perpetrators – both directly and by virtue of command responsibility, however high the level of responsibility – the Security Council should consider the establishment of an international tribunal for the purpose. This should preferably be done with the consent of the Government, but such consent should not be a prerequisite. Such a tribunal should have jurisdiction over all crimes under international law committed against any party in the territory since the departure of the colonial power.²⁸²

The report confirmed the United Nation’s interest in “participating in the entire process of investigation, establishing responsibility and punishing those responsible and in promoting reconciliation. Effectively dealing with this issue will be important for ensuring that future Security Council decisions are respected”²⁸³. The UN thereby also confirmed its understanding of the organisation as a duty-bearer in relation to the right to justice.

Following its special session on the situation of human rights in East Timor, the Commission on Human Rights called upon the Secretary-General to establish an international commission of inquiry to gather and compile systematically information on possible violations of human rights and acts committed that might constitute breaches of international humanitarian law. Soon after, the UN Secretary-General followed this call and appointed an International

²⁸² UN General Assembly, *Situation of Human Rights in East Timor*, UN Doc. A/54/660, 10 December 1999, para. 73.
²⁸³ Ibid., para. 47.
Commission of Inquiry on East Timor (ICIET), consisting of five international personalities\textsuperscript{284}. The ICIET’s report, published on 10 December 1999, concluded that it had recognised patterns of gross violations of human rights and breaches of humanitarian law, which seemed to have varied over time, but took the form of systematic and widespread intimidation, humiliation, and terror, destruction of property, and violence against women and displaced people. The ICIET also identified patterns used in relation to the destruction of evidence in particular in relation to the involvement of the Indonesian Army and militias. To address these crimes, the ICIET called, as the three appointed Special Rapporteurs, for an independent international body to conduct further systematic criminal investigations of the human rights violations and violations of international humanitarian law. It also called for reparations for the violations from those responsible and for considering the issues of truth and reconciliation\textsuperscript{285}.

The UN leadership did not accept any of the recommendations for an international criminal tribunal. Rather, it relied on promises made by the Indonesian government to bring to justice its own perpetrators. Secretary-General Annan therefore decided to “wait and see what steps the Indonesians took”\textsuperscript{286}. Annan had “been strongly assured” that there would be no impunity for those responsible and he was “encouraged by the commitment” shown by the new Indonesian President Abdurrahman Wahid to “uphold the law and to support the investigation and prosecution of the perpetrators through the national investigation process under way in Indonesia”\textsuperscript{287}. Indonesia’s proposal to hold its perpetrators accountable seemed trustworthy at the time due to the findings of its National Human Rights Commission, Komnas-HAM, which had established a commission, KPP-HAM\textsuperscript{288}, to investigate human rights abuses in East Timor\textsuperscript{289}. KPP-HAM confirmed patterns of crimes against humanity, including amongst other

\textsuperscript{284} An overview of the commission’s work can be found in UN Office of the High Commissioner for Human Rights, Report of the International Commission of Inquiry on East Timor to the Secretary-General, UN Doc. A/54/726, 31 January 2000.


\textsuperscript{286} Identical Letters Dated 31 January 2000 From the Secretary-General Addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights, UN SCOR, 54\textsuperscript{th} Sess., Agenda Item 96, at 1, UN Doc. A/54/726.

\textsuperscript{287} Ibid.

\textsuperscript{288} KPP-HAM’s mandate was to investigate violations of human rights in East Timor in 1999, with special focus on the involvement, if any, of Indonesian state organs in such violations.

forms of violence, mass killings, murder, forced displacement, and disappearances. It also confirmed the “scorched earth and destruction policy”, according to which evidence was deliberately eliminated in a planned fashion by destroying documents, mass graves, and the removal of remains to hidden locations. Included in this scorched earth policy were various acts of looting, stealing, and robbery of goods. It estimated that around 70% of the civilian buildings (shops and residences) were smashed or burnt after the announcement of the ballot, as well as thousands of vehicles. Remarkably, in relation to the criminal responsibility for the crimes committed, the report went as far as stating:

All of the crimes against humanity in East Timor, direct or indirect, took place because of the failure of the TNI Commander to guarantee the security of the implementation of the announcement of two options by the government. […] For this, TNI General Wiranto as Commander of the TNI was the one who must bear responsibility.

To enhance criminal accountability, the report requested the Indonesian government to establish a Court of Fundamental Human Rights with special jurisdiction over cases of human rights and humanitarian law violations. For Timor-Leste, opting against an international criminal tribunal meant that a twin-track approach was chosen whereby national prosecutions would be conducted in parallel by Indonesia and Timor-Leste.

5.1.1 UNTAET’s path to the creation of the Serious Crimes Regime

Pursuing justice locally in Timor-Leste was challenged by a shortage or even total absence of local staff capable of instigating and conducting the criminal trials required to address the crimes committed. Indonesia’s “scorched earth and destruction policy” left the country with major structural and institutional devastation. Under Indonesian occupation, no Timorese had been permitted to serve as judges or prosecutors. Therefore, the total departure of the occupying forces (and the majority of perpetrators) left the country with the lack of a skilled national legal profession combined with the absence of local administrative staff. It created an

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290 Ibid., para. 84.
291 Ibid., para. 193.
292 Ibid., para. 195.
institutional vacuum. UNTAET was thus a novelty that required the UN to provide the overall administration of Timor-Leste, making the state entirely dependent on outside skills to run economic, socio-political, and legal institutions. It had to construct a criminal justice system that could handle ordinary criminal cases from the time of the intervention and into the future and a mechanism to properly investigate and adjudicate serious crimes of an extraordinary nature – crimes against humanity, war crimes, and genocide. Institutionally, this meant creating a court system to accommodate both tribunals for ordinary crimes as well as those under universal jurisdiction.

The subsequently erected Serious Crimes Regime included a Serious Crimes Unit (SCU) working under the authority of the Office of the General Prosecutor (OGP) and the Special Panels, established at the District Court of Dili, the capitol of Timor-Leste. Its Appeal Chamber also sat within the Court of Appeal of the Dili District Court. Legally, the Serious Crimes Regime was created through the UNTAET Regulation 2000/11 of 6 March 2000 (UNTAET/REG/2000/11). It was given the mandate to prosecute and bring to trial those who committed “serious crimes” between 1 January 1999 and 25 October 1999 (Section 10.1 and 10.2). The court’s jurisdiction over “serious crimes” meant that the court had exclusive jurisdiction over genocide, war crimes, crimes against humanity, murder, sexual offences, and torture (serious criminal offences).

Section 10.2 of UNTAET Regulation 2000/11 had far-reaching implications as it limited the jurisdiction of the Special Panels and SCU to crimes committed between 1 January 1999 and 25 October 1999, thus excluding the court’s jurisdiction over all offences committed during the 25 years of Indonesian occupation. This was a particularly paradoxical feature of UNTAET Regulation 2000/11, as its temporal limitation was in conflict with the duty to prosecute crimes against humanity, war crimes, and genocide under international law.

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296 UNTAET Regulations were promulgated by the Special Representative of the Secretary General after Consultation of the National Consultative Council.

provision was therefore later amended through Section 2.4 of UNTAET Regulation 2000/15, providing the Special Panels with jurisdiction in respect of crimes committed in Timor-Leste prior to 25 October 1999\(^{298}\). This meant that from June 2000 onwards there was – theoretically – a possibility to investigate and prosecute for atrocities committed during the entire period of the Indonesian occupation or even the violence predating it. Nevertheless, it was soon realised that the scale of the task was simply unworkable in the circumstances in which UNTAET had to function. Factual, financial, and organisational limitations led de facto to an exclusive focus on the offences committed in 1999\(^{299}\).

Regulation 2000/15 provides, as Linton calls it, the “nuts and bolts”\(^{300}\) to construct the vehicle of justice envisaged in Section 10 Regulation 2000/11. The descriptions and definitions used in UNTAET Regulation 2000/15 for genocide, crimes against humanity, and war crimes were a duplicate of those used in the Rome Statute. Section 4 of UNTAET Regulation 2000/15 therefore defines genocide as in Article 6 of the Rome Statute, Section 5 defines crimes against humanity as in Article 7 of the Rome Statute, and Section 6 defines war crimes as in Article 8 of the Rome Statute. Section 7 of UNTAET Regulation 2000/15 reproduces the definition of torture from Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (General Assembly Resolution 39/46, 10 December 1984, which entered into force 26 June 1987). Although Section 2.1 of UNTAET Regulation No. 2000/15 states that the Special Panels “shall have universal jurisdiction”, the Special Panels exercised jurisdiction merely based on the active and passive personality principle.

To exercise jurisdiction and undertake prosecution, UNTAET drafted its own rules of procedure for the court. It did so through Regulation 2000/30, which was passed on 25 September 2000. The draft version of the document comprised elements of both civil and common law systems, a mishmash of the different foreign legal systems representing the background of those involved in its drafting. When presented to the Timorese National Council for “consultation” the Regulation was met with anger and deep resentment by Timor-Leste’s jurists. Outraged at their exclusion from the drafting process of Regulation 2000/15


establishing the court, they saw the same thing being repeated. A requested genuine and extended consultation led to the creation of a virtually new document\textsuperscript{301}. Much effort was made to ensure that Regulation 2000/30 complies with international standards and universal principles, such as the presumption of innocence of the suspect\textsuperscript{302}, the \textit{ne bis in idem} and \textit{habeas corpus} principle, the right to non-self-incrimination\textsuperscript{303}, and guarantees for a fair trial and investigation\textsuperscript{304}. The Regulation applied to both serious and ordinary crimes and provided a clear basis for the procedures to be followed at all stages of criminal proceedings, including investigation, arrest, detention, review hearings, preliminary hearings, interlocutory appeals, trials, and appeals from judgements of first instance. Mirroring the Rules of Procedure and Evidence of the ICC, ICTY, and ICTR Statutes, it also provided for a statutory right to a legal representative without cost\textsuperscript{305} and the protection of victims and witnesses\textsuperscript{306}. It bound the Serious Crimes Regime to the observance of internationally recognised standards or any other relevant regulation or directive, and, where appropriate, applicable treaties and recognised principles and norms of international law, including established principles of the international law of armed conflict\textsuperscript{307}.

Other substantive legal provisions, such as defences and the procedure for a guilty plea, also replicate the Rome Statute. In line with Article 68 of the Rome Statute, the statutes of the ICTY and ICTR, and their respective rules of procedure and evidence, UNTAET Regulation 2000/30 entailed special provisions for the participation of victims in the proceedings. These included, \textit{inter alia}, being informed on any progress, being present at hearings and being heard at all stages\textsuperscript{308}. It has also foreseen special protection measures for victims and witnesses as well as a right of the victim to file a petition against the dismissal of the case\textsuperscript{309}. The reproduction of international statutes was praised in international criminal law

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\textsuperscript{303} Ibid., Section 6.2.
\textsuperscript{304} Ibid., Section 6 to 7.7.
\textsuperscript{305} According to Section 6.2. (c)-(d) and 6.3. the suspect has (c) the right to a legal representative appointed for him if he is unable to pay for a lawyer.
\textsuperscript{307} See Section 3.1 (a) and (b) of UNTAET Regulation 2000/15 of 6 June 2000, UNTAET/REG/2000/15.
\textsuperscript{309} Ibid., Section 25 and 35.
\end{flushright}
scholarship and led to the conclusion that the Special Panels case law provides a precedent for future prosecutions before the ICC.\textsuperscript{310}

Overall, the creation of the Serious Crimes Regime did not result from an integrated process based on prior planning or consultation between the UNTAET and local representatives. It rather followed a series of \textit{ad hoc} responses to a crisis.\textsuperscript{311} For Timorese nationals and local representatives, these developments marked the beginning of the creation of a hybrid, though more international than local, criminal justice mechanism – initially even staffed exclusively by international prosecutors and investigators.\textsuperscript{312}

5.1.2 The Special Panels for Serious Crime: Composition and funding

The Special Panels were created as a hybrid institution,\textsuperscript{313} in theory, composed of both East Timorese and international judges to complement each other in terms of local knowledge and expertise in international law and criminal justice. In the same way, the Panels of the Court of Appeal were foreseen to be composed of two international judges and one East Timorese judge.\textsuperscript{314} In cases of special importance or gravity a panel of five judges, composed of three international and two East Timorese judges, was foreseen (Section 22.2 of UNTAET Regulation 2000/15). In relation to the judges, Section 23.2 of UNTAET Regulation 2000/15 specified that the judges be “persons of high moral character, impartiality and integrity and who possess the qualifications required in their respective countries for appointment to judicial offices”.


\textsuperscript{312} Mohamed Othman, \textit{Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor}, (Berlin-Heidelberg: Springer, 2005), 97.


Until Timor-Leste’s independence, the UN Transitional Administrator appointed the judges on the recommendation of the Transitional Judicial Services Commission\textsuperscript{315}. Through the years, the international judges who sat on the Special Panels came from a variety of national jurisdictions, including Burundi, Uganda, Italy, Portugal, Brazil, Cape Verde, Germany, and the United States. Amongst those, only two had experience from superior courts in their home countries. The remainder of the judges were from courts of lower jurisdiction or even non-criminal jurisdiction. None had specific prior experience in the application of international criminal or humanitarian law\textsuperscript{316}. Remarkably, none of those appointed held the position of presiding judge who could have spoken for the court and directed its administration. Therefore, none of the judges had authority to represent officially the interests of the tribunal as an institution.

Due to Timor’s legacy from 25 years of occupation, the appointment of qualified and suitable local judges was difficult and delayed the creation of the Special Panels\textsuperscript{317}. With the exception of one judge (who was a judge in Portugal before taking up his position), the Timorese nationals working for the court had no previous sentencing experience. Local Timorese that worked for the court reported patronising attitudes of international appointees, citing instances in which their questioning was cut short, despite the fact that they related to specific details of the context that may not have been apparent to internationals\textsuperscript{318}. In addition, international judges sometimes demonstrated a lack of awareness of Timorese cultural behaviours and historical background. The judges were described as operating in a professional, social, and cultural vacuum, who never received any cultural awareness training or special introduction to Timor-Leste’s culture\textsuperscript{319}.

\textsuperscript{315} This Transitional Justice Service Commission was established by UNTAET to guarantee independence in the appointment of the judiciary from the exercise of executive power; see UNTAET Regulation 1999/3 of 3 December 1999, UNTAET/REG/1999/3.


\textsuperscript{318} See the discussion in Suzannah Linton, “Prosecuting Atrocities at the District Court of Dili”, \textit{Melbourne Journal of International Law} 2 (2001): 422.

While generally one of the reasons for promoting hybrid forms of justice is that such institutions may perform at a lower cost than international justice, any court still needs sufficient resources to complete its task. The Special Panels were established by UNTAET without the prior planning or assessment of the potential financial, personnel, and other resource needs. Due to UNTAET’s far-reaching tasks, the practicalities of running a justice system received little priority. Whereas the annual budget of the ICTY was around USD 100 million, the Serious Crimes Regime was supposed to execute a mandate broader than that of the ICTY, with an annual budget of only around USD 6 million\(^{320}\). This led most visibly to the complete absence of administrative support staff like court stenographers, legal clerks, and researchers. The court thus lacked the very backbone of a judicial system. Without secretaries, court reporters, legal clerks, and stenographers, judges had to do their own research, drafting, and editing and take care of the administration of the panels\(^ {321}\). Thus many of the early trials were conducted without a transcript or audio recording, violating UNTAET the right of an accused to an official transcript of the proceedings for use on appeal\(^ {322}\). It was not until 2002 that, after sustained criticism of the functioning of the Special Panels, UNMISET introduced a small support unit for the judges that comprised researchers and translators, all from outside Timor-Leste\(^ {323}\). In addition, the Special Panel Judges’ posts were rated between the P3 and P5 levels on the UN salary scale, which is substantially less pay and prestige than the Under-Secretary-General level posts in the ICTY, ICTR, and the Special Court for Sierra Leone.

In failure to recruit, the Court of Appeal was closed for nearly two years. From the end of October 2001 to June 2003, there were no international, Portuguese speaking judges available to replace two judges that had left the mission earlier. These personnel shortages and delays in


\(^{321}\) Judge Rapoza reports that sometimes UNTAET was not even in a position to provide fuel for the court’s generator; see Phillip Rapoza, “Hybrid Criminal Tribunals and the Concept of Ownership: Who Owns the Process?”, *American University International Law Review* 21 (2005): 530-532.


hearings created a significant backlog of cases, including those relating to reviews of pre-trial detention.  

5.1.3 The Serious Crimes Unit: The prosecutorial authority of the Serious Crimes Regime

The Special Panels and the Serious Crimes Unit (SCU) developed quite independently and never functioned as one institution. The SCU was designated to conduct investigations and prepare indictments to assist in bringing to justice those responsible for crimes against humanity and other serious crimes that fell within the jurisdiction of the Special Panels. The legal basis for prosecution was established through UNTAET Regulation 2000/16 of 6 June 2000. The Regulation gave the Deputy General Prosecutor for Serious Crimes exclusive prosecutorial authority to direct and supervise the investigation and prosecution of serious crimes. He was also given the mandate to exercise jurisdiction throughout the entire territory of Timor-Leste. During its time of existence, the SCU was headed by five different Directors General of Prosecution for Serious Crimes, which reflects the general turnover the SCU had to cope with.

The SCU consisted of four prosecution teams, each comprising one international prosecutor, case managers, and investigators, as well as forensic staff, evidence management and witness support teams. By spring 2003, the SCU reached its peak staff number with a total of 124 members including 44 UN international staff (prosecutors, case managers, investigators, forensic specialists, and translators, as well as 10 UN police investigators) and 35 UN national staff working as translators and supporting exhumations. Due to the fact that the SCU’s mandate was renewed every six months, the SCU never received a fixed timeframe for its

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325 As described above, the interpretation of the exclusive jurisdiction of the Special Panels over ‘serious crimes’ allowed the Special Panels and the SCU to remain competent to conduct the investigation and trial of ‘ordinary’ crimes even in cases in which certain elements of serious crimes could not be established by the prosecution or in the judgement of the court.
327 Ibid. 7.
work and its staff contracts never exceeded 6 months. This uncertainty meant that there was a high fluctuation rate and an inability to effectively plan in the long-term. The result, which will be discussed below, was an *ad hoc* approach to investigations and prosecutions. In addition, it led to difficulties in recruiting an adequate number of experienced investigators, which subsequently influenced the criminal analysis and forensic capacities.

5.1.4 The Appeals Chamber

The Court of Appeal, consisting of two UNMISET-funded international judges and one national judge, became operational in July 2000. It handed down its first appeal decision in October 2000. Until 2002, the Court of Appeal operated in three languages, with no working language common to all the judges. After 2002, the Court of Appeal operated solely in Portuguese, although this meant that non-Portuguese-speaking judges on the court could not communicate with the other judges and could also not follow some of the proceedings or read the court’s judgements and other documents. This reflected a policy of the Timorese government to impose Portuguese on the judiciary at any cost, despite the constitutional guarantee of dual national languages (Bahasa and Portuguese) and the use of English as the working language of the Special Panels. Difficulties in appointing Portuguese-speaking international successors prevented the Court from sitting for more than 18 months, from October 2001 to June 2003. Nevertheless, during this time, individuals continued to be arrested, held in detention, tried, and convicted. Many of these individuals were detained illegally on expired warrants. They were deprived of their right to appeal.

The appellate practice at the Special Panels was highly problematic. Rather than setting standards for the rule of law and international criminal justice, the court’s decisions did much to undermine the credibility and legitimacy of the judiciary. The Court in general rendered poor legal decisions. For illustration, Bowman refers to a debacle that occurred on 15 July 2003, when the Appeals Chamber finally began operating. It ruled that a defendant,

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previously convicted of murder, was instead guilty of genocide, a crime with which he had never been charged. This decision concerns the case of Armando dos Santos, who had been convicted of murder and sentenced to 20 years imprisonment by the Special Panel for Serious Crimes in September 2002. The Court instead found Santos guilty of genocide (an offence with which he was not charged) and increased his sentence from 20 to 22 years.\footnote{For an in-depth discussion of the Appeals Chambers’ judgement see Herbert D. Bowman, “Letting the Big Fish Get Away: The United Nations Justice Effort in East Timor”, \textit{Emory International Law Review} 18 (2004): 391; David Cohen, “Justice on the Cheap’ Revisited: The Failure of the Serious Crimes Trials in East Timor”, \textit{Asia Pacific Issues} 80 (August 2002): 8.}

The Special Panels immediately objected to this decision. In a public statement it rejected the jurisprudence of the Appeal Court and described it as “violating the East Timorese Constitution and violating international human rights standards”. Therefore, the panel refused to revise the trial chamber judgement as otherwise the Special Panel judges would “not be adjudicating in accordance with their conscience.”\footnote{Special Panel for Serious Crimes, \textit{Prosecutor v. Joao Sarmento Domingos Mendonca}, Case nº 18a/2001, Decision on the defense (Domingos Mendonca) motion for the Court to order the Public Prosecutor to amend the indictment, 24 July 2003, para. 7-10.} Such incidents manifest a lack of comprehension of the body of international law the appeal chamber was to apply and of basic tenets of appellate practice, fair trial standards, and its own statute.\footnote{David Cohen, “Accountability in the Balance: Trials Before the Special Panels for Serious Crimes in East Timor 1999-2005”, \textit{Law in Context} 27 (2009): 123.}

5.1.5 The Defence

In order to ensure equality of arms, UNTAET opted for the introduction of a public defender system through the Special Panels Public Defenders’ Office. This honourable attempt was required in a situation “starved” by the absence of local private legal practice.\footnote{Mohamed Othman, “East Timor: A Critique of the Model of Accountability for Serious Human Rights and International Humanitarian Law Violations”, \textit{Nordic Journal of International Law} 72 (2003): 464.} However, by summer 2002 there were only two international defenders supporting the trials before the Special Panels: one paid by the UN as a judicial affairs officer and the other funded by the organisation No Peace Without Justice. The United Nations Development Programme funded one additional lawyer to work primarily as a mentor to East Timorese public defenders involved with ordinary crimes. With the exception of these three lawyers, the Public
Defenders’ Office was staffed and funded entirely by the government of Timor-Leste. The Public Defenders’ Office was provided with neither translators nor investigators, and had no budget to cover witness expenses such as for travel and witness protection. Consequently, during the first 14 trials the defence did not call even a single witness. The level of defence, especially in the first two years, calls into question the legitimacy of convictions in certain cases. Finally, towards the end of 2002, UNTAET made funds available and enabled an internationally staffed Defense Lawyers Unit. Thus, later defendants had the benefit of counsel who engaged in activities that protected their clients’ rights, called witnesses, made objections, and filed motions.

5.1.6 Contextual challenges of the Serious Crimes Regime

In Timor-Leste, despite a general willingness of witnesses to give testimony, a major constraint to the investigation of serious crimes was the unavailability of physical evidence. Most of it could not be located or had been destroyed, either purposefully as part of Indonesia’s “scorched earth and destruction policy” or due to lengthy exposure in tropical conditions. Due to the nature of the crimes, prosecutors encountered difficulties in obtaining direct evidence from eyewitnesses who themselves, and not from hearsay, witnessed the commission of the crimes. In particular, when massacres were committed, those who survived only did so because they went into hiding, meaning that they did not see the perpetrators. Those spotted were killed. As a result, most survivors could provide only limited information. Those who themselves survived physical harm were often reluctant to provide evidence due to post-traumatic stress disorders, a legitimate fear of reprisal, and the population’s general mistrust of the judicial system and international workers.

Once witnesses had been identified and their status defined (witness, victim, or potential suspect), witness statements needed to be in a format that permitted the prosecutor to assess

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the credibility while at the same time providing the necessary safety guarantees. The SCU and the Special Panels had no mechanism available to avoid face-to-face confrontations between the defendant and victims/witnesses. Without the ability to provide special protective measures, questioning in certain cases bore the potential to endanger victims and witnesses. In a tight-knit society like Timor-Leste, in which most witnesses personally knew the offender, subsequent intimidation of the person or his or her family members was not unheard of. Once these issues became known, victims increasingly refused to give evidence. In particular, during court hearings, witnesses often refused to provide evidence or denied statements they had made before.\(^{339}\)

The Special Panels and the SCU also encountered massive challenges resulting from their hybrid composition as well as the various languages and dialects spoken in Timor-Leste. Within Timor-Leste 82% of the population speak Tetum, the local language, 43% Bahasa Indonesia, and 5% Portuguese, the post-independence official language. There are about 15 further indigenous languages spoken within Timor-Leste. Tetum, Galoli, Mambai, and Tokodede are classified as Austronesian languages, while Bunak, Kemak, Makassai, Dagada, Idate, Kairui, Nidiki, and Baikenu are the non-Austronesian tongues. Only Tetum and Portuguese are official languages and recognised as such by the Serious Crimes Regime. The requirement that the judiciary was in a position to function in four working languages (all the above including English) created significant transaction costs and slowed down the pace of serious crimes prosecution.\(^{340}\) Especially in cases that required interpreters of the less-common Timorese languages, translators with little experience in translation were required to deal with complex legal and situational contexts. In most cases, multiple language interpretations had to be made of the oral evidence given.\(^{341}\) Bowman, who worked for the Special Panels from 2002 onwards, observed that it was “not always certain that the accused (or the judges and lawyers for that matter) truly understood what was being said in court”.\(^{342}\)

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\(^{339}\) Ibid.


Language barriers also existed between the national and international legal staff. None of the international judges, for example, spoke Bahasa Indonesia, the professional language of the Timorese judges, or Tetum, the daily language of communication in Timor-Leste. Instead, Timorese judges were expected to communicate with their international colleagues in either English or Portuguese, languages in which they had only limited proficiency and received little support.

5.1.7 The (absence of a) completion strategy

UNTAET Regulation No. 2000/15 creating the tribunal did not prescribe an end-date for international involvement in the Timor-Leste court system. Hence, neither the Special Panels and the SCU nor the Appeals Chamber had developed a completion strategy. The first withdrawal by the UN from Timor-Leste’s criminal justice mechanisms began with the closure of SCU investigative offices in outlying regions in May 2004. This withdrawal was a consequence of Security Council resolutions 1543 (2004) and 1573 (2004), directing that UNMISET’s mandate terminate on 20 May 2005 and all activities of the Serious Crimes Unit should cease. Accordingly, SCU staff was reduced and the mechanism forced to complete all on-going investigations on 30 November 2004. In December 2004, the SCU filed its four last indictments charging another 14 individuals with crimes against humanity. The mandate of the Serious Crimes Regime formally terminated on 20 May 2005. At the time, the SCU had filed 95 indictments against 391 individuals, which led to the completion of 55 trials, mostly involving relatively low-level defendants. One hundred and one defendants appeared before the Special Panels. Eight-seven of the 101 individuals, all from Timor-Leste, received final verdicts. Eighty-four individuals were convicted and three acquitted (originally four but one acquittal was reversed by the Court of Appeal). Only three of those convicted by the Special Panels were accused of crimes against pro-autonomy support (i.e., for supporting FALINTIL or FRETILIN) and only one member of FALINTIL was convicted of crimes.

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344 The 55 Decisions by the Special Panel are available at “East Timor Home”, website of the War Crimes Study Center (WCSC) at the University of Berkeley California: http://socrates.berkeley.edu/~warcrrime; a list of the indictments can be found in Annex 12 to the CAVR Final Report Chega!

against humanity for the murder of an individual in Autira (Emera) on 19 September 1999\(^\text{346}\). In regard to the remaining 24 individuals, proceedings were either dismissed or withdrawn.

The follow-up mission to UNMISET, the United Nations Office in Timor-Leste (UNOTIL), did not have a mandate to continue or to support the serious crimes process. All that was agreed on between the UNOTIL secretariat and the government of Timor-Leste, was to preserve a complete copy of all the records compiled by the Serious Crimes Unit\(^\text{347}\). To do so, the Secretary-General extended the mandate of 10 staff of the Serious Crimes Unit, including an international judge, a prosecutor, a legal officer, and administrative assistants until 30 June 2005. They preserved the records of more than 450 cases compiled by the Serious Crimes Unit\(^\text{348}\). According to Aniceto Neves of the local NGO Yayasan HAK (Association for Law, Human Rights and Justice), it is this premature and uncoordinated departure of the UN that left the judicial system vulnerable to political manipulation\(^\text{349}\). If the UN had stayed longer and nurtured stronger judicial institutions, it would have been possible to lessen the overt political control that enables Indonesia’s senior army officials to continue to enjoy impunity.

5.1.8 The Serious Crimes Investigation Team

On 26 May 2005, just a week after the formal closure of the SCU, an UN-appointed Commission of Experts (CoE) published its report on the prosecution of serious violations of human rights in Timor-Leste. The CoE had compiled and analysed substantial primary source materials, including legislation, indictments, judgements, written briefs, and trial transcripts. It conducted a fact-finding mission to Timor-Leste to meet with the president and members of the judiciary, UNMISET staff, victims, groups, and NGOs\(^\text{350}\). The CoE concluded that the trials held at the *Ad Hoc* Human Rights Court in Jakarta were manifestly inadequate and that


the prosecution of serious crimes had not yet achieved full accountability for those who bore the greatest responsibility for serious violations of human rights in Timor-Leste in 1999\textsuperscript{351}. The experts also noted that without the presence of an international component to the local judiciary, Timor-Leste will not have the capacity, in the foreseeable future, to undertake the investigation, prosecution, adjudication, and defence of serious crimes cases in accordance with international standards\textsuperscript{352}. In light of the absence of enforcement powers or a legal apparatus available to compel Indonesia to arrest and transfer indictees to Timor-Leste, the CoE recommended that the Security Council adopt a resolution under Chapter VII of the Charter of the United Nations to create an \textit{ad hoc} international criminal tribunal for Timor-Leste, to be located in a third state\textsuperscript{353}.

The CoE submitted its report to the Security Council in June 2005. However, the Security Council declined to consider directly the recommendations and instead requested that the Secretary-General submit a further report on justice and reconciliation for Timor-Leste with a “practically feasible” approach, taking into account the “views expressed by Indonesia and Timor-Leste”\textsuperscript{354}. On 26 July 2006, the Secretary-General issued his report on justice and reconciliation for Timor-Leste. At the time, the serious crimes process had been dormant for more than a year and the outbreak of violence in Dili, involving the police and armed forces, in April and May 2006, called for further accountability measures. While this could have provided an opportunity to revisit the serious crimes issue, the report merely acknowledged that the closure of the serious crimes process had left a number of issues unresolved, like how to address the hundreds of indicted persons residing in Indonesia who have not been brought to justice\textsuperscript{355}. It remained silent on the recommendations made for the creation of an international tribunal or the re-activation of the now-defunct SCU. With reference to the “views expressed by the governments of Timor-Leste and Indonesia”, the United Nations were determined to “assist the relevant Timorese institutions in this regard, including by strengthening the capacity of the OGP to determine the scope and order of investigations to be

\textsuperscript{351} Ibid., paras. 261-271.
\textsuperscript{352} Ibid., para. 136.
\textsuperscript{353} Ibid., paras. 407-441.
\textsuperscript{355} UN Secretary-General, \textit{Report of the Secretary-General on Justice and Reconciliation for Timor-Leste}, UN Doc. S/2006/580, 26 July 2006.
completed and to resume investigative functions accordingly” 356. To do so he recommended the creation of an “international assistance programme” for Timor-Leste consisting of an international investigative team to resume the investigative functions of the SCU with a view to completing investigations into serious crimes committed in 1999 and to strengthen the capacity of national justice sector institutions to prosecute the serious crimes committed in 1999 357.

One month later, on 25 August 2006, the Security Council established the UN Integrated Mission in Timor-Leste (UNMIT) under Resolution 1704 358 with a mandate to assist the OGP of Timor-Leste through the provision of a team of experienced investigative personnel. This new investigative team, called Serious Crimes Investigation Team (SCIT), was created in January 2007 and located in UNMIT’s Office of the Deputy Special Representative of the Secretary-General for Security Sector Support and Rule of Law. However, the SCIT could not take up its investigative function until an Assistance Agreement was signed in February 2008 between the UN and the Government of Timor-Leste (Assistance Agreement) 359. The Assistance Agreement provided the SCIT with access to the archives of the SCU that had been handed over to the OGP in 2005, allowing SCIT to finally become operational in May 2008. With a mandate to resume and complete the work of the SCU, the SCIT was not in a capacity to open new investigations following reports made to it of serious crimes committed in 1999 360. To complete and resume the work of the SCU, the SCIT first prepared a detailed inventory of the 458 case files it had access to within the archives. The cases were assessed and given priority based on the level of previous investigation by the SCU. In some cases, only complaints were made to the SCU and no investigation had been initiated; in others, indictments had already been made or drafted. To allow for a more coordinated approach, the SCIT entered all case information into a database. After consideration, it regarded 396 of 458 cases worthy of further investigation 361. Those remaining cases were prioritised on the basis of three criteria: the extent of the SCU’s investigation; the geographical location (SCIT

356 Ibid., para. 36.
357 Ibid., para. 39 (d) (iii).
359 Assistance Agreement, Section 4.4.1.
361 UN Office of Internal Oversight Services, Serious Crime Investigation Programme in UNMIT - Delays in Commencement of Investigative Work has Resulted in a Backlog of Cases. Audit Report, 10 February 2009, paras. 5-6. 98
initially focused on areas where significant numbers of serious crimes were committed but
where the SCU completed comparatively few investigations, such as the districts of Lautém
and Liquiça); and the gravity of the crime\textsuperscript{362}.

Although investigations into serious crimes cases were reconstituted, the way in which the
SCIT was designed reflects that the UN Security Council was not wholly committed to
prosecutions. This is in particular evidenced by the fact that the SCIT was given only
investigatory, and not prosecutorial, powers\textsuperscript{363}. All investigations performed by the SCIT had
to be conducted under the coordination, direction, and supervision of the Prosecutor General
of Timor-Leste. Its work plan, investigation strategy, timetable, and methodology had to be
approved by the Prosecutor General. Once the SCIT considered an investigation as
completed, it submitted its case files, including an investigation report, arrest warrants, and
indictment briefs, to the Prosecutor General for further action\textsuperscript{364}. Although SCIT did not have
the power to indict, it made a recommendation to the OGP to either close or prosecute the
case. The OGP was then in an independent position to consider an indictment or closure of the
case\textsuperscript{365}.

While this mandate might seem restrictive, it yet again demonstrates a means to avoid
responsibility for criminal proceedings by the international community. It placed the SCIT in
a position to investigate; afterwards it left the government of Timor-Leste with the political
burden of prosecution.

\textsuperscript{362} International Center for Transitional Justice (2010), \textit{Impunity in Timor-Leste: Can the Serious Crimes Investigation Team
\textsuperscript{363} Lia Kent, \textit{The Dynamics of Transitional Justice. International Models and Local Realities in East Timor} (London: Taylor
and Francis, 2012), 71.
\textsuperscript{364} UNMIT Newsletter, Issue 5, December
2009\url{http://unmit.unmissions.org/Portals/UNMIT/SCIT/SCIT%20Newsletter/SCIT%20newsletter5_041209ENG_jd.pdf}.
\textsuperscript{365} International Center for Transitional Justice (2010), \textit{Impunity in Timor-Leste: Can the Serious Crimes Investigation Team
5.2 Indonesian *Ad Hoc* Human Rights Court

The International Commission of Inquiry on East Timor (ICIET) and the Indonesian Human Rights Commission (Indonesian: *Komisi Nasional Hak Asasi Manusia*, abbreviated to Komnas-HAM) both strongly called for criminal trials against Indonesian military officials. Due to promises given by the Indonesian government in 1999 and early 2000 to hold its perpetrators accountable, the idea of the creation of an international criminal tribunal was adjourned and instead a twin-tracked justice system of domestic and hybrid jurisdiction was favoured. The Indonesian counterpart to the Serious Crimes Regime was the *Ad Hoc* Human Rights Court. It had jurisdiction to try international crimes committed in Timor-Leste between April and September 1999. The main motivation for the creation of the court was clearly to respond to the – at the time existent – threat and expectation that Indonesian military officers would stand trial at an international crime tribunal or in Timor-Leste\(^{366}\).

The Indonesian legislation creating the court was passed in November 2000\(^ {367}\). It vested the court, a special chamber within the existing legal system, with temporary jurisdiction to consider events occurring between April and September 1999. The period from January to March 1999, in which pre-referendum violence had already escalated, did not fall under the panel’s jurisdiction. The chamber consisted of both career judges and *ad hoc* appointees, selected during the course of secret hearings by a closed session of Indonesia’s Supreme Court\(^ {368}\). Unlike within Timor-Leste, Indonesia could vest the chamber with its own legal professionals. The conflict of 1999 was carried out exclusively on the territory of Timor-Leste, leaving the Indonesian state and society mainly intact. The judicial infrastructure in Indonesia had not been affected and courtrooms and prosecution offices were available to prepare and hold trials. Thus, the infrastructural conditions for local trials were much better in Indonesia than they were in Timor-Leste\(^ {369}\). Nonetheless, none of the judges had training in, or experience with, international law or human rights law. Twelve trials took place before the Indonesian *Ad Hoc* Human Rights Court between March 2002 and August 2003.


discussion below highlights that the lack of political will and the impact of internal politics created a major obstacle to prosecution and punishment of those who allegedly committed crimes in Timor-Leste.
5.3 Timor-Leste’s Truth Commission: Comissão de Acolhimento, Verdade e Reconciliação de Timor-Leste

In the wake of immediate and continuing pressing humanitarian needs, transitional justice mechanisms, other than criminal justice efforts, received increased attention from Timor-Leste’s interim political leadership and UNTAET. Of core concern were the tens of thousands of Timorese who had fled to West Timor. This refugee population was heterogeneous, including thousands of victims who were forcibly displaced following the referendum but also the leadership of pro-autonomy militia groupings. A process was required that consolidated social cohesion amongst fractured communities and that appealed to a common sense of identity in order to enable the return of its community members370. In August 2000, the CNRT (interim National Congress), which included representatives of East Timorese political parties and other groups that had supported a referendum, unanimously endorsed the proposal to establish a truth commission371. The initiative led to the creation of the CAVR, which was designed to cooperate with and complement the work of the Serious Crimes Regime as part of the fight against impunity and the struggle to promote genuine reconciliation.

Within this initial phase, post-conflict societies and governing authorities are confronted with the question of deciding on the commission’s mandate, the period to be covered, and the question of whether the names of culprits should be made public. Decisions ought to be taken similar to the ones by a court or a prosecution authority: Which groups and situations is the commission to focus on? Is the aim to investigate a selected group of specific events, and thereby investigate cases that are meant to represent the broader pattern of violations? Should those perpetrators identified be named with reference to their ethnicity, class, nationality, or institutional affiliation? Should victims be screened or promised reparations?372 Ideally, the retrospective focus will be defined by the particularities of the era of violent conflict and be dependent on the legacy of and the unique factors that led to the outbreak of violent conflict. Further challenges are connected with the truth-seeking process of reconstructing reality as

faithfully as possible. There is, foremost, both a quantitative and a qualitative concern of how to best compile the numerous testimonies in relation to individual and group cases.\footnote{Athanasios Chouliaras, “II. The Victimological Concern as the Driving Force in the Quest for Justice for State-Sponsored International Crimes”, in \textit{Victimological Approaches to International Crimes: Africa}, eds. Rianne Letschert, Roelof Haveman, Anne-Marie de Brouwer and Antony Pemberton (Mortsel: Intersentia, 2011), 61.}

5.3.1 Creation and composition of the CAVR

In stark contrast to the establishment of the Special Panels or the SCU, the creation of the CAVR emerged as the result of careful planning and community consultation, which revealed a clear local demand for reconciliation.\footnote{Caitlin Reiger, “Hybrid Attempts at Accountability in Timor-Leste”, in \textit{Transitional Justice in the Twenty-first Century: Beyond Truth versus Justice}, eds. Javier Marízcurrena and Naomi Roht-Arriaza (Cambridge: Cambridge University Press, 2006), 153.} Those involved in the establishment of the CAVR were committed to the principles of local ownership and as one of their first moves created a Steering Committee, co-ordinated by the UNTAET Human Rights Unit, to develop the terms of reference and structure of the proposed commission. The Committee included representatives from East Timorese human rights NGOs, women’s groups, youth organisations, the Commission for Justice and Peace of the Catholic Church, the Association of ex-Political Prisoners (ASSEPOL), FALINTIL, UNTAET and UNHCR, and the International Center for Transitional Justice. The Steering Committee conducted consultations with communities across Timor-Leste and with East Timorese refugees in West Timor and in other parts of Indonesia from September 2000 to January 2001. It visited each of the 13 districts, holding public meetings at the district, sub-district, and village levels. The objective of these consultations was to collect information so as to gain an understanding of the attitudes of the people of Timor-Leste on issues relating to reconciliation and their views on a, yet to be created, truth-seeking mechanism. Through these meetings, it found overwhelming community support for the creation of a commission and concluded that a commission should be created that reflects Timor-Leste’s cultural and spiritual values and promotes the healing of divisions between individuals and groups. It was agreed therefore that the Portuguese word
acolhimento (literally translated as reception\textsuperscript{375}) include notions of welcoming, accepting, offering hospitality, and forgiveness\textsuperscript{376}.

The draft legislation for the creation of the CAVR was finalised at the end of January 2001. It was subsequently forwarded to the CNRT, who ratified it before passing it on to the UN’s Transitional Administrator, Sergio Vieira de Mello, for promulgation on 13 July 2001 through UNTAET Regulation 2001/10\textsuperscript{377}. As the political and administrative infrastructure of Timor-Leste was still in the early stages of reconstruction, the Regulation mandated the Transitional Administrator to appoint between five and seven National Commissioners\textsuperscript{378}. To identify suitable candidates the Transitional Administrator created a Selection Panel, which included representatives of major political parties and civil society groups\textsuperscript{379}. Following its formation, the Panel travelled across Timor-Leste and to Indonesia to canvas nominations. Although those nominated by the Selection Panel originally comprised foreign nationals with a strong background in human rights, the Selection Panel decided that the commissioners should be Timor-Leste nationals who had gained the endorsement of members of the public during the community consultations\textsuperscript{380}. The Transitional Administrator, Sérgio Vieira de Mello, on 21 January 2002 designated seven National Commissioners (five men and two women)\textsuperscript{381}.

Aniceto Guterres Lopes was nominated chair of the CAVR\textsuperscript{382}. As a lawyer and human rights activist, Guterres was a prominent figure in pre-independence and post-independence Timor.

\textsuperscript{375} According to the CAVR’s final report, acolhimento became the centrepiece of the CAVR’s work out of recognition of the importance of East Timorese people accepting each other after so many years of division and conflict. Its inclusion in the title of the commission was clearly a response to the situation of East Timorese who had gone to West Timor in 1999, those who had returned to Timor-Leste as well as those who remained in camps and settlements in West Timor. For more detail see CAVR, Final Report Chega !, Acolhimento and Victim Support – Part 10.1, para. 1-13.

\textsuperscript{376} CAVR, Final Report Chega !, Introduction – Part 1, p. 12.


\textsuperscript{379} Ibid., Section 4.3.a., which contains a full list of the parties and groups represented in the Panel.


\textsuperscript{381} Those appointed were Aniceto Guterres Lopes, Father Jovito Rêgo de Jesus Araújo, Maria Olandina Isabel Caëiro Alves, Jacinto das Neves Raimundo Alves, José Estévão Soares, Reverend Agustinho dos Vasconcelos, and Isabel Amaral Guterres; for more detailed information see CAVR Final Report, Part 1: Introduction, p.14

\textsuperscript{382} He had been an active member of Resistencia Nacional dos Estudantes de Timor-Leste (RENETIL) since 1989, and is co-founder of Yayasan Hak, the largest human rights non-governmental organisation in Timor-Leste. He has also served on the UNTAET Judicial Transitional Services Commission since January 2000, and was a founder of the Jurists Association of East Timor in April 2000.
Together with the National Commissioners, he was responsible for developing the commission’s methodology, establishing a database, undertaking preliminary research and establishing policies. In addition, 29 Regional Commissioners (out of these 10 women) were sworn in on 15 May 2002. They were nominated in consideration of the representation of a diversity of experiences and views including attitudes towards the past political conflicts in Timor-Leste, and regional and gender representation. Their duty was to represent the CAVR and the National Commissioners in the districts and to allow local communities to relate directly to the CAVR. They also played a leading role in facilitating victims’ hearings in sub-districts.

Already in this initial phase, victims and their suffering were at the core of the commission’s focus. Victims were given a strong voice in the truth-seeking process and the possibility to re-integrate into society, of which they saw themselves as valued members.

5.3.2 Objectives and mandate of the CAVR

Institutionally, the CAVR was created as a complementary mechanism to the UN-sponsored Serious Crimes Regime, as part of a larger transitional justice framework aimed to satisfy the needs of both justice in relation to past crimes and reconciliation in Timor-Leste. Rather than duplicating the investigative process of the SCU, the mandate of the CAVR was to focus on the broader patterns of violations that had taken place during the relevant twenty-five year period. The CAVR’s mandate was formalised through Section 3.1 of UNTAET Regulation 2001/10, according to which the broad and overarching objectives of the CAVR were to include:

(a) inquiring into human rights violations that have taken place in the context of the political conflicts in East Timor;
(b) establishing the truth regarding past human rights violations;
(c) reporting the nature of the human rights violations that have occurred and identifying the factors that may have led to such violations; […]

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384 Ibid., Section 11.4.
386 Ibid., Part 2 - The Mandate of the Commission, para. 28.
(d) identifying practices and policies, whether of State or non-State actors which need to be addressed to prevent future recurrences of human rights violations […]
(f) assisting in restoring the human dignity of victims;
(g) promoting reconciliation;
(h) supporting the reception and reintegration of individuals who have caused harm to their communities through the commission of minor criminal offences and other harmful acts through the facilitation of community based mechanisms for reconciliation; and
(i) the promotion of human rights

In regard to the term “political conflicts in East Timor”, the CAVR’s temporary mandate covered the entire conflict period from 25 April 1974 to 25 October 1999. In comparison to the co-existent Special Panels, its mandate thereby encompassed establishing the truth not only in relation to the 1999 violence but also in relation to the 25 years of Indonesian occupation. In particular, the regulation made explicit reference to the “events and experiences of all parties immediately preceding, during and after the entry of Indonesia into East Timor on 7 December 1975”. It thereby also included reporting on violence committed by pro-independence groups as well as during the internal conflict preceding the occupation.

The CAVR’s subject matter mandate was set out in Section 1 (c) of UNTAET Regulation 2001/10. It designated the commission to inquire into “human rights violations” such as “violations of international human rights standards and violations of international humanitarian law”. The CAVR interpreted this mandate as a duty to inquire into alleged violations of fundamental rights and freedoms referred to in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (and its Protocols), the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of all forms of Racial Discrimination, the Convention on the Elimination of all forms of Discrimination against Women, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment, and the International Convention on the Rights of the Child. With reference to “violations of international human rights standards and violations of international humanitarian law” UNTAET Regulation 2001/10 introduced an unusually broad

388 Ibid., Section 1 (c).
389 Ibid., Section 13.2 (b).
390 Ibid., Section 1 (c).
definition of the term “human rights violations”. It mandated the commission to make inquiries into violations of international humanitarian law such as the Geneva Conventions, and of “the laws and customs of war”\textsuperscript{391}.

The referral mechanism, enabling the CAVR and the OGP to communicate directly and refer evidence, can clearly be regarded as the most innovative and unprecedented aspect comprised in UNTAET Regulation 2001/10. This referral mechanism distinguishes the CAVR from truth commissions established prior to and since its creation\textsuperscript{392}. For the CAVR the referral mechanism implicated that it had to refer human rights violations that amounted to serious crimes to the OGP with the recommendation of prosecution\textsuperscript{393}. The CAVR’s complementary nature together with its referral mechanism will be an aspect discussed later in detail, as it allowed the commission not only to denunciate a case but also to refer witness and suspect testimony to the prosecutorial authority.

5.3.3 Rules of procedure and “evidence” of the CAVR

To hold and organise public hearings and statement taking, Section 14 of UNTAET Regulation 2001/10 vested the CAVR with substantial quasi-judicial powers. Similar to a judicial authority, the CAVR was in a position to order individuals to attend hearings, answer questions, and produce specified documents or objects relevant to inquiries\textsuperscript{394}. It could also request information from government authorities, gather information, and hold meetings with victims, witnesses, and authorities both within and outside Timor-Leste\textsuperscript{395}.

As in criminal proceedings, it was a criminal offence to knowingly mislead the CAVR or fail to comply with an order of the CAVR, to hinder the CAVR in its activities, to attempt to influence the CAVR improperly, to threaten or intimidate witnesses, or to disclose

\textsuperscript{391} See Section 1 (d) of UNTAET Regulation 2001/10, which states: ‘International humanitarian law’ includes the Geneva Conventions of 12 August 1949; the Protocols Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International and non-International Armed Conflict of 8 June 1977; and the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects of 10 October 1980; and the laws and customs of war.’


\textsuperscript{393} See Section 3.1 (e) of UNTAET Regulation 2001/10 of 13 July 2001, UNTAET/REG/2001/10.

\textsuperscript{394} Ibid., Section 14.1 (a)-(e).

\textsuperscript{395} Ibid., Section 14.1 (l).
confidential information\textsuperscript{396}. In addition, through section 15.1 of UNTAET Regulation 2001/10, the CAVR was vested with large investigation and seizure powers. According to this provision, the CAVR could request an Investigating Judge of the District Court to issue a search warrant that would enable police to search particular premises. Section 15.2 to 15.6 specify the rules of procedures under which the police could conduct house searches and seize objects upon request by the commission and the records (to be signed by the person present) to be taken while pursuing the request. Consequently, the warrants issued upon request of the CAVR did not differ from those investigating judges usually issue in criminal proceedings. Its strict rules of procedure and evidence were necessary in the light of the close cooperation of the CAVR with the OGP and its ability to refer cases for prosecution. If the rules of procedure of the CAVR would not have met the minimum requirements of criminal proceedings, the evidence gained, be it personal or physical, could not have been used by the Special Panels. For the same reasons, the CAVR had strict and explicit regulations on the principle of non-self-incrimination according to Section 17 of UNTAET Regulation 2001/10:

17.1 No witness may be compelled to incriminate himself or herself. Every person who is invited or required to come before the Commission shall be informed of such right. If at any time it appears to the Commission that a question asked of a witness is likely to elicit a response that might incriminate the witness, the Commission shall readvise the witness of his or her right not to answer the question.

17.2 No witness may be compelled to incriminate the witness’ spouse or partner, parents, children, or relatives within the second degree.

Accordingly, the truth established within these strict and quasi-judicial proceedings comes close to the factual truth established in the pursuit of criminal justice.

5.3.4 The CAVR’s Final Report “Chega!”

Truth commissions usually conclude their efforts with the completion of a final report containing a set of recommendations and transcripts or summaries of public hearings\textsuperscript{397}. Ideally, the report is an authoritative statement on the truth, a holistic truth that addresses the role played not only by individuals but also by structures, institutions, ideologies, and

\textsuperscript{396} Ibid., Section 20.1.

policies. As an official acknowledgement of widely known and sometimes systematically denied truths, the report covers root causes reflecting the historical, social, and political context that triggered the conflict and usually comprises recommendations that support long-term development and democratisation. The CAVR delivered its final report, named “Chega!” on 31 October 2005. It comprises a variety of recommendations, in particular in relation to the implementation of reparation. Consisting of over 2,500 pages, it is a comprehensive and detailed record of the suffering of the Timorese people in their struggle for freedom, a harsh indictment of the 25-year Indonesian occupation and a plea to overcome the inaction of the international community. In line with its mandate, the CAVR included a number of recommendations to the government of Timor-Leste but also to the international community and the governments of Indonesia and Portugal. The recommendations touched on various issues, including the implementation of human rights policies in governmental structures and decision-making, the creation of a national annual day of commemoration, reform of the security sector, reparation for victims, a renewal of the Special Panels mandate, as well as the creation of an international tribunal.

Given this important historical record comprised in the report and the factual truth investigated only by the CAVR, it is unfortunate that the report was never widely disseminated within the various regions. Indonesia even dismissed the report. Officials in Washington, London, and their Western allies generally ignored it. Within Timor-Leste, the post-CAVR Technical Secretariat in a combined effort with civil society organisations in the UK, Indonesia, and Australia created dissemination teams that delivered audio, video, and paper publications on the local district level and across social groups. However, in remote and inaccessible areas, the report requires further dissemination to create a sense of collective memory, and to provide victims with a sense of individual acknowledgement.


399 “Chega!” is Portuguese for “no more, stop, enough”. It was chosen as the title of the CAVR Report as it captures the main message given by victims to the CAVR that the human rights violations they experienced must never be allowed to recur. For further information see http://www.cavr-timorleste.org.

400 CAVR, Chega!, Part 11 – Recommendations.
5.3.5 The Community Reconciliation Processes

A unique feature of the CAVR was its Community Reconciliation Process (CRP). Held under the auspices of the CAVR, the CRP combined both retributive and restorative aspects of justice. It was designed as a restorative and reconciliation initiative at the grassroots level, which – if conducted successfully – would bar perpetrators from further prosecution. It combined practices of traditional justice, arbitration, mediation, and aspects of both criminal and civil law. One of the main factors leading to the creation of a community-based justice mechanism was the need of a reintegration mechanism for those who had been involved in fighting, had fled to West Timor, and were wishing to return to their communities. Most of the non-Indonesian perpetrators had come from the same villages as their victims. The future would involve them living together and facing each other on a day-to-day basis. Hence, their return posed a major challenge threatening the fragile peace. The fear was that as more refugees returned from West Timor, they would become victims of payback violence. In this context, policy makers began seeking a solution that would require fewer resources and would not place further strain on the already struggling formal justice sector. A mechanism was needed that was able to address a large number of cases in a relatively short period of time, that assisted in the reintegration of offenders into their former communities, but at the same time helped to maintain the fragile peace of the territory. The underlying belief was that community reconciliation could best be achieved through a facilitated, village-based, participatory mechanism. Its legal basis can be found in Section 3.1 of UNTAET Regulation 2001/10:

Section 3.1 The objectives of the Commission shall include:

(e) the referral of human rights violations to the Office of the General Prosecutor with recommendations for the prosecution of offences where appropriate;
(f) assisting in restoring the human dignity of victims;
(g) promoting reconciliation;
(h) supporting the reception and reintegration of individuals who have caused harm to their communities through the commission of minor criminal offences and other harmful acts through the facilitation of community based mechanisms for reconciliation; and

(i) the promotion of human rights.

Through the inclusion of the Community Reconciliation Process, the CAVR attempted to draw on the high regard in which local customary practices were held and fuse practices deeply rooted in Timorese culture with the legal principles of the emerging state of Timor-Leste. Accordingly, nearly three-quarters of CRP hearings involved an adaptation of a local dispute resolution practice, *nahe biti boot*, named for the unfolding of a large woven mat (*biti boot*) where disputants and community representatives would come together and resolve differences. The CRP incorporated a combination of factual/forensic truth, personal/narrative truth, social/dialogue truth and the potential for healing/restorative truth, with the last being an integral component of the *nahe biti boot* process. This was a novel and previously untested programme aimed to reintegrate offenders and victims who had become estranged from their communities by committing politically related, “less serious” harmful acts during the political conflicts in Timor-Leste.

Although each district team determined its own procedures at CRP hearings, guidelines were provided and a generic format subsequently evolved in many districts. The procedure for initiating a CRP process was given in UNTAET Regulation 2001/10 Section 23.1:

Section 23.1 Initiation of the Community Reconciliation Process
A person responsible for the commission of a criminal or non-criminal act (hereinafter: the Deponent) who wishes to participate in a Community Reconciliation Process in respect of such act must submit a written statement to the Commission. This statement must contain the following:
(a) a full description of the relevant acts;
(b) an admission of responsibility for such acts;
(c) an explanation of the association of such acts with the political conflicts in East Timor;
(d) an identification of the specific community in which the Deponent wishes to undertake a process of reconciliation and reintegration (hereinafter: the Community of Reception);
(e) a request to participate in a Community Reconciliation Process;
(f) a renunciation of the use of violence to achieve political objectives; and

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According to Section 22 of UNTAET Regulation 2001/10, the CRP’s temporary mandate comprised all relevant acts committed within the context of the political conflicts in East Timor between 25 April 1974 and 25 October 1999. As will be shown later, this mandate, which included addressing offences committed outside 1999, was conflicting with the mandate of the Serious Crimes Regime, to which the CRP was to refer cases with recommendations for prosecution.

As a mechanism operating in tandem with both, the CAVR and the Office of the General Prosecutor (OGP), it was the obligation of the CRP to inform any individual willing to give a statement on the possible referral of the evidence provided to the criminal justice system. As to the process itself, it was initiated through a voluntary statement by a deponent, which was submitted to a Statements Committee. This committee examined whether the act or acts disclosed therein were appropriately dealt with in the context of a Community Reconciliation Process. All statements received were – as a controlling mechanism – forwarded in copy together with the assessments made to the OGP. This pre-assessment of all statements by the OGP was introduced in order to ensure that offenders would not benefit from a bar on prosecution unless justified.

Once forwarded, the OGP had 14 days to review the statements and the assessments, which added a significant workload to the already overburdened SCU. This, in turn, caused frustrating delays for the CAVR, caused by the fact that applications and summaries were written in Bahasa Indonesian or Tetum and needed to be translated into English for the international prosecutors based at the SCU. Only when the OGP agreed to a case being dealt with by a CRP, the CAVR organised the necessities to conduct a CRP in the deponent’s local village. If, subsequently, during a CRP hearing, a deponent gave credible evidence of

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407 Ibid., Section 24.
408 Ibid., Section 24.5.
the commission of a serious criminal offence, the CRP Panel was obliged to refer the evidence to the OGP and adjourn the CRP\textsuperscript{411}.

The CRP will be discussed below in further detail. It lies at the heart of the interaction between the right to justice, truth and reparation within Timor-Leste’s transitional justice mechanisms.

\textsuperscript{411} See Section 27.5 of UNTAET Regulation 2001/10 of 13 July 2001, UNTAET/REG/2001/10.
5.4 The Commissions for Truth and Friendship

After the CAVR made public its findings and the Serious Crimes Regime had come to an end, debates increased within the UN on how to assess the progress made in relation to the prosecution of the serious crimes committed in 1999. Both Indonesian and Timorese leaders found themselves under international and domestic pressure for accountability. The Timorese government regarded increasing calls for an international tribunal as futile and impractical and as a threat to bilateral relations with Indonesia. It more and more took a “reconciliatory” approach to safeguard friendly relations and economic cooperation with Indonesia. Already in May 2004, Timorese President Xanana Gusmão had met with Indonesian President Megawati Soekarnoputri and (already indicted) General Wiranto to make preliminary plans for a bilateral and conciliatory approach. On this occasion, the creation of a bilateral truth and reconciliation commission was first discussed. The meetings were held on the anniversary of Timor-Leste’s independence, on which Gusmão and Wiranto publicly appeared in harmony and referred to each other as a “dear friend”\(^{412}\). The concept evolved and led to the creation of the Commission of Truth and Friendship (CTF) by bilateral agreement. The Terms of Reference for the Commission of Truth and Friendship established by the Republic of Indonesia and the Democratic Republic of Timor-Leste (TOR) were made public on 9 March 2005: The CTF was to establish the truth about the events of 1999 and to heal wounds and promote friendship as a new and unique approach, rather than the prosecutorial process\(^{413}\). The TOR did not require the commission to determine individual responsibility or name names. Prosecution was not an objective and rather regarded as an obstacle to truth and promotion of reconciliation. Rather, the TOR vested the CTF with the ability to make recommendations for amnesty and the rehabilitation of wrongly accused persons, as “a definitive closure of the issues of the past would further promote bilateral relations”\(^{414}\). The CTF was a clear indication of both political leaderships rejecting a legalist retributive justice approach and favouring the promotion of a nation-building agenda. The subsequent creation of the CTF mirrored the political agenda to be followed: Neither victims, nor human rights groups, nor the broader community were included in the design of the commission.

412 During this meeting, pictures were taken that showed them hugging as an act of reconciliation. The photograph was published widely in the Timorese and Indonesian press.

413 Article 10 of the Terms of Reference for the Commission of Truth and Friendship established by the Republic of Indonesia and the Democratic Republic of Timor-Leste.

414 Ibid., Article 8.
Consequently, the CTF’s composition was the result of negotiations between the government of Indonesia and Timor-Leste only. The ten members of the CTF, including two co-chairpersons and six alternate members, were chosen following a selection procedure that took place behind closed doors and without civil society input. Unsurprisingly, initial public reaction in Timor towards the CTF was largely negative and human rights groups in both Indonesia and Timor-Leste along with the Catholic Church objected to the commission.

415 The CTF was co-chaired by Dionisio da Costa Babo Soares and Benjamin Mangkudilaga; further commissioners were Agus Widjojo, Wisber Loeis, Achmad Ali, and Petrus Turang from Indonesia, Cirilio José Jacob Valadares Cristovao, Aniceto Longuinhos Guterres Lopes (former CAVR national commissioner), Felicidade des Sousa Guterres, and Jacinto das Neves Raimundo Alves (former CAVR national commissioner) from Timor-Leste; the alternate commissioners (5 only) were Samsiah Achmad and Antonius Sujata from Indonesia and Maria Olandia Isabel Caeiro Alves (former CAVR national commissioner), Isabel Ferreira, and Rui Perreira dos Santos from Timor-Leste.

416 James DeShaw Rae, Peacebuilding and Transitional Justice in East Timor, (Boulder, CO: First Forum Press, 2009), 156.
6. A synergetic co-existence?

The following chapter will focus on the outcomes of the transitional justice mechanisms implemented in Timor-Leste. It discusses to what extent these mechanisms aimed at delivering and fulfilling victims’ right to justice, truth and reparation and the obligations of the state resulting therefrom. Central to this discussion will be whether the mechanisms implemented were victim-centred processes that allowed for participation and individualisation of the right to justice, truth and reparation. Methodologically, it will be asked how each of the transitional justice mechanisms implemented served its major goal. Firstly, how did the Serious Crimes Regime contribute to the realisation of the victims’ right to justice? It will then be asked how the co-existent transitional justice mechanisms complemented each other in relation to justice, truth and reparation. Did the Serious Crimes Regime enhance victims’ right to truth and did the CAVR contribute to realising victims’ right to justice? The discussion will thereby shift the focus onto the synergies resulting from concurrent transitional justice mechanisms, asking whether the mechanisms implemented had a supportive or negative effect on the other, complementary rights. The aim is to offer a theoretical analysis of whether the goals and objectives of the Special Panels, CAVR, and reparation measures meshed to create the synergies between their concurrent operations. This analysis will lead to a conclusion on lessons learned from the Timorese experience and the implications of this case study for the current understanding of transitional justice.

6.1 The Serious Crimes Regime and its effects on victims’ rights

According to the “Basic Principles and Guidelines”, victims of gross violations of international human rights law and serious violations of international humanitarian law have a right to equal and effective access to justice. The right to justice involves the duty of a state – or those executing its authority – to carry out prompt and impartial investigations of violations of human rights and international humanitarian law and to bring to justice those responsible for serious crimes under international law. When the UN created the Serious

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417 UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Resolution 60/147, UN Doc. A/RES/60/147, 16 Dec 2005, VII, para. 11.
Crimes Regime, it raised high expectations in a traumatised society that was left with a legacy of 25 years of impunity for massive violations of human rights and international humanitarian law. Optimistically, UN experts indeed described the Serious Crimes Regime in 2005 as a mechanism that

has ensured a notable degree of accountability for those responsible for the crimes committed in 1999. [...] The serious crimes process has also significantly contributed to strengthening respect for the rule of law in Timor-Leste and has encouraged the community to participate in the process of reconciliation and justice\textsuperscript{418}.

This chapter will question to what extent this statement can be upheld. It will ask whether the Serious Crimes Process implemented in Timor-Leste contributed to the victim’s right to justice. For its analysis, it will make use of the findings of the CAVR’s final report and compare them to the outcomes achieved by the Serious Crimes Regime.

\subsection*{6.1.1 Contribution of the Special Panels to the right to justice}

In the study of the Serious Crimes Regime, two main factors were identified that limited the achievements of criminal justice efforts in relation to the victim’s right to justice: 1) the \textit{de facto} restriction of the temporary mandate to offences committed between January and October 1999 and 2) the focus on “ordinary” crimes. The first left unrecognised all victims of violence committed between 1975 and 1999. The second resulted from a shift in the prosecution strategy from low-level to senior pro-Indonesians. It encouraged the government of Timor-Leste to transform criminal justice efforts into a political endeavour. In addition, the limited engagement of victims in the process clearly challenges the “individualisation” of the limited outcomes achieved. The reasons and results will now be discussed in more detail.

6.1.1.1 Restriction of the temporary mandate to offences committed between January and October 1999

Limiting temporary mandates of courts and truth commissions to a certain era serves in most cases the practical purpose of highlighting the peak in which the worst atrocities occurred. This allows setting parameters for the scope of investigation. A restriction of the mandate is often required to enable the criminal justice system to deal with the most severe crimes and yet have a manageable workload. *Vice versa*, purposely limiting the temporal range will necessarily lead to the exclusion of certain factors and can enable the current government and international actors to avoid responsibility and culpability. In Timor-Leste, the drafters of UNTAET Regulation 2000/11 restricted the Special Panels jurisdiction to offences committed in the period between 1 January 1999 and 25 October 1999 (Section 10.1 and 10.2). Although this mandate was extended through Section 2.4 of UNTAET Regulation 2000/15 to crimes committed on the territory of Timor-Leste prior to 25 October 1999, factual, financial, and organisational limitations led *de facto* to an exclusive focus on the offences committed in 1999. Both the court and its prosecution authority had difficulties in recruiting and funding an adequate number of experienced international investigators, which led to massive shortcomings in criminal analysis and forensic capacities. This incapability had serious implications for the SCU’s decision as to which cases and types of crimes were to be prosecuted and subsequently led to a decision to exclude the crimes committed during the occupation from the scope of the Serious Crimes Regime. This was in spite of the fact that the findings of the CAVR indicate that the offences committed during the occupation by far outweighed those committed between January and October 1999. It estimated that the number of conflict-related killings from 1974 to 1999 may have reached 18,600 (compared to ~1,400 in 1999). The CAVR estimates that this total number of conflict related deaths includes the killing of 5’120 non-combatants and 835 disappearances. It also reported on two periods of large-scale disappearances: the first period occurring from 1978 to 1980 (329 cases out of 835 reported cases) in the aftermath of the completion of major military offensives against the resistance, and the second period from 1983 to 1984 after the breakdown of a ceasefire between Indonesian forces and FALINTIL (175 cases out of 835 reported cases).

Displacements in particular occurred between 1975 and 1980, with 61,400 in 1975 and 59,800 in 1976.\textsuperscript{423} The CAVR also observed patterns of systematic illegal detention and torture, in particular after 1984 (~10,000 cases).\textsuperscript{424} In addition, the CAVR found that members and leaders of the pro-integration UDT party, and those associated with it, were also involved in cases involving the detention, torture, and killing of civilians, prisoners, the wounded, and the sick. It regarded these as violations of their obligations under Common Article 3 of the Geneva Conventions.\textsuperscript{425} None of these offences was ever brought to account.

These findings indicate that the most egregious violations of international humanitarian law were committed in the years following Indonesia’s invasion until 1999. The CAVR regarded then President Suharto, who ruled over Indonesia from 1967 until 1998, along with his Ministers of Defence and security and intelligence apparatus with high-level command responsibility as most responsible for the bloodshed. It also assumed that the United States and other western countries politically supported Indonesia’s invasion of Timor-Leste. Other nations had rather economic interests, amongst them Australia, which made business deals with Indonesia that concerned the future exploration and development of ocean resources, and other foreign nations like China, France, Russia, and the United Kingdom, which supplied Indonesia with logistics and the weapons for Timor’s systematic destruction.\textsuperscript{426} This collective assistance of the West was decisive in allowing the 1975 invasion to go forward and for the occupation to continue until 1999.\textsuperscript{427} It is plain that when creating the Serious Crimes Regime and interpreting its temporary mandate these countries did not have any interest in investigating and prosecuting the crimes which were enabled through their support of the Indonesian government and shedding light on their own involvement in the conflict.

Although not consulted when UNTAET passed Regulation 2000/15, the Timorese government itself also had an interest in not encouraging investigation into the offences committed before 1999. It, too, had its share and responsibility in the early years of carnage. In 1974, two diametrically opposed Timorese parties fought for dominance. The conservative

\textsuperscript{423} The number of displacements in 1999 were substantially fewer, with approximately 28,100 events.
\textsuperscript{424} CAVR, Final Report Chega !, Part 6 - Profile of Violations, paras. 12-31.
\textsuperscript{425} Ibid., Part 8.2 - Responsibility and Accountability, p. 10.
\textsuperscript{426} James DeShaw Rae, \emph{Peacebuilding and Transitional Justice in East Timor} (Boulder, CO: First Forum Press, 2009), 158-159.
Timorese Democratic Union (UDT) supported continued association with Portugal, whereas FRETILIN promoted independence. An outburst of violence between the UDT and FRETILIN, including the latter’s military branch, FALINTIL (Forces of the National Liberation of East Timor), resulted in more than 2,000 deaths in 1974. FRETILIN committed several mass killings of UDT and APODETI political elite. Representatives of FRETILIN executed prisoners in Aileu (Aileu), Maubisse (Ainaro), and Same (Manufahi) between December 1975 and February 1976. The CAVR came to the conclusion that local-level FRETILIN and FALINTIL leaders and commanders in Aileu, Maubisse, and Same, and senior leaders and commanders, including members of the FRETILIN Central Committee present in these areas at the time, were responsible for the torture and execution of prisoners in these places in late 1975 and early 1976. The highest number of reported fatal violations by FRETILIN/FALINTIL took place in 1982, 1984, and 1998-1999. Ill-treatment and torture of detainees was also widespread and in some areas systematic. They occurred both during interrogation and in the punishment of the prisoner. Although legally in a position to investigate these cases, the Serious Crimes Regime sidestepped investigations thereof by narrowing its temporal mandate. As a consequence, the offences committed by FALINTIL and supported by the current political elite remained outside the focus of criminal investigation and thus unpunished.

For the many victims of these crimes, the restriction of the mandate meant that they were not in a position to obtain justice nor had any prospect of any other form of remedy for the violations suffered. A study undertaken by Robins confirmed that hardly any family of persons who went missing between 1974 and 1999 had knowledge of the limited judicial process that had taken place. They remained untouched by the serious crimes process that led many to conclude that criminal justice efforts regarded the offences committed in 1999 as more important than the widespread violations that took place within the preceding years of occupation. Moreover, their right to justice was simply not recognised, despite international

430 Ibid., Part 7.2 - Arbitrary Detention, para. 714.
431 Ibid., Part 7.4 - Arbitrary Detention, para. 45.
norms against impunity, promoted by the UN, the very same authority responsible at the time for delivering justice to Timor-Leste’s victims of serious crimes.

6.1.1.2 *De facto* restriction of the subject matter mandate

The Serious Crimes Regime’s focus on the offences committed in 1999 subsequently led to a further, *de facto* restriction of the processes mandate. Within this narrow focus, it was difficult for prosecution to demonstrate the pre-1999 contextual, structural, and systematic element of the offences that remained outside the scope of investigation by the Serious Crimes Regime.

The focus on “ordinary” crimes was first considered as a means of dealing with the massive workload the Serious Crimes Regime was confronted with. Its judges and prosecutors had inherited an enormous caseload from INTERFET, comprising numerous persons in detention. Coupled with that were the ongoing criminal investigations that were brought to the SCU by CIVPOL investigators, who were equally overstrained. Instead of developing a clear prosecution strategy, UNTAET’s prosecution service and judicial authorities took four approaches to regularise the legal status of detained suspects: (a) release or discharge those whose conviction was unlikely; (b) substitute restrictive measures, i.e., conditional release, for those with only a flimsy indication that they had committed a crime; (c) provisional detention for those with enough evidence to sustain a charge of murder, manslaughter, or rape, and, (d) provisional detention for notorious pro-integration militiamen, where evidence indicated participation in multiple crimes committed over an extended period. The main reason for this uncoordinated start-up lies in the particular post-conflict setting in which Timor-Leste found itself. The Indonesian Human Rights Commission (Komnas HAM) and the ICIET in their reports had both outlined the major incidents of violence that took place in 1999 with special focus on the Indonesian Army members who contributed to the atrocities. Both could have served as guidance to the SCU in developing its prosecution strategy against the armed forces. However, this would have meant that the Indonesian officers who had departed from Timor-Leste with the occupational power would have been, from the start, at the centre of the investigations. For those who remained within Timor-Leste, victims, witnesses, and perpetrators, this was politically too delicate and, due to thousands of low-level perpetrators in

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police and later pre-trial custody, not an option. In addition, those who lost family members primarily provided the SCU with evidence against low-level militiamen whose involvement they had directly observed and not the big fish in command. The SCU had no choice but to begin investigating and prosecuting those who remained in Timor-Leste and to open cases against those with most evidence at hand. This led to the conduct of an upside-down prosecution initiative, far from what can be called a “strategy”: Prosecution began with focus on the small fish, making it difficult, if not impossible, for prosecution to establish the “systematic and widespread” nature of crimes against humanity or the institutionalised violation of Geneva Conventions. In this early period, the SCU opted for an easier and less resource-intensive approach. It developed charges of “ordinary” murder instead of charges of crimes against humanity or war crimes. This upside-down prosecution dynamic had major effects on the following proceedings in which the Serious Crimes Regime was barely in a position to introduce in its findings the particular contextual elements and state-sponsored nature of the offences committed in 1999.

It was not until February 2002 that the SCU introduced a prioritising strategy, which finally led to a shift in focus to those persons who had organised, ordered, instigated, or otherwise aided in the planning, preparation, and execution of the crimes (within the temporary mandate of the SPSC). With this shift in focus came investigations in relation to crimes against humanity and war crimes on counts such as murder, persecution, rape, torture, and inhumane treatment and the identification of those responsible higher up in the chain of command. Finally using the findings of the ICIET, the SCU identified ten priority cases relating to specific incidents that occurred during 1999, most of which involved mass killings. These ten priority cases included the Liquiçá church massacre on 6 April 1999; the Los Palos case of 21 April to 25 September 1999; the Lolotoe case of 2 May to 16 September 1999; the

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434 According to Article 9 (3) ICCPR, “anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power”. “Promptly”, as in Article 9 (3) ICCPR, requires that everyone detained shall be entitled to trial within “a reasonable time” or to be released pending trial.


438 In this case, the highest sentences were those handed down with 33 years (later reduced to 25 years on the basis of a Presidential pardon), and others were sentenced to about 23 years (Los Palos case).
murders at the house of Manuel Carrascalao on 17 April 1999; the Kailako and Maliana Police Station killings, April/September 1999; the Suai church massacre on 6 September 1999; the attacks on Bishop Belo’s compound and the Dili diocese on 6 September 1999; the Passabe and Makaleb massacres, September to October 1999; the TNI Battalion 745 case, April to September 1999; and cases of sexual violence committed in various districts, March to September 1999. Among these cases, an additional prioritisation was made to focus on the investigations and prosecutions of murder (approximately 1,400). Rape and torture were only investigated when associated with murder. Cases that concerned forcible transfer to West Timor, even when this potentially constituted a crime against humanity, were not pursued.

On 24 February 2003, General Wiranto, Defense Minister and Commander of the Armed Forces of Indonesia, six other high-ranking officers of the Armed Forces of Indonesia, and the former Governor of Timor-Leste were charged with crimes against humanity for murder, deportation, unlawful detention, intimidation, arson, and destruction of property committed in Timor-Leste during 1999. The indictment was based on the finding that these crimes were all undertaken as part of a widespread or systematic attack directed against the civilian population of Timor-Leste and specifically targeting those who were believed to be supporters of independence for Timor-Leste. The indictment was based on 1,500 witness statements that gave evidence for 280 murders.

Contrary to its aim, the indictment of General Wiranto in February 2003 and the political pressure that resulted from it provided the government of Timor-Leste with an escape route into impunity. Indonesia accused the UN of bringing to court a politically motivated case. Instead of refuting such accusations and defending its strategy, the UN published a press statement explaining that the indictment was issued under the legal authority of the Timorese

439 Following the Lolotoe trials, two of the three accused were found guilty of torture and imprisonment, whereas Jose Cardoso Fereira was sentenced to 12 years imprisonment for rape as a crime against humanity. The trials set an important jurisprudential precedent and were the high water mark of the Dili trials for gender justice, notwithstanding some concerns about the conduct and fairness of the trial and their selective nature (prosecuting those within Timor-Leste but incapable of prosecuting those who ordered the crimes residing within Indonesia).

440 The SCU was able to issue indictments in respect of 572 of the approximately 1,400 murders; see David Cohen, “Justice on the Cheap’ Revisited: The Failure of the Serious Crimes Trials in East Timor”, Asia Pacific Issues 80 (August 2006): 4.

441 E.g. in The Prosecutor v. Leonardus Kasa (the Kasa case) the trial proceeded without any reference to the context of systematic gender-based violence in a refugee camp in West Timor. Neglecting the widespread and systematic element of displacement and sexual violence, the court found that sex was consensual and therefore should be classified as adultery, over which the Special Panels had no jurisdiction.

Prosecutor General. Against all logic, it asked reporters in future to refer to the SCU indictments as Timor-Leste indictments and not UN indictments. It instructed the SCU to remove the UN seal from its letterhead. The UN’s move to distance itself from its own work had a devastating effect on the motivation of its own staff, who regarded it as a major achievement undertaken in direct fulfilment of the UN Security Council’s mandate. Given that the SCU was at the time effectively run by a UN appointee and that UN employees were carrying out the majority of its work, the UN’s position shocked Timorese leaders. Occupied with nation building, they felt that the responsibility for bringing those who had committed the mass crimes to justice should rest with the international community. In response, the Timorese government publicly declared that the indictment was the work of the UN, completing the mutual disavowal of responsibility for the serious crimes process. These developments resulted in a huge credibility loss for the UN. In addition, they demonstrate the rather weak and contradictory approach chosen in UNTAET: the strategic decision to focus on those who bear greatest responsibility was overthrown by the political pressure that resulted therefrom. While the attitude of the local government of Timor-Leste can be explained with its desire to build good relationships with its neighbour Indonesia, in regard to UNTAET its reaction to the Wiranto indictment evokes many questions as to its true commitment to bringing to justice those responsible for the serious crimes committed in Timor-Leste.

In the midst of this political pressure, the Special Panels were dependent on the (political) support and cooperation of Indonesian justice institutions to pursue the anticipated trials against those who had departed from the territory with the occupying power. Unlike the ICTY or ICTR, the Special Panels were created with no direct authorisation under Chapter VII of the UN Charter to compel states to cooperate with the Serious Crimes Regime. This was probably one of the greatest design flaws in the entire serious crimes process, allowing

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those outside the borders of Timor-Leste to benefit from an impunity gap. Without any power to compel at hand and in the absence of political pressure on Indonesia, the Serious Crimes Regime was forced to accept Indonesia’s refusal to arrest and transfer indictees to the Special Panels. To overcome this obstacle, Indonesia and Timor-Leste signed a Memorandum of Understanding. While UNTAET facilitated requests for investigation by the Indonesian Attorney General in accordance with the memorandum (i.e. through witness interrogations and forensic investigations), the SCU attempts to question witnesses or seek extradition were fruitless. The Memorandum of Understanding was not legally enforceable and, throughout the whole process, Indonesia continued to refuse extradition or even to cooperate with SCU investigators. This makes evident how reliant the Serious Crimes Regime was on cooperation by the Indonesian justice institutions. It also confirms that the decision to hold alleged perpetrators accountable is far easier when the former opponent has been defeated and the previous regime removed from power. With Kuosmanen and others, it is suggested here that greater support and intensified commitment from the international community, in particular through the creation of an international tribunal, would have allowed the government of Timor-Leste to externalise the political most apparent costs and pressure.

Overall, the shift in focus had paradoxical consequences in regard to those prosecuted and convicted by the Special Panels. Those Indonesian forces and mid- or high-ranking pro-Indonesian Timorese militia members intended to be brought to trial by the shift in focus had left Timor-Leste and, due to the above-mentioned reasons, remained out of reach. On the other hand, the investigation of their cases revealed further evidence and testimony against

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448 Mohamed Othman, Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor (Berlin-Heidelberg: Springer 2005), 147.


451 Out of despair, the SCU registered 263 arrest warrants with Interpol.

452 James DeShaw Rae, Peacebuilding and Transitional Justice in East Timor (Boulder, CO: First Forum Press, 2009), 166.

453 Taru Kuosmanen, Bringing Justice Closer – Hybrid Courts in Post-Conflict Societies (Helsinki, Erik Castrén Institute Research Reports 22/2007), 51 (with further references).
low-level perpetrators living in Timor-Leste, which led to the conviction of further low-level militia members. Often illiterate and poor peasants, these offenders had been vulnerable to recruitment by the Indonesian armed forces. Remaining in Timor-Leste, it was, once more, them who were brought to account for the atrocities committed instead of those who ordered them to contribute to the offences.

As of September 2011, of the 391 persons ultimately indicted by the SCU, 303 remained at large in Indonesia. None of the senior members of the Indonesian armed forces – identified as having been involved in the priority cases – ever stood trial. All of the 87 persons convicted (out of the 101 brought to trial) by the Special Panels were low-level perpetrators. Amongst those was only one FALINTIL pro-independence resistance fighter. The inequity involved in bringing pro-Indonesian low-level militia members to trial is evident. For local Timorese, why extraditions from Indonesia had not occurred was the source of much confusion and led to increasing levels of frustration and anxiety within communities. A consensus developed that the responsibility for so many perpetrators of serious crimes remaining in Indonesia lies with UNTAET and the legal system it had introduced. Timorese remain irritated by seeing high-ranking Indonesians flaunt their power and, often, wealth. With this outcome, perceptions of injustice, rather than justice, were clearly reinforced.

6.1.1.3 Victim participation: Personalisation of victims’ right to justice

Criminal procedures and processes can influence how people understand how just a specific process is, irrespective of its outcome. The biased and relatively few processes held under the

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456 Personal conversation with Marek Michon and Julia Ahlinho from the SCIT at UNMIT Headquarters in Dili, 16 September 2011.
Serious Crimes Regime were characterised by very limited victim participation. To many Timorese, the Serious Crimes Regime remained inaccessible from the start. Already during its conceptual phase, no consultation with the local population took place. Furthermore, the criminal justice process was created following a toolkit approach, side-lining national politics. It was a process devised in the context of technical UN state building, a short-term, externally driven attempt to promote universal values, with no or limited willingness to engage with the CNRT and the community more generally\(^{459}\). This lack of engagement with the national and communal leadership clearly hampered victim participation from the start.

Structurally, the drafters of the UNTAET Regulations governing the court gave no incentive to victims to participate in the hearings or voluntarily come forward with statements. None of the UNTAET provisions had foreseen any compensation for travel expenses or any other means for witnesses to receive money for transport and accommodation. This prevented many witnesses from voluntarily presenting themselves to the court. Those who travelled to Dili to give testimony missed valuable time at home, sometimes during important planting seasons, and often lacked relatives with whom to stay in Dili. In an economy based on agriculture, trade, and self-sufficiency, this is a crucial factor that was underestimated. As a result, many villagers considered the trial process to be only for the elites\(^{460}\). Open court eyewitness testimony was rare, which is reflected in the courts’ judgements, which rarely and only briefly summarise the testimony lying at the basis of the conviction.

During the Serious Crimes Regime’s time of existence, victims in particular lacked an understanding of the process. Proceedings were held in closed courtrooms, inaccessible to the wider public. Efforts to make the courts’ findings known reflect the alien and un-contextual approach taken by the UN: It created a comprehensive website for the tribunal which included useful details. However, in a society where the majority of the population is not connected to the electricity grid and internet services are uncommon, the website remained inaccessible to victims and available for international consumption only. Newspaper reporting was multilingual, but priced prohibitively. Unfortunately, radio, the major source of information to which the local population has access, was not used to transmit the courts’ findings\(^{461}\). In addition, the Special Panels did not offer any official public outreach for publicising or


\(^{461}\) Ibid., 162-165.
explaining to victims the Special Panels’ work. In the largely illiterate population, scattered throughout inaccessible mountains with poor or no means of communication, the decisions rendered by the Special Panels remained unknown to most462.

This poor outcome of the criminal justice process in reaching victims was confirmed by a study undertaken by Stanley. She states that few of the torture victims she interrogated had known about and been able to participate directly in the criminal justice process463. This finding was also confirmed by a study undertaken by Robins. He observed that hardly any victim family he talked to knew of the limited judicial process that had taken place and no family had been heard by any court. The dominant attitude of most victims to the judicial process was ignorance. Those few families who were in contact with the Serious Crimes Process saw it as remote and understood little about it464. This experience is contrary to the aim of the creation of the Special Panels as a hybrid mechanism located within Timor-Leste. The physical presence of the court within Timor-Leste was thought to provide a visible and more engaging method of punishing those responsible. Public perception of the court confirms that due to the design and functioning of the court the potential virtues of the mixed model were lost because of the failures of the Serious Crimes Regime. With no direct efforts towards explaining its work, the prospects for a wider catharsis were minimal465.

Unsurprisingly, many Timorese expressed the view that the Serious Crime Regime is yet another introduced form of justice and accountability that is largely alien, culturally irrelevant, and socially unenforceable. Contrary to local culture, in which justice is not simply about punishment but about mediation and participation, formal justice was – once more – imposed from above without any meaningful outcome for the victims concerned466. This highlights that the local and international agendas were based on two fundamentally different


concepts of justice. This difference in legal culture had far-reaching consequences that were not always resolved. UNTAET was unable to deliver a measure of justice that was broadly accepted by the population.

6.1.1.4 The emerging reconciliation discourse

While the conduct of criminal trials was challenging and clearly limited victims’ right to justice, the promotion of reconciliation with Indonesia continues to pose the biggest obstacle to further implementation of the right to justice. The formerly oppressive Indonesian regime maintains a strong influence as a powerful neighbour, particularly given the vulnerability of Timor-Leste’s land and sea borders and its continued fragile economic position. Compounding these difficulties are the vast social, economic and infrastructural tasks, combined with widespread and chronic poverty affecting much of the population. In this context, the restoration and maintenance of regional peace and stability is regarded as critical to the viability and development of the new nation.

It is argued here that the increased promotion of reconciliation to prevent prosecution was provoked by opting for a twin-tracked justice system instead of the creation of an international tribunal. An international tribunal would have been in a position to apply universal standards of prosecution instead of holding politically convenient trials. During the existence of the Serious Crimes Regime, Indonesia remained unwilling to respond to any requests for legal assistance received from Timor-Leste. At the same time, its own trials held at the Ad Hoc Human Rights Court developed more and more into trials proving the myths of an internal conflict between Timorese factions, freeing Indonesian authorities from responsibility. No international political pressure was exercised on Indonesia. When creating the Serious Crimes Regime as a twin-tracked justice system, the UN argued that individual accountability for human rights violations was fundamental to deterrence and establishing a strong “rule of law” culture. The non-application of these standards to the Indonesian counterpart led to emerging tensions at the UN headquarters level, within UNTAET, and

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between UNTAET and the East Timorese leadership\textsuperscript{468}. For Timor-Leste, the incapability of the international community to apply the same standards to Indonesia demonstrated that pursuing justice is not an imperative. This is contradictory to (the objective of) the promotion of justice, by the UN, as a universal right of victims of serious crimes.

Harper described the dilemma in which UNTAET and the international community found themselves to challenge Indonesia’s attitude towards prosecution. She rightly observed that the UN, through the design of the justice mechanisms as two concurrent national jurisdictions, introduced a rhetoric that favoured stability and political relations over (the depoliticised and universal notion of) justice. Within this rhetoric, Indonesia was considered important for ongoing regional stability. An aggressive political manoeuvring, in particular through an international tribunal, may have risked confrontation, perhaps jeopardising important geopolitical relationships. UNTAET wanted to strengthen good relationships between Indonesia and the soon-to-be independent Timor-Leste. If UNTAET had used its political power to facilitate extradition, this already fragile relationship may have been further jeopardised.

Timor-Leste’s political leadership absorbed UNTAET’s “stability discourse”. It allowed the government of Timor-Leste to take a “realist” approach, reflecting a narrative that obscures responsibility for past crimes committed by the pro-independence resistance, while at the same time protecting present and future relations with the large and formerly aggressive neighbouring state of Indonesia\textsuperscript{469}. It posits that an insistence on prosecutions is both anti-democratic and potentially destabilising, and that compromises need to be made to establish a lasting peace\textsuperscript{470}. This attitude has survived to the present time and has proven useful to Timor-Leste’s current political leadership. Influential positions of this current leadership are predominately held by those who led the resistance to Indonesia\textsuperscript{471}. For this political faction, it is much more comfortable to emphasise reconciliation, “social justice”, and development.

\textsuperscript{468} Lia Kent, \textit{The Dynamics of Transitional Justice. International Models and Local Realities in East Timor} (London: Taylor and Francis, 2012), 50.


\textsuperscript{471} E.g. José Maria Vasconcelos, Timor-Leste’s current president, is popularly known by his nom de guerre Taur Matan Ruak (Tetum for “Two Sharp Eyes”). He was the last commander of FALINTIL.
over judicial process. Resistance figure and CNRT leader Xanana Gusmão, Timor-Leste’s current Prime Minister, first publicly promoted a reconciliation narrative “South African style”, stressing values of “forgiveness and forgetting”. Already in December 2000, he called for a reconciliation process in which the leaders of pro-autonomy political parties and organisers of the violence would return to the scene of their crimes and receive amnesty in exchange for confession. Amnesties are thereby promoted as a valuable solution in order to strengthen democracy and long-term political change. Gusmão argued that this would enable people to move on with their lives and forgive, whereas a focus on “formal justice” through the judiciary, trials, punishment and prison, would not. This statement marked the beginning of a politicisation of criminal investigation by Timor-Leste’s political leadership. The attitude of those governing became a major impediment to prosecution. As Cumes argues,

[T]his position of the government's leaders reflects a serious misunderstanding of the distinction between a criminal tribunal process, which is a retributive, legal process culminating in acquittal or punishment, and the social process of reconciliation which is properly ascribed to restorative processes such as a truth and reconciliation commission.

The government opts for a forward-looking narrative of closure, forging new relationships with previous enemies. It combines this approach with, as will be discussed later, a biased “meta-narrative” that invokes a particular version of the past: a heroic and triumphal story that elevates ideas of sacrifice, national unity, and liberation.

The approach taken by the Timor-Leste political elite reflects what Ignatieff described as “false reconciliation”, which he defines as an indulgence of former opponents in the illusion that they have left the past behind, trying to impose a forgetting and forgiving mentality.
Renner describes such “reconciliation” as an “empty universal” conceptualised as a vague, yet powerful ideal that is fundamentally political. It produces – or rather reproduces – social reality and is used to legitimise certain policies. It allows the justification of political practices through the reconciliation discourse. Because the empty signifier is vague and illusive, various political factions can relate to it to promote their own political goals and accept it as a universal ideal. In Timor-Leste, the reconciliation paradigm is used in this form to oppose retribution. This meta-narrative perpetuates impunity for the crimes committed by the resistance and shields the role Timor-Leste’s current political leadership played in the struggle for independence. It thereby contravenes impartial investigations of serious crimes under international law and reflects a denial of responsibility. To victims of serious crimes, struggling to build new relationships with former opponents, this rhetoric, in turn, created added psychological stress. Many victims felt the need to be in tune with the national reconciliation agenda, which was clearly troublesome. Individual processes of reconciliation did no longer correspond to Timor-Leste’s national (political) approach to reconciliation.

Timor-Leste’s political discourse reflects what Harris-Rimmer described as a decision-making process marked by friction between conflicting “legalist” and “realist” narratives. The victim and his or her needs are not present in either of them. The realist school of thought challenges to the obligation to punish imposed by international law. It is reflected in the governments of Timor-Leste and Indonesia’s attitude according to which trials have destabilising influence that threatens Timor-Leste’s fragile peace. From the “realist” point of view, Gusmão was given little choice but to reconcile with Wiranto. The “legalist” position characterises certain international crimes, such as war crimes, torture, genocide, and crimes against humanity, as violating jus cogens norms, which are qualified as peremptory and non-derogable norms that are fundamental to the interests of the international community (referred to above as maximalist approach). Based on this understanding, war crimes, crimes against

479 Lia Kent, Unfulfilled Expectations: Community Views on CAVR’s Community Reconciliation Process (Judicial System Monitoring Programme 2004), 40.
480 This realist school is in line with what Olsen, Payne and Reiter refer to as a “minimalist” approach to transitional justice.
482 Olsen, Payne and Reiter call this “legalist” approach “maximalist approach to transitional justice”.

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humanity, or genocide result in a non-negotiable obligation to prosecute those responsible. From the legalist perspective, it is impossible to conclude that the Serious Crimes Regime fulfilled the duty to prosecute, re-established the rule of law, or had a notable reconciliatory impact on the local society. Rather, the weaknesses of the model offered by the UN to the people of East Timor undermined the effects of criminal trials and gave a distorted meaning to the notion of accountability. It strengthened the perception that the law will be applied only to the weak and politically unimportant.

6.1.1.5 Prospects for justice: Cases conducted by the Special Panel from 2006 to 2009

Since the closure of the SCU and the Special Panels, five trials have been held in relation to serious crimes committed in 1999 at the Dili District Court. These cases follow rather unusual procedural settings: evidence was gathered by the SCU, the very same authority indicted the accused, but an “ordinary panel” without the presence of the original prosecution authority now conducts trial hearings. The first trial held under such circumstances was the case of Manuel Maia, who was indicted by the SCU in 2003 for crimes against humanity. His case was heard by the Dili District Court in August 2005. At the time, Manuel Maia was apprehended after crossing the border from Indonesian West Timor. Community members immediately detained him and subsequently handed him over to the national police. His arrival compelled the national judicial system to address the important but thorny question of how to try previously indicted serious crimes suspects. The question of whether or not the courts of Timor-Leste, since the suspension of the Special Panels, were competent to try suspects accused of serious crimes was never expressly regulated neither in any UNTAET Regulations nor in national law. While these questions were being clarified, Maia spent a year in detention before finally being tried before an ad hoc panel formed on the basis of Article 3 of Government Decree Law 13/2005, which enacts the Code of Criminal Procedure, the panel being comprised of two international judges and one national judge.

484 Taru Kuosmanen, Bringing Justice Closer – Hybrid Courts in Post-Conflict Societies (Helsinki, Erik Castrén Institute Research Reports 22/2007), 49.
No international prosecutor was involved. He was charged with murder, forcible transfer of a population, and persecution by destruction of property as crimes against humanity. On 2 August 2006, he was acquitted of all charges. Apparently, there were significant problems in the presentation of evidence by the prosecution authority at the trial.

The second trial for serious crimes heard at the Dili District Court since the closure of the SCU involved militia member Domingos Mau Buti, aka Domingos Noronha, who was apprehended after crossing the border from Indonesian West Timor in December 2008. Domingos Mau Buti, a former pro-integrationist Mahidi militia member, was charged in December 2004 by the former Deputy-General Prosecutor for Serious Crimes Unit for crimes against humanity including four counts of murder and one count of rape between April and September 1999. National police captured him in December 2008 after he illegally crossed the border. Following provisions of Article 3 of Government Decree Law 13/2005, implementing the Code of Criminal Procedure, the Dili District Court again formed a Special Panel ad hoc to hear this case. His trial commenced on 18 January 2010. The Panel was composed of two international judges and one Timorese judge. Public Prosecution was represented by an international prosecutor. Although the international prosecutor – assisted by the SCIT – presented adequate evidence supporting the charges of crimes against humanity, the court denied a conviction due to the principles of *nullum crime sine lege* and consequently of non-retroactivity. On 26 March 2010, the Special Panels found the defendant guilty and sentenced him to 16 years in prison for the murder of three persons on 27 March 1999 in Lepo village, Zumalai Sub-District. This was the first case conducted by the OGP with the support of the SCIT. Following an appeal by the prosecution, the Court of Appeal

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487 Indictment number 02/2003.
490 *Prosecutor v Domingos Mau Buti aka Domingos Noronha*, Indictment of 6 December 2004, Case No. 08/2004
491 UNMIT/Serious Crimes Investigation Team (SCIT) newsletter, Issue no. 6 May 2010.
493 For the preparation of the case, the SCIT depended on information and evidence from Indonesia. Like its predecessor, the SCIT issued requests for mutual legal assistance in relation thereto. However, none of these requests were responded to by the Indonesian authorities; see International Center for Transitional Justice, *Impunity in Timor-Leste: Can the Serious Crimes Investigation Team Make a Difference?*, June 2010, p. 31.
upheld the conviction of murders. Mau Buti is currently the only person serving a sentence for serious crimes committed in 1999.494

The case of Maternus Bere can be considered the first case reflecting the political leadership’s attitude to criminal justice. Maternus Bere was the leader of one of the pro-Indonesian militia groups, who was in 2003, together with 13 others, charged with 51 counts of crimes against humanity including murder, extermination, forced disappearances, torture, inhumane acts, rape, deportation and persecution. These charges were made in connection with the Suai Church Massacre that occurred on 6 September 1999, leading to the deaths of 200 people. Following the indictment in 2004, the Special Panel issued an arrest warrant for Bere that led to his arrest 5 years later, on 8 August 2009, after he crossed the border from West Timor. Soon after his arrest Indonesia’s Minister for Foreign Affairs, Hassan Wirajuda, put Prime Minister Xanana Gusmão under political pressure. Wirajuda refused to participate in Timor-Leste’s independence day celebrations unless Bere was released. In response to this pressure, Gusmão ordered prison authorities to release Bere without a judicial hearing and without a court order.495 Bere returned to Indonesia. Following severe criticism, Prime Minister Gusmão stated that his action was a political decision justified by the national interest.496 It is agreed here with Burgess that such unilateral steps taken by a political leader to release a prisoner arrested on charges of murder and crimes against humanity raise serious issues of the separation of powers, violations of the constitution and the government’s commitment to international human rights and humanitarian law497.

The case of Valentim Lavio was concluded at the Dili District Court on 8 July 2011.498 He was accused of having been amongst Besi Merah Putih (translated the “red and white iron”) militiamen who were believed to have committed crimes against humanity in the form of murder in Liquiçá in 1999 shortly after the referendum. The Panel created within the Dili District Court was presided over by an international judge, who was accompanied by one

495 Ibid., 66-67.
496 Plenary Session of the National Parliament of 12 November 2009, Response by his Excellency the Prime Minister, Kay Rala Xanana Gusmão, on the Occasion of the Motion of No Confidence.
international and one national judge\textsuperscript{499}. Lavio was found guilty of crimes against humanity through the killing of a pro-independence supporter in Liquiçá district in 1999 and sentenced to nine years in prison (Case No. 13/C.Ord/2011). Nonetheless, he was not detained in the immediate aftermath of the guilty verdict. His subsequent appeal was rejected by the Court of Appeal on 26 September 2011, as it did not contain any reasoning. Subsequently, on 17 October 2011 a warrant for his arrest was issued by the Dili District Court, which was transmitted to the competent Liquiçá District Police on 20 October 2011\textsuperscript{500}. In November 2011, Timorese authorities confirmed that police were unable to arrest him as he had fled to Indonesian West Timor\textsuperscript{501}.

The Dili District Court held a further trial of Besi Merah Putih members on 3 October 2012\textsuperscript{502}. All three were found guilty of crimes against humanity committed in the suco of Ulmera, Liquiçá, through the murder of two persons after the results of the 1999 Popular Consultation referendum were made public. The court had established that the defendants had acted as General Commanders and Section Commanders of the Besi Merah Putih. The judgement is so far not available through open sources, but what has become known is that the court sentenced all three to 15 to 30 years in prison based on the Penal Code Article 124\textsuperscript{503}. The court thereby opted for the highest punishment that can be imposed according to Article 124 of the Penal Code, which codifies crimes against humanity and a punishment of 15 to 30 years of imprisonment. Given the reluctance to hold trials for serious crimes, the proceeding itself, as well as the sentence resulting from it, can clearly be regarded as a landmark decision. Whether the sentences have been executed remains unclear as of March 2014.


\textsuperscript{500} Amnesty International, East Timor: UN Security Council Must Address the Continuing Impunity for Crimes Against Humanity, 21 February 2012.

\textsuperscript{501} This although, on 16 August 2011, the Governments of Timor-Leste and Indonesia had agreed on signing a new law on international criminal judicial cooperation (47/11), enabling the extradition between the two States, which was approved by the Timor-Leste Parliament. Although it provides a sufficient framework to request and pursue the extradition of perpetrators of serious crimes residing outside Timor-Leste, no extradition of any of those indicted by the SCU has taken place since.

\textsuperscript{502} Dili District Court, Case No. 282/C.Ord/2012/TDD. The trial had to be postponed three times, as one of the accused would not appear in court until an arrest warrant was issued against him.

\textsuperscript{503} “Militia men sentenced to 15 up to 30 years in prison”, Suara Timor Loro Sa’e, 16 November 2012 (language source Tetum).
The criminal justice processes conducted under the Serious Crimes Regime, the SCIT, and the national OGP clearly had a limited effect on the implementation of victims’ right to justice, in spite of the fact that attaining retributive and criminal justice is centrally important to victims. Across cultures, victims in their thirst for justice in the form of prosecution increasingly turn to the international community to stand with them in their pursuit of justice against seemingly insurmountable challenges. Victims in Timor-Leste attribute the inefficacy of the Serious Crimes Regime to international actors. The actors who came to Timor-Leste to promote their values (including calls for a right to justice) have not fulfilled their moral and legal obligations. The continuing impunity enjoyed by Indonesian high-ranking officials confirms a wilful avoidance on the part of Indonesia, tolerated by the very same international community that calls for criminal trials in Timor-Leste. While the international community, and in particular the UN, continues to emphasise the need for justice, its own, deeply flawed, process has had limited effect due to the political dimensions of criminal justice. It is agreed with Stanley here that the international community has promoted a human-rights-conscious identity that it has not lived up to by behaving in ways that encourage or secure human rights standards. Rather, its efforts have strengthened the impression of arbitrary and selective criminal justice processes.


6.1.2 Contribution of the Serious Crimes Regime to the right to truth

Trials and truth commissions perform similar truth-seeking functions. As a by-product of examining and cross-examining witnesses and reviewing evidence about the responsibility of particular individuals, trials and judgements have the potential to establish the truth about the crimes under focus and create a historical record. Thus, in criminal trials, the reality of mass atrocities is deconstructed and reconstructed in very concrete legal terms. The result is an “evidential” or “factual truth” that consists more in a technical finding, reached through a sophisticated process, than in the genuine and complete truth about past crimes. The historical record established through criminal proceedings will consequently always be limited and will enable the right to truth only of those directly affected by the crime.

UNTAET Regulation 2000/30 explicitly mandated the SCU “to establish the truth of the facts under investigation”. Due to the prosecution strategy described above as well as the focus on 1999 only, the criminal justice system was only in a position to evaluate a limited aspect of Timor-Leste’s violent conflict and was not in a position to make charges for war crimes committed between 1974 and 1999, even though the court concluded that “[…] during 24 years of Indonesian rule in East Timor, there was an armed conflict between paramilitary groups openly supported by Jakarta and others dedicated to the independence of this half-island territory since the Portuguese colonial period. That conflict heightened in the second half of the late 1990’s with the persecution against civilian population when the international community addressed its concerns about the autonomy or independence of this territory.”

In relation to the existence of an armed conflict in 1999, the court’s findings were also limited. Without further elaboration, the Special Panel concluded that “at least some months before and after the popular consultation on 30 August 1999, there was an armed conflict in East Timor”. However, it made no charges for war crimes committed in the context of this conflict, even though international humanitarian law supports the qualification of the situation in Timor-Leste in 1999 as an armed conflict: Timor-Leste was, in accordance with the provisions of Hague Convention IV and its attached regulations, considered occupied from

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509 Ibid., para. 682.
the invasion by Indonesia from October 1975 onwards. Both Indonesia and Portugal (the lawful administrator) had ratified the Geneva Conventions and remained parties throughout the period of Indonesia’s occupation of East Timor. Thus it seems that the Geneva Conventions and the grave breaches regime applied as treaty law to the occupation of Timor-Leste and bound Indonesia as the occupying power as well as Portugal (even though it was not a belligerent). The occupation continued until the end of September 1999, when the attacks on pro-independence supporters reached their peak. Based on the position described above that Portuguese Timor was illegally invaded, occupied, and annexed by Indonesia, the 1999 armed conflict is considered to have been international in nature\(^{510}\). Accordingly, the offences committed in 1999 could have been considered as war crimes. By excluding this particular nature of the conflict, the Serious Crimes Regime excluded the grave breaches of the Geneva Conventions from its historical record.

Moreover, prosecution dissolved the organised campaign into a series of discrete incidents embedded in local antagonisms and involving spontaneous, excessively violent acts. The role of the Indonesian military in designing systematic violence is thereby entirely ignored by the investigations in the judicial process\(^ {511}\). In addition, the one-sided investigation with focus on low-level militia members merged the very many militia groups into one abstract group participating in the conflict. Despite their different names and histories\(^ {512}\), this indifferent terminology of the court and prosecution labelled the very many convicted low-level perpetrators as belonging to a seemingly broader “pro-Indonesian” militia, which was included in the broader narrative of the conflict and had concrete effects on those who were labelled as militia members. In relation to the factual truth to be established and made known through the criminal proceedings, both dissolving the organised campaign and focusing on “the militia” had far-reaching implications. It disconnected the Indonesian authorities from the unlawful acts and diluted their involvement in war crimes committed by militias. The Serious Crimes Regime thereby missed an opportunity to exercise truth-seeking functions and to document authoritatively the crimes committed in all aspects.


None of the SCU’s prioritised cases focused on sexual violence or torture. Of the 95 indictments issued in total, only eight brought charges against the (multiple) accused for crimes against humanity through sexual violence. Moreover, only one resulted in a conviction of four years of imprisonment for a single act of rape. In other cases, charges of rape were made, but not as crimes against humanity or war crimes, which resulted in a dismissal due to lack of jurisdiction. The Special Panels 16 convictions on counts of torture and/or inhumane acts (held before the shift in the prosecution strategy) highlighted the blatant use of violence against select individuals and the psychological suffering that is endured through torture. However, given the extent of the use of sexual violence and torture, the narrative of these trials clearly does not do justice to the suffering of victims under the occupation and withdrawal of Indonesia. In relation to the un-investigated offenses, a review undertaken by Cohen of the SCU investigative files indicates that several of the priority cases (which remain tucked away in the OGP’s archives) involved systematic sexual violence. During his research, Cohen found extensive evidence (in SCU case files and elsewhere) that indicated widespread practices of abduction, sexual enslavement, and forced marriage. It seemed to him that women were targeted for sexual violence because of their own or their family’s political orientations. He concludes that “this would indicate that such crimes were perpetrated systematically as a policy to terrorise particularly pro-independence supporters”. The inability to bring these cases to trial seriously affects the truth established by the Serious Crimes Regime and its subsequent justice efforts. The non-recognition of sexual violence and torture through the court affects the lives of very many victims. The failure to prosecute these larger patterns of systematic violence means not only that impunity prevails, but also that the criminal justice processes failed to provide the Timorese people with an accurate portrayal of

513 In September 2002 the Special Panel handed down its first and only conviction for rape: Francisco Soares, a former militia commander, was sentenced to four years imprisonment for raping a woman taken from the TNI 744 base in Becora in September 1999 (Case Number: 14/2001). In the Atabae rape cases (Case No. 8/2002), charges were made for 13 counts of crimes against humanity that included multiple rapes and torture between April 1999 and late September 1999, however, all accused remain at large. The Laksaur militia case (Case No. 9/2003) charges were made in relation to 51 counts of crimes against humanity including rape, torture and enforced disappearances against 11 accused. All accused remain at large.


517 Ibid., 113.
the nature of the violence that destroyed their country in 1999 and victimised so much of the population518.

In addition, admissions of guilt were a prominent feature in the proceedings of the Serious Crimes Regime. When the Special Panels resumed work, in around 50% of the cases convictions were made based on guilty pleas519. The possibility to make an admission of guilt was foreseen in Section 29.2 of UNTAET Regulation 2000/30 in order to move cases through the system very quickly. The Special Panels’ judgements confirm that plea bargaining practices were in particular popular during the early days of the court’s existence and in particular before the introduction of the Defense Lawyers Unit (DLU). Combs, who did an intensive study on the guilty pleas at international courts and hybrid tribunals, came to the conclusion that in the Special Panels’ early cases a practice developed in which defendants immediately admitted to participating in the crime for which they were charged, without knowing what they were admitting to or the consequences of their pleas. Virtually all defendants also maintained that they committed their offences because they were forced, or at least ordered, to by a militia leader or an Indonesian military official520. In other experiences of criminal trials after violent conflict, the use of guilty pleas had a positive impact on the truth-seeking dimension of criminal trials. In these proceedings, the exchange of a confession of criminal wrongdoing and cooperation for leniency provided an incentive for perpetrators to share their part of the story521. In Timor-Leste, offenders knew that there were no resources to challenge their version of the events and therefore they could offer a minimal admittance of guilt. The inability of both the court and prosecution to challenge the evidence led to an acceptance of this incomplete version of the past, which clearly limited truth-seeking efforts.

The effects of truth seeking through the Serious Crimes Regime were clearly limited and incomplete: the number of murders for which indictments have been issued represents only about two fifths of the number of killings committed in 1999; the factual truth established in

518 Ibid., 115-116.
521 Mark Freeman, Truth Commissions and Procedural Fairness (Cambridge: Cambridge University Press, 2006), 75.
relation to sexual violence and torture was even more limited. In addition, the 87 defendants tried before the Special Panels represent only a fraction of the number of individuals indicted, 303 of whom live in Indonesia. Outstanding cases include at least 828 cases of alleged murder, 60 alleged cases of rape or gender-based crimes, and possibly hundreds of cases of torture and other acts of violence. In regard to these, no official record has been established through the criminal justice system, in spite of the fact that state sponsored crimes were carried out publicly. This outcome leaves those who survived the offences with only a general understanding about who did what but with no judicial record thereof.

In those cases where the Serious Crimes Regime was in a position to undertake investigation, the processes held were often unsatisfying. They lacked legal expertise and factual truth-finding did not form part of the mandate. Even in cases in which the SCU was able to establish direct links between the offence committed on the ground and high-ranking Indonesian generals, the Special Panels were not in a position to confirm these findings authoritatively. Rather, their convictions of low-level perpetrators contradict the findings of the SCU. Overall, the way truth seeking was undertaken confirms an understanding by those responsible that truth seeking remains outside their mandate. The contradictory narratives highlight the need for a truly complementary approach to transitional justice. If justice and truth are to be achieved simultaneously through criminal proceedings, those involved in criminal proceedings and in drafting legal decisions need to be aware of this truth-seeking function. Moreover, they need to consider the implications of their work on the victim’s right to truth.

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6.1.3 Contribution of the Serious Crimes Regime to the right to reparation

UNTAET Regulation 2000/15 establishing the Serious Crimes Unit and Special Panels had foreseen that a trust fund is created “for the benefit of victims of crimes within the jurisdiction of the panels, and the families of such victims”\(^{523}\). It also stipulated that the Special Panels take “appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”\(^{524}\). Yet, the Serious Crimes Regime was financed through a trust fund based on meagre voluntary contributions by international donors. This fund never made any budget available for reparations. A second option for reparation was included in the Indonesian Criminal Procedure Code, applicable by the Special Panels. According to its Article 98, anyone who suffered loss as a result of a crime may request compensation from the court\(^{525}\). It was up to the presiding judges to determine whether this compensation case was to be heard alongside the criminal case. However, neither the Special Panels nor the Appeals Chamber applied this provision. Perhaps its application was unclear or SCU prosecutors overlooked the article. Overall, the Serious Crimes Process did not grant reparation to victims and their families by court order or judgement\(^{526}\).

This can partly be explained with the emergence of the co-existent CAVR and the inclusion of *nahe biti boot* in its process, the truth commission became the prominent mechanism for reparations. Responsibility for reparation shifted from judicial means to the truth-seeking mechanism, which from its creation emphasised its aim of establishing a national reparations programme. This shift of responsibility was also observed in the context of Sierra Leone. Here, the complementary Truth and Reconciliation Commission also led to a disconnection of the issue of reparations from the court\(^{527}\). This tendency was also reflected in victims’ understanding of who is responsible for providing reparation. Research undertaken by Harper revealed that victims did not regard reparation as a main objective of the Special Panels. None

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\(^{524}\) Ibid., Section 24.


of the respondents identified the absence of compensation as one of the judicial system’s major shortcomings.\(^{528}\) It is most likely that this attitude towards reparation resulted from the fact that to ordinary Timorese the concept of reparation through court order was unknown and not practiced throughout the occupation. To them, reparation resulted out of informal mechanisms practiced within communities and based on traditional mechanisms. Harper’s research also established that rather than being preoccupied with the non-payment of compensation, respondents were primarily concerned that alleged criminals both in Indonesia and in Timor-Leste had not been prosecuted.\(^{529}\)

New prospects for reparation through the court have emerged since Article 104 of the Penal Code of Timor-Leste entered into force on 18 March 2009. Compensations for losses and damages resulting from the crime are now compulsory and have to be assessed and arbitrated by the court.\(^{530}\) However, none of the serious crimes processes held at the Dili District Court since the provision entered into force applied the provision.

**6.1.4 Conclusion**

What at first appeared to have resulted in an impressive number of investigations and prosecutions in a short period of time in the end resulted in a small number of convictions. Compared to the 1,339 reported murders from 1999, the SCU only completed investigations and issued indictments for less than half of them. Since the UN mission departed at the end of 2012, no trials have been held in relation to serious crimes committed in 1999. The violence committed between 1974 and 1999 remains untouched by any criminal investigation, even though UNMIT has officially handed over its serious crime cases to the OGP and Prosecutor-General Ana Pessoa who affirmed that the OGP will continue to process these cases based on the existing national law.\(^{531}\) Crimes other than murder, in particular torture and systematic sexual violence, remain un-investigated, as do the crimes under international law that had

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\(^{529}\) Ibid.


\(^{531}\) “UNMIT Hands over Serious Crime Cases to Public Prosecution”, *Suara Timor Loro Sa’e*, 14 November 2012 (language source Tetum) and “UNMIT submits 396 cases to Public Prosecution”, *Timor Post*, 7 November 2012 (language Source: Tetum).
been committed during the Indonesian occupation\textsuperscript{532}. Those who were sent to prison are low-level militia perpetrators, many of whom were coerced by Indonesian military or Timorese commanders into participating in militia activities. The process lacked victim participation and remained inaccessible and incomprehensible to many victims. The truth resulting from the criminal justice process produced a narrative of low-level Timorese, often acting under the order of Indonesian authority. Combined with the reconciliation rhetoric that emerged, this historical record causes confusion on the part of victims trying to move on with the personal experience of the violence suffered.

\textsuperscript{532} International Center for Transitional Justice, \textit{Impunity in Timor-Leste: Can the Serious Crimes Investigation Team Make a Difference?}, June 2010, p. 11-12.
6.2 The Indonesian Ad Hoc Court and its effects on victims’ rights

The Indonesian Ad Hoc Human Rights Court confirmed that the mere ritual of a judicial proceeding was all that was needed to pacify the international community and to stave off the dreaded international tribunal, which had been threatened against Indonesia533. Despite reassuring words of then-president Wahid that Indonesia would prosecute those responsible for the massacres in Timor-Leste, only a handful of senior military officers were prosecuted by this ad hoc national court. From a list of 22 suspects, the Attorney General of Indonesia formally accused 18, some of whom were top generals. Out of these, six were convicted. Following appeals, five had their convictions overturned. In the end, only one individual, Eurico Guterres, was sentenced to 10 years of imprisonment in 2006. This decision was overturned in 2008, which finally led to his release534.

6.2.1 Contribution of the Ad Hoc Court to the right to justice

With this outcome, the Ad Hoc was highly criticised and often referred to as sham trials or show trials535. The outcomes are said to mirror poorly led investigations that led to badly drafted indictments that were the consequence of a political culture within the Indonesian Attorney General’s Office and the Public Prosecution Service. Foremost, prosecution failed to establish the existence of an organised or coordinated effort by the Indonesian security forces or civil administration authorities to commit serious human rights violations in its proceedings536. Crucial evidence was not introduced despite the offered cooperation and the

transfer of witnesses by the Special Panels and the SCU\textsuperscript{537}. Many key documents, submitted by KPP-HAM to the Indonesian Attorney General’s Office were never discussed in court\textsuperscript{538}.

Overall, the processes held clearly demonstrate a lack of commitment and failed to establish accountability at the highest level of government. They perpetuate a culture of impunity that was responsible for the violence in the first place. As a result, the initiated proceedings neither met international standards nor achieved legitimacy in the eyes of national and international observers. Subsequently, the failure of the prosecution provided a convenient excuse for acquittals that seemed supported by the available limited evidence\textsuperscript{539}. It therefore came as no surprise that General Wiranto, Defense Minister and Commander of the Armed Forces of Indonesia, who had been identified in the Komnas-HAM report as the alleged perpetrator who bore the greatest responsibility, was not prosecuted\textsuperscript{540}. Within a few years, charges against him were dropped and he became a credible, though unsuccessful, presidential candidate\textsuperscript{541}.

According to the UN Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (CoE), established in May 2005, the prosecutions before the ad hoc court were manifestly inadequate and did not investigate direct forms of liability or involvement even when there were obvious lines for further investigations\textsuperscript{542}. These circumstances led to inadequate presentation of sufficiently relevant, inculpatory evidence in support of the charges in most of the trials\textsuperscript{543}. The court came to differing legal interpretations


\textsuperscript{539} David Cohen, \textit{Intended to fail. The Trials Before the Ad Hoc Human Rights Court in Jakarta}, International Center for Transitional Justice, August 2003, pp. 53-61.

\textsuperscript{540} Like the hundreds of others who were indicted for crimes against humanity, he never appeared before the Special Panels. In fact, he continued to pursue a high-profile political career in Indonesia and was a candidate in the 2009 presidential elections. On 12 December 2012, Wiranto declared that he was ready to run another time for presidency in the 2014 Indonesian general election; see “Wiranto ready for presidency”, \textit{The Jakarta Post}, 12 December 2012.

\textsuperscript{541} John Braithwaite, Valerie Braithwaite, Michael Cookson and Leah Dunn, \textit{Anomie and Violence. Non-truth and Reconciliation in Indonesian Peacebuilding} (Canberra: Australian National University E Press, 1998), 100.


of identical subject matter and demonstrated a lack of willingness to utilise international jurisprudence and proficiency in analytical evaluation of the facts and law. Judgements were inconsistent, resulting from the application of diverging judicial techniques. The CoE therefore concluded that the judicial process of the Indonesian Ad Hoc Human Rights Court was not effective in delivering justice for victims of serious violations of human rights and did not make those who bear the greatest responsibility for serious violations accountable.

6.2.2 Contribution of the Ad Hoc Court to the right to truth and reparation

Due to its lack of political will to investigate and bring to account those responsible for serious crimes in Timor-Leste, the Ad Hoc Court’s outcome in relation to truth and reparation had to be limited. Its temporal mandate, from April to September 1999, allowed it to shed light on certain aspects of the 1999 violence only. In addition, due to a Presidential Decree (96/2001 of August 2001) the court’s mandate was narrowed to three of the 13 districts (Dili, Liquiça and Suai) of Timor-Leste. It led to indictments in relation to murder only. No other offences were pursued. In limiting its investigations, the court did not provide an accurate and complete historical record of the scale, widespread nature, and systematic nature of the attacks against the population. There was also little elucidation of the organisational structure, the chain of command and control, and the plan and policy of the security forces that were involved in the events of 1999. Indictments were deliberately structured so that none of the cases gave cause for the various official and unofficial operations in Timor-Leste to be examined. The institution had the effect of extending impunity for top-ranking Indonesian military leaders while highlighting violence perpetrated by Timorese. It accepted the myth that the violence committed in Timor-Leste was instigated without any organised support by Indonesian military, police or security units. There was little discussion of the emergence of militias and the historical relationship between the Indonesian State, the paramilitary and

544 Ibid., 353.
civilian militias. Clearly, with such biased findings, the court did not contribute to establishing a factual truth. In order to avoid victims and witnesses challenging the findings of the court, it carefully selected witnesses. Most were connected to the Indonesian government, army and police, with an interest in confirming the involvement of Timorese in the violence committed. Judges, court staff and defendants intimidated those not willing to participate in upholding the myth. The very few Timorese participants were threatened by military officials. The court confirmed the atmosphere of intimidation in a courtroom filled with uniformed members of the military’s special forces. It provided insufficient facilities to protect victim-witnesses, particularly those from Timor-Leste. This ultimately prevented further witnesses from Timor-Leste from coming forward and clearly impeded victim participation in the trials. Uncovering the truth, just as providing some measure of justice for victims, was never the object. Rather, as Stanley rightly observed, the Ad Hoc Court was a means for Indonesian authorities to continue previous violence and fearful domination under the new dynamics of transitional justice.

The court had no effect on victims’ right to reparation. Legal rules of the ad hoc court were such that they excluded victims and prevented civil claims. Victims did not enjoy any individual or collective restorative measures to improve their lives. In light of the court’s findings and the allocation of guilt away from Indonesia to Timorese militias, this comes as no surprise.

6.2.3 Conclusion

Promises made by the Indonesian government to hold accountable those responsible for attacks on the civilian population were not kept in regard to the investigation of crimes committed between April and September 1999 or before. The crimes committed during the

Indonesian occupation did not form part of the process. Rather, the Ad Hoc Court was successful in avoiding the prosecution of the Indonesian military through international institutions or based on universal jurisdiction. To victims, acquittals and light sentences produce feelings of indignation, disappointment, helplessness, and lack of trust in the legal system, if not a secondary victimisation. Unfortunately, Indonesia’s unwillingness to do its share was foreseeable at the creation of the twin-tracked justice system. Due to the involvement of Indonesian military and civilian authorities in the crimes committed in Timor-Leste, it was already at the time very likely that Indonesia could not be expected to bring to account the members of its army nor to cooperate with a Timor-Leste-based trial process. With no political pressure at hand to force Indonesia to bring to justice its perpetrators and to enforce cooperation with Timor-Leste’s justice mechanism, the twin-track approach, favoured by the international community instead of an international criminal tribunal, did not enhance justice, truth and reparation for Timor-Leste’s victims of serious crimes. Rather, it provided Indonesia with a carte blanche for communicating its version of the tragedy of Timor-Leste to the international community and the domestic audience.

6.3 Comissão de Acolhimento, Verdade e Reconciliação de Timor-Leste and its effects on victims’ rights

Courts differ from truth commissions in various fundamental aspects. Truth commissions generally focus on the larger picture and patterns of crime, collect strong evidence, and analyse the social causes of conflict. Truth commissions thereby counteract communal and official denials and grant victims the dignity of formal acknowledgment of their suffering, even if they personally do not appear as witnesses. Unlike in criminal proceedings, truth commissions do not follow the structure of plaintiffs, acts of prosecution, and trial. Yet, there is investigation, fact finding, and reporting. In Timor-Leste, the CAVR applied a two-fold approach to truth seeking. As regards Dili, truth-seeking efforts focused on national reconciliation, whereas in rural Timor-Leste activities focused on the community. The founders of the CAVR opted for this two-level approach, as a single focus on the national perspective would not have offered a truth that distinguishes between different areas and would not have taken into account the importance of local community. Both truth-seeking approaches followed different methods. Truth seeking on the national level was primarily facilitated through the national public hearings, whereas on the community level the CAVR followed the South African TRC’s notion of “revealing is healing” and attempted to entice victims to testify554. On the community level the CAVR was thereby in a position to take into account local views in which aggression against an individual is considered an aggression against other members of that person’s kin. Through engaging in this wider communal context of injustice, the CAVR hoped to re-establish social trust and stability555. The idea was to tap into the rich oral traditions of rural communities and initiate a healing process that allows victims to share their stories and be listened to by those they live with.

6.3.1 Contribution of the CAVR to the right to truth

To establish the truth on the national and community level, the CAVR made use of a variety of methods for the collection of information, each one providing its own kind of grounding for truth claims. It recorded and compiled summaries of oral statements, considered them in relation to material evidence obtained, and conducted surveys according to the protocols of

554 Ibid., 65.

social science. It then used quantitative analysis of data collected as well as a qualitative approach to gather the data for its final report. The quantitative data was collected through its statement-taking process but also through Benetech®-HRDAG, who had developed four anonymised datasets jointly with the CAVR. In addition, the CAVR collected qualitative data through open interviews with witnesses and, occasionally, perpetrators, and secondary sources in order to illuminate important patterns in the violence over time and location. The benefit of applying both quantitative and qualitative research methods was to develop a comprehensive understanding of the violence that occurred in Timor-Leste between 1974 and 1999.

6.3.1.1 Public hearings

The CAVR held public hearings on the national, regional, and community level. The hearings on the national level, with the aim of promoting national reconciliation, involved leaders of political parties, representatives of civil society, the clergy, and other important public figures. During these hearings, participants were asked to publicly explain how they experienced the occupation but also the civil war of 1974-75. In total, seven hearings were held on a national level, which usually lasted two or three days and addressed a special thematic characteristic of the conflict. Such thematic hearings included a National Public Hearing on Self-determination and the International Community, held on 15-17 March 2004, National Public Hearings on the Internal Political Conflict, and a National Public Hearing on Children and Conflict on 29-30 March 2004. The CAVR also held a two-day National Public Hearing on Women and Conflict on 28-29 April 2003. This hearing provided an opportunity for 14 women survivors of violations to tell their stories, accompanied by four expert witnesses who provided

557 HRDAG is a division of Benetech Inc. in Palo Alto, California, USA, whose specialized staff includes statisticians, computer programmers, and record linkage experts; HRDAG has worked with official truth commissions in Haiti, South Africa, Guatemala, Peru, Ghana, and Sierra Leone; with the International Criminal Tribunal for the Former Yugoslavia; and with non-governmental human rights groups in El Salvador, Cambodia, Guatemala, Colombia, Afghanistan, Sri Lanka, and Iran.
558 These included the fatal violations data from the narrative testimony database, called the Human Rights Violations Database (HRVD); the Graveyard Census Database (GCD); the fatal violations data from the Retrospective Mortality Survey (RMS); the Multiple Systems Estimation (MSE) data file.
560 Ibid., Part 11- Recommendations p. 28.
background information on the reported violations. These accounts were broadcasted live by national radio and television services, requiring extraordinary courage from those victims and women who came forward and provided statements.

Compared to other truth commissions, the CAVR’s main emphasis was on truth seeking on a community level. The regional commissioners organised and facilitated 294 half-day or day-long forums in 284 villages at which invited members of a community would narrate their local history. Attendees would describe the violence the community had experienced, creating sketch maps on which to locate specific events and timelines that registered the chronology of those events. The hearings were primarily considered as methods to facilitate the psychological recovery of victims and the reconciliation of old rivals. In the community level hearings, victims gave detailed accounts of their suffering and on-going personal difficulties.

To overcome cultural barriers that made it difficult for victims and in particular women to speak about the human rights violations they experienced, the CAVR had developed special methods for the community hearings. These required, amongst other measures, gender balance in the recruitment of statement-takers and victim support staff for each team as well as the involvement of women in community-based group discussions and cooperation with East Timorese NGOs. Workshops were held only for women survivors, and sessions were held specifically for women in 22 villages. In addition, research teams conducted more than 200 interviews with female victims of human rights violations. A further characteristic of these hearings was that they were conducted under strong influence by the Catholic Church. As the hearings were opened with a short speech from the village’s Catholic priest, who highlighted the importance of repentance and forgiveness in the Catholic religion, involved parties shared a common starting point from which to seek a resolution of their disputes. This setting, Ling believes, provided for cultural familiarity with a religious concept that strongly

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561 Ibid., Part 7.7 – Sexual Violence, paras. 21-22.
562 Research into the South African TRC confirmed that one of the biggest successes of the TRC was the publicity generated by the commission and the public awareness resulting from it.
564 CAVR, Final Report Chega !, Part 10.3.5 – Acolhimento and Victim Support, para. 196.
enhanced the participants' commitment to the reconciliatory process\textsuperscript{566}. In total, 3,482 men and 1,384 women participated in the public hearings and discussions on the community level\textsuperscript{567}. The accounts that emerged from the community hearings revealed how different communities and regions suffered in different ways and at different times throughout the conflicts\textsuperscript{568}.

In addition to the above national and community level hearings, complementary individual statements were taken by local Timorese, trained to conduct interviews and record individual oral testimony of victims, witnesses, and perpetrators (all called “deponents”). Through this method, a total of 7,669 statements were collected and recorded on cassette. Testimony was provided on a voluntary basis and included first-hand knowledge and indirect knowledge on human rights violations, including testimony of those who committed violations themselves\textsuperscript{569}. In this statement-taking process the commission conducted open-ended interviews that allowed the deponents “to narrate their stories at length, in whatever manner they wished”. Statement takers were only instructed to ensure that the deponent provided particular information for the CAVR in order to understand who did what to whom, when and where, and the causes and consequences of these events. The information provided in the statements therefore greatly depended on the statement taker’s own sense of what constituted enough information. Depending on the interviewer’s standards, some interviews lasted less than an hour, some lasted many hours, and the quality of the written summary varied depending on the talents of the statement taker\textsuperscript{570}. The aim was to give victims an institutional space in which they could recount their experiences. Yet, no account was verified; all statements were accepted without reservation. Inevitably, this acceptance of statements unchallenged brings into question the veracity of the report and it may be argued that this undermines the recognition of individual suffering\textsuperscript{571}.

\textsuperscript{566} Cheah Wui Ling, “Forgiveness and Punishment in Post-Conflict Timor”, \textit{UCLA Journal of International Law and Foreign Affairs} 10 (2005): 344.
\textsuperscript{567} CAVR, Final Report Chega!, Part 7.7 – Sexual Violence, para. 21.
\textsuperscript{568} Ibid., Part 10.3.5 – Acolhimento and Victim Support, para. 196.
\textsuperscript{569} Both oral and written records are archived in the post-CAVR secretariat in Dili.
\textsuperscript{571} Elisabeth Stanley, \textit{Torture, Truth and Justice. The Case of Timor-Leste} (London: Routledge, 2008), 123.
6.3.1.2 Quantitative data collection

The CAVR conducted three combined data streams – the Human Rights Violations Database, the Retrospective Mortality Survey, and the Graveyard Census Database – to establish independent demographic estimates of the total extent, pattern, trend, and levels of responsibility for past fatal violations in Timor-Leste, which were then included in the final report of the CAVR. The Human Rights Violations Database created by Benetech-HRDAG for the CAVR contains information on fatal violations, without identifying information about the victims or witnesses of the violations. The geographic location and the date of the violation were only published in aggregated forms providing the name of the district, year, and month. The database was created from the statement-taking process described above, as well as from qualitative reports from Amnesty International in combination with data collected by Fokupers, a local Timorese NGO. For the Human Rights Violations Database (HRVD), each narrative statement was read by someone called a “coder”, whose task was to break it down into a series of distinct violations of rights and then enter the codes for those violations in the boxes of the database. Although it has been criticised in relation to its representativeness in terms of location, age, gender, ethnicity, or educational level, the CAVR together with Benetech undertook enormous efforts to code the 7,669 statements.

The Retrospective Mortality Survey is described as a random-sample household survey used to measure displacement and mortality during the CAVR’s mandate period. The Retrospective Mortality Survey was undertaken by the CAVR and HRDAG to enable statistical estimates of the extent of natural mortality, famine-related deaths, conflict-related deaths, and displacement. Methodologically, this survey established a stratified random sample of 1,322 randomly selected households and used a structured questionnaire to collect information from the sampled household. However, the survey faced one large problem: the mass deaths of the late 1970s lowered the probability of the surveyors coming across surviving parents, siblings, or children. Entire families, even entire neighbourhoods, had perished at that time.

572 Benetech-HRDAG reached a Memorandum of Understanding with the CAVR following which the data collected by Benetech-HRDAG are published on the Internet at http://www.hrdag.org/resources/timor-leste_data.shtml.


The third dataset was the Graveyard Census Database. Benetech together with CAVR staff visited graveyards to record the name, date of birth, and date of death. In a first round, 128,751 records were collected from 803 cemeteries. In a second round, a further 153,057 records from 1,779 cemeteries were collected. The CAVR was the first truth commission to use such records as part of the reconstruction of historical memory. However, the Graveyard Census Database also had its limitations. It did not include deaths of people who were not buried in a properly marked grave inside a graveyard. This resulted from the fact that during the years of mass deaths, in the 1980s, many victims of starvation and disease were buried in unmarked graves outside of graveyards or not buried at all, while others were buried without durable tombstones or markers. Only half of the gravestones contained both a name and date of death. The other half were not included in the Graveyard Census Database. The findings were further limited by local common naming practices.

6.3.1.3 Participation of victims in the CAVR’s processes

The CAVR’s inclusive measures enabled perpetrators, indirect witnesses, and victims to participate in truth seeking. Unlike the Serious Crimes Regime, the CAVR encouraged a high level of participation from the Timorese population and responded to the desires of many to be heard. Overall, it recorded 85,164 human rights violations. 3,482 men and 1,384 women participated in the public hearings and discussions on the community level alone. During the eight national public hearings, 1,000 thematic interviews were conducted. In addition, quantitative data collection included 7,669 statements and engaged around 2,700 households. From this inclusiveness of the CAVR clearly benefitted those who wished to come forward, regardless of their level of personal suffering.

However, probing research by Robins in Timor-Leste has shown that the success of the CAVR in relation to including victims in the truth-seeking process should not be overestimated. His ethnographic study revealed that those who engaged with the work of the


CAVR represent 2% of the Timorese victim population only\textsuperscript{578}. This limited outreach can be explained mainly by the lack of physical access for ordinary, largely rural, Timorese to the CAVR. Here, Timor-Leste's infrastructure, in particular the lack of communication means and widespread illiteracy, made it difficult for the victims to engage actively in the truth-seeking process\textsuperscript{579}. As a consequence, to those victims who were not able to engage with the CAVR, the commission’s truth-seeking efforts failed as a healing exercise and clearly fell short in realising victims’ right to truth. This subsequently led to a disconnection of these victims from the goals for which the CAVR was created, namely, the establishment of an authoritative record of the past and the creation of a collective memory.


\textsuperscript{579} Ibid., 21-22.
6.3.1.4 Complementary aspects of the CAVR in relation to the Serious Crimes Regime

The CAVR has provided strong arguments for calling for the creation of a truth commission to complement the structural deficiencies of criminal trials. Timor-Leste, like most post-conflict states, faced weak state infrastructures and judicial services. As described, dealing with the past through criminal trials and bringing perpetrators to account remained a highly challenging and often limited endeavour. The criminal proceedings held were not proportionate to the scale of the violations committed. The CAVR offered the emerging democratic state a more inclusive approach to investigating past abuses based on broad witness participation. It allowed investigations and findings that were not possible in the criminal justice framework. Co-existent to the Serious Crimes Regime, the CAVR thoroughly assessed the violence committed by FALINTIL in 1974, violence that surrounded Indonesia’s invasion in 1975, and structural violence that upheld the repression during Indonesia’s occupation of Timor-Leste.

6.3.1.4.1 Violence of 1974-1999

The period relevant to the CAVR included the significant political conflict of 1974 involving East Timorese factions, the full-scale military invasion by Indonesia, almost twenty-five years of large-scale violations during the military occupation, and the explosion into uncontrolled violence and destruction in 1999. The report authorises a version of truth that acknowledges widespread human rights violations across the entire period from 1974 to 1999. Within its 2,500 pages, the report gives a credible and detailed account of the serious crimes committed by reproducing victim testimony and providing the name of the person who gave testimony. In addition, the CAVR also published the names of those individuals and institutions it believed to be most responsible for serious crimes committed between 1974 and 1999. It was mandated to do so through Section 13 of UNTAET Regulation 2001/10, which explicitly called for the investigation of “which persons, authorities, institutions and organisations were involved in human rights violations”. Under focus were the Indonesian security forces, political parties, and those states that the CAVR found most seriously violated their

581 See Sections 13.1 (a)(i), (iii) and (iv) and 13.1 (c) of UNTAET Regulation 2001/10 of 13 July 2001, UNTAET/REG/2001/10.
obligations to recognise and protect the rights of the people of Timor-Leste to determine their own political, social, and economic reality.

Contrary to the narrative established within the criminal justice process, nearly 30% of the killings of civilians reported to the CAVR during its truth-seeking process were attributed to resistance and pro-independence groups\textsuperscript{582}. Most related to the period of internal conflict between FRETILIN and UDT and were politically highly sensitive. The CAVR broke the silence surrounding these events. It addressed this period of internal armed conflict prior to the Indonesian occupation in one public hearing in Dili exclusively focusing on the violence committed between 1974 and 1976. This was an extremely sensitive issue as this conflict between East Timorese factions had involved many of the current national leaders. The hearing was provoked by a previous public hearing on massacres, during which evidence was given on widespread atrocities committed by Timorese factions in the civil war preceding the Indonesian occupation (1974-1975). The violations had involved suspected FRETILIN and FALINTIL “traitors” and were of fundamental importance to national reconciliation. Most important, information concerning these events had never before been made public in any way\textsuperscript{583}. Through these hearings, the CAVR established that non-Indonesia-affiliated Timorese forces (e.g. FALINTIL and parties involved with the August-September 1975 civil war) were responsible for approximately 10% of the killings in 1975. The highest number of reported fatal violations by FRETILIN/FALINTIL took place in 1982, 1984, and 1998-1999\textsuperscript{584}. Ill-treatment and torture of detainees were also widespread and in some areas used systematically. They occurred both during interrogation and in the punishment of the prisoner\textsuperscript{585}. After Indonesia adopted its notorious deportation policy, FRETILIN sometimes forced IDPs to join or aid their movement, or wiped out these new village residents consequently. The CAVR concluded that the FRETILIN Central Committee did not make a formal decision to commit these violations. Nevertheless, it found that senior leaders and commanders either were aware that they were taking place, were directly involved in deciding that they should take place, or were present when they did take place\textsuperscript{586}. This is the first

\textsuperscript{582} CAVR, Final Report Chega!, Part 3.7 – History of the Conflict, para. 153.


\textsuperscript{584} CAVR, Final Report Chega!, Part 7.2 - Arbitrary Detention, para. 714.

\textsuperscript{585} Ibid., Part 7.4 - Arbitrary Detention, para. 45.

\textsuperscript{586} Ibid., Part 8.2 - Responsibility and Accountability, p. 9.
official account of violence attributable to pro-independence groups and thus a major contribution to establishing this aspect of the conflict and in recognising victimhood caused by pro-independence factions.

6.3.1.4.2 Violence against women

As mentioned above, only very few cases held at the Special Panels addressed sexual violence against women. But even the CAVR was confronted with cultural barriers to investigating violence against women. Although the CAVR held a three-day public hearing to which women were invited to come forward and share their suffering, accompanied by experts to provide gender and violence-related support, limited participation by women undermined the recognition of their experiences. Those women who came forward were willing to give detailed accounts of their suffering, which were broadcasted live by national radio and television services, despite the heavy cultural taboos and personal difficulties. However, fewer women than men took part in the public hearings and some women deferred to male members of their family to recount their experience.

Through its statement-taking process, the CAVR documented 853 reported instances of sexual violations. Amongst these, rape was the most commonly reported sexual violation, at 46.1% (393 out of 853) of all sexual violations documented by the CAVR, followed in frequency by sexual harassment and other acts of sexual violence at 27.1% (231/853) and sexual slavery at 26.8% (229/853). Out of these, 93.3% (796/853) were attributed to Indonesian security forces and auxiliaries, 2.5% to FRETILIN (21/853), 1.2% to FALINTIL (10/853), 0.6% to UDT forces (5/853), 0.1% to Apodeti forces (1/853), and 0.9% to others (8/853).

The CAVR also interviewed more than 200 victims and witnesses of sexual violence. Its final report underlined that “the voices of the victims in this chapter provide a clear picture of the widespread and systematic nature in which members of the Indonesian security forces openly engaged in rape, sexual torture, sexual slavery and other forms of sexual violence


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throughout the entire period of the invasion and occupation”\[^{590}\]. In most cases, the acts took place openly in official places. Many of the victims were raped repeatedly during military operations. It was a commonly accepted practice for military officers to force young women, by threats of direct violence to themselves, their families or their communities, to live in situations of sexual slavery. According to victim testimony, such behaviour was not only tolerated by senior officers and officials, but even encouraged by them\[^{591}\]. Members of the Indonesian security forces were thereby able to force women into sexual slavery in military institutions or their homes openly, without fear of reprisal. The CAVR concluded that the offences committed enjoyed total impunity and victims had no possibility of escaping or seeking refuge. With this emphasis, the CAVR, again, established an important part of Timor-Leste’s history, unaccounted for by the Serious Crimes Regime. It thereby made an important contribution to making public and acknowledging that women were targeted during the occupation and armed conflict. Overall, the CAVR came to the conclusion that “rape, sexual slavery and sexual violence were tools used as part of the campaign designed to inflict a deep experience of terror, powerlessness and hopelessness upon pro-independence supporters”\[^{592}\]. This means of warfare and repression remained entirely outside the focus of the co-existent criminal justice process.

\section*{6.3.1.4.3 Torture}

The CAVR also established that torture was widely experienced in Timor-Leste during the internal armed conflict, the Indonesian occupation and in 1999. It was more frequently used in the period from 1974 to 1984, as compared to 1985 to 1998, when it mainly targeted specific individuals. The motives for torture varied depending on who committed it. During the period of internal conflict, FRETILIN made use of torture techniques in its wide-scale detention of UDT supporters. They were held in overcrowded, unsanitary conditions under severe food shortage. In detention, inmates faced brutal torture, including whipping, heavy beatings, burning, stripping, stabbings, and several forms of humiliation. Although aware of these practices, FRETILIN leaders failed to intervene. During the Indonesian occupation, torture pervaded the criminal justice system and occurred against persons that were considered to

\[^{590}\]Ibid., para. 10.
\[^{591}\]Ibid., paras. 12 and 13.
\[^{592}\]Ibid., para. 366.
endanger the security of the state. The CAVR estimates that Indonesian military and police, together with Timorese auxiliaries, were responsible for 82.4% of all reported torture and ill-treatment cases. It is believed that these forces saw in torture a means of militarising, policing, and controlling all aspects of life in Timor-Leste. The aim was to obtain confessions or information about FRETILIN members, locations of weapons, and political strategies. Torture was introduced as a means of threatening the population, in particular in areas inaccessible and unknown to the occupying forces. The Serious Crimes Regime was only in some cases able to give recognition to the phenomenon of torture, limited to the crimes under its jurisdiction (those of 1999). Out of the 87 persons who stood trial, only 16 were convicted on torture charges. Their indictments mention events in which victims were burnt with cigarettes or heated metal, cut with knives, and severely beaten. Although these indictments expose the historical truth of isolated incidents of torture, they do not mirror the severity of the use of violence. Victim recognition remains limited and the process only brings acknowledgment for select individuals. With the introduction of the prosecution strategy in 2003, torture fell entirely out of the focus of the SCU.

With its broad truth-seeking efforts, the CAVR clearly established an accurate record of the country’s past, clarifying uncertainties in relation to certain events and ending silence and denial concerning a contentious past. Through its detailed analysis, the CAVR established that as egregious as crimes committed in 1999 were, they were far outweighed by those committed during the previous 24 years of occupation. To come to its important findings, the CAVR employed the above mentioned means and methods of statement taking and inquiry into the causes of the conflict. Through this in-depth investigation, it was able to describe phenomena that had not been examined in their complexity and severity by the Serious Crimes Regime. It demonstrated the CAVR’s power to face political factions that continue to control transitional policy choices. By establishing the truth in relation to these aspects of Timor-Leste’s violent past, the CAVR made a major contribution in clarifying who was involved, which crimes were committed, and the effects these crimes had on Timor-Leste’s victims. Acknowledging these facets of the conflict was a first step towards coming to some form of acknowledgment.

593 Ibid., Part 7.7 – Arbitrary Detention, Torture and Ill-treatment, paras. 114-180.
594 Ibid., paras. 405-410.
597 The 1,400-1,500 lives lost in 1999 represent less than one percent of the death toll during the Indonesian occupation.
and reconstruction of an individual and collective memory of the past and thereby allowing victims to redefine their place in society. The CAVR’s final report significantly contributed to establishing the truth about the facts that fell outside the Serious Crimes Regime’s (limited) mandate. It thereby also highlights one of the Serious Crimes Regime’s major shortcomings – its focus on the violence of 1999 only.

Seen through a “complementary” lens to transitional justice, it was the findings of the CAVR that went beyond the historical record established by the court that highlighted the limitation and selectivity of the cases dealt with by the Serious Crimes Regime. The CAVR thereby clearly complemented the work of the Serious Crimes Regime in relation to the phenomena of the war crimes of murder, displacement, sexual violence, and torture. This highlights the importance of truth telling alongside or co-existent with criminal justice initiatives. It is agreed with Cumes that the truth revealed by the CAVR and comprised within its final report tells the story of the reality. It reveals the human condition of those who came forward and shared their experience. But, most of all, it dispels the lies about the past and of the powerful. In the case of Timor-Leste, it demonstrates the betrayal and deceit of a quarter-century of misinformation, indifference, and hostility tantamount to criminal complicity by the international community. It is this version of the truth that confronts impunity because it reveals its insidiousness.


6.3.2 Contribution of the CAVR to the right to justice

The CAVR was not originally designed to prepare as fully as possible individual cases. Rather, its complementarity was understood as such that criminal investigation and prosecution was clearly the responsibility of UNTAET, which was provided with significant funding and staffed by international investigators and prosecutors. Accountability and justice were to be provided by its court. Rather than duplicate the process of the Serious Crimes Regime’s mandate, the CAVR wanted to focus on the broader patterns of violations that had taken place during the relevant 25-year period\(^{600}\). Due to the limited capabilities of both Indonesia’s and Timor-Leste’s criminal justice systems, the CAVR’s mandate soon evolved into investigating offences that remained untouched by the criminal justice mandate.

The above-mentioned investigations by the CAVR of sexual violence, torture, and violence attributable to pro-independence groups are an example thereof. They confirm that, when operating simultaneously with criminal trials, truth commissions may provide essential complementary information on the root causes and motivation of the crimes. On the other hand, criminal investigation can lend credibility to the work of the commission and encourage those to come forward who have no prospect of being heard within the confined adversarial process\(^{601}\). For Timor-Leste, the cooperation between the CAVR and the Serious Crimes Regime meant that the CAVR had to guarantee a minimum standard of fair trial and that the findings made by the commissions would be sufficiently in-depth in order to be taken into account within criminal proceedings. While the vast evidence assembled and preserved allowed the CAVR to contribute to the (criminal) justice system, the official cooperation with the court raised expectations amongst those who came forward to testify that punishment would follow.

Expectations were in particular raised through a list the CAVR compiled and included in its final report. This list includes the names of individual perpetrators who were identified by witnesses and victims as having been involved in multiple serious human rights violations. The CAVR decided to publish the list after careful consideration of the following aspects\(^{602}\):

\(^{600}\) CAVR, Final Report Chega !, The Mandate of the Commission – Part 2, paras. 26-34.
\(^{602}\) CAVR, Final Report Chega !, Part 2 - The Mandate of the Commission, paras. 26-34.
- the limited degree of justice achieved by the Serious Crimes Regime in relation to the mass violations committed in Timor-Leste;
- the effects of public naming of an individual as a perpetrator in relation to the reputation, career and family life;
- the fundamental right of all persons accused of serious allegations that they be given an opportunity to respond to those allegations.\(^{603}\)

In criminal proceedings, the judicial standard for convicting someone – generally speaking – requires a level of proof that is beyond reasonable doubt. To date, there is no uniform practice in regard to the standard of proof mandatory for the truth commission to find an individual responsible for serious human rights violations. Most truth commissions demand at least a “balance of probabilities”, which requires that there is more evidence to demonstrate a fact to be true than not to be true. The CAVR based its findings on individual criminal responsibility on an evaluation of a so-called “civil standard on the balance of probabilities”. This meant that the commission had to determine whether the available evidence was sufficient to establish that human rights violations had occurred, and whether particular individuals or institutions were responsible and accountable.\(^{604}\) It thereby went further than merely establishing the truth of facts. It also considered the facts it had established in relation to allegations made against certain perpetrators or groups. From these considerations, it came to its conclusions on individual and institutional responsibility. To ensure that the findings did not lead to undefended allegations, the CAVR established certain due process requirements. These included the right of the person who allegedly committed a serious crime to be informed about the allegations made against him and that the commission intended to publish his or her name in its final report.

Before it named persons suspected of crimes within its final report, the CAVR applied quasi-judicial proceedings. Public naming – and shaming – was only undertaken if the accused was given the opportunity to make explanations in relation to the accusation made against him. When acts were concerned that related to events that took place more than 25 years ago, this was a rather difficult endeavour. In addition, contacting those residing outside Timor-Leste was extremely difficult. As regards to those individuals to which the CAVR could sufficiently establish that the crime was committed it has, in accordance with its powers under Section 3(1)(e) of Regulation 2001/10, provided its entire list to the Prosecutor General of Timor-

\(^{603}\) Ibid., para. 34.

\(^{604}\) Ibid., para. 27.
Leste. In relation to these persons, the CAVR included a recommendation that each individual named should be subject to further investigation and, if warranted, prosecuted. It forwarded the very same list to the Office of the President of the Republic with a recommendation that all of those persons named should be prohibited from holding public office. The aim of the CAVR was that the identified persons would be brought to trial within a national, international, or foreign jurisdiction, clarifying the allegations and the criminal responsibility of the person within criminal due process.

The detailed investigation of the crimes committed between 1974 and 1999, combined with discussions on those responsible for their commission, distinguishes the CAVR from many other truth commissions. It was able to demonstrate that the offences committed before 1999 had their roots in institutionalised practices of the Indonesian state and were part of an overall strategic purpose of breaking the resistance movement. These findings underline the failure of the Serious Crimes Regime to address one of the major aspects of Timor-Leste’s violent past. They highlight that the Serious Crimes Regime was a short-term endeavour with a legacy of overwhelming unfinished business. The CAVR therefore called for further prosecution, as it was of the opinion that those who planned, ordered, committed, and are responsible for the most serious human rights violations have not been brought to account. It recommended that the Serious Crimes Unit and Special Panels in Timor-Leste have their respective mandates renewed by the United Nations and their resources increased in order to be able to continue to investigate and try cases from throughout the period 1975-99. More precisely, it called for the criminal investigation and prosecution of the following historical cases:

- The execution of FRETILIN-linked youth in Manufahi on or around 28 August 1975 by UDT-linked perpetrators.
- The executions of UDT and Apodeti-linked prisoners by FRETILIN-linked perpetrators in Aileu, Maubisse, and Same in December and January 1976.
- The reported massacre of civilians in Kooleu Village in Lautém District by FRETILIN-linked perpetrators in January 1976.

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605 Ibid., para. 37.
- The executions of FRETILIN members and associates by FRETILIN members and associates during party divisions in 1976, and especially 1977.
- The massacres of civilians in Dili on the day of the full-scale Indonesian military invasion, 7 December 1975, and killings on following days.
- The Indonesian military encirclement and annihilation campaigns of 1977-79.
- The massacres of civilians by Indonesian security forces that occurred in and around Kraras Village, Viqueque District, from 1983.
- The policy and practice of removing civilians to be held in captivity on the island of Ataúro from the early 1980s.
- The Santa Cruz Massacre of 12 November 1991, and subsequent detention, torture, and reported killings.

With these strong calls for justice, the CAVR made a major contribution to re-opening the discussion on the necessity of further criminal prosecution and the possible ways to do so. This recommendation corresponds to the desires expressed during community discussions organised by the Post-CAVR secretariat, the Serious Crimes Investigation Team (SCIT), the UN Human Rights and Transitional Justice Unit from UNMIT, and local NGOs in September and October 2009. Such outreach work demonstrates the importance of public debate initiated through the findings of a truth commission and the importance of this complementary highlighting what has yet to be accomplished in relation to the victim’s right to justice.

Through its in-depth quasi-legal investigation into the conflict and its participating perpetrators, the CAVR clearly took a complementary and holistic approach to transitional justice and victim’s right to justice. However, more than 8 years since the termination of the CAVR’s work, the reluctance of the government of Timor-Leste and the international community to make use of the evidence confirms local perceptions of injustice. Expectations once again evolved into disappointment and resignation. If the evidence gathered by the CAVR will not be used in criminal trials, the CAVR will be transfigured into a “substitute” or “alternative”, rather than complementary mechanism, to the criminal justice process. This would be problematic as the important steps taken by the CAVR were only in a position to preserve social memory and at best make the findings available to further criminal

608 The CAVR itself favoured the establishment of an international criminal tribunal in its recommendations; see CAVR, Final Report Chega!, Part 11 - Recommendations, para. 7.2.
609 UNMIT Newsletter, Issue 5, December 2009
investigations. A credible criminal justice process is now needed to follow up on this important documentation of past atrocities and to hold those responsible for serious crimes accountable.
6.3.3 Contribution of the CAVR to the right to reparation

The CAVR presented itself as a truth commission that in all aspects of its work sought to have a reparative effect. It encouraged victims to come forward and make recommendations in relation to reparation after giving testimony or at the end of public hearings. Victims reported unimaginable losses in the form of loss of a family member, loss of the home and land, brutal forms of torture, displacement, persecution, the exclusion from community and social life, denial of freedom of speech, just to name a few. Victims communicated their expectations and shared with the commission clearly and repeatedly their most apparent needs. By providing victims with this opportunity, the CAVR became the prominent transitional justice mechanism for reparations.

6.3.3.1 The Urgent Reparations Programme

In Timor-Leste, nearly all communities and families have undergone some form of victimisation during the 25 years of occupation and the following struggle to independence. Due to the high level of destruction and poverty, with areas in which most of the population may count as victims, a scheme in which individual reparation claims could have been pursued during the operational phase of the commission would have overstrained its abilities. Yet, to respond to the most urgent needs expressed by victims, the CAVR set parts of its budget aside to commence a limited programme to provide “urgent reparations” and secured additional funding for this programme from the World Bank’s Community Empowerment Project. This so-called “Urgent Reparations Programme” was available to victims and family members of victims of killings, disappearances, detention, torture, rape, and other forms of sexual violence because of their severity and the longevity of their suffering. Forced displacement and destruction of property were not included because they affected such a large percentage of the population. Between September 2002 and March 2003, approximately USD 166,000 was made available to 712 victims (516 men, 196 women) who gave testimony during hearings at national, sub-district, and village levels. Besides providing monetary compensation to victims, the programme actively referred victims to existing services.

conducted healing workshops, and provided funds to local NGOs to implement a collective reparations programme in severely affected communities.\(^{611}\)

### 6.3.3.2 The CAVR’s recommendations in relation to a national reparations programme

When the CAVR presented its final report to the president of Timor-Leste on 31 October 2005, it made several detailed recommendations “to implement a programme of reparations for the most vulnerable victims of human rights violations based on national legislation”\(^ {612}\). It called on Indonesia, Timorese political parties, FALINTIL, and the international community, who gave backing to Indonesia, to contribute – at least financially – to such a reparations programme. With the highest proportion of institutional responsibility for human rights violations falling on the shoulders of the state of Indonesia, the CAVR regarded Indonesia as having the “moral and legal responsibility to repair the damage caused by its policies and state agents”\(^ {613}\). It was aware, though, that “to gain reparations from an invading nation is one that may take time” and therefore called upon Timor-Leste to “step into the void”\(^ {614}\). Through an analysis of the role of the international community and the very nature of the invasion and occupation, the CAVR concluded that a variety of powerful actors abroad aided and abetted Indonesia’s blatant violations of international law. It confirmed that Western governments provided Jakarta with many billions of dollars’ worth of weapons, military equipment and training, and economic aid, combined with valuable diplomatic cover. This support maintained the illegal occupation of Timor-Leste and indirectly allowed violations to take place. It therefore placed the international community and multi-national business corporations under an obligation to finance reparations to victims based on the principle of international responsibility recognised in the international customary law of torts\(^ {615}\).

Accordingly, the CAVR recommended that the reparations scheme be jointly funded by fixed allocation (guaranteed by legislation) from the Timor-Leste national budget, reparations by the state of Indonesia, and reparations by Indonesian business companies, as well as from the

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\(^{611}\) Ibid., para. 12.4.

\(^{612}\) Ibid., para. 12.1.

\(^{613}\) Ibid., para. 12.3.

\(^{614}\) Ibid., para. 12.3.

Permanent Members of the Security Council – China, France, Russia, United Kingdom, United States of America. It also welcomed contributions from international agencies and NGOs, based on the principle of social justice, including special funds for victims of human rights violations, such as the United Nations Fund for Victims of Torture. The government of Timor-Leste immediately rejected these recommendations, claiming that they would be undiplomatic and not fair.

6.3.3.2.1 Reparation for the most vulnerable victims

The CAVR proposed a national reparations programme that was characterised by a distinction between victims, vulnerable victims, and most vulnerable victims. It made this distinction in awareness of Timor-Leste’s limited financial resources and of what can be expected from international donors. It acknowledged in its final report that “all East Timorese people have been touched and victimised by the conflict in one way or another”, but regarded only the most vulnerable as eligible for reparation. The aim was that priority would be given to the most vulnerable victims, often on the margins of their communities. These should gain access to basic services and opportunities provided to the general community. By doing so, it wanted to contribute to healing, national reconciliation, and a further reduction in the possibility of violence. “Most vulnerable victims” were defined according to the human rights violation suffered as follows:

- Victims of torture are those who were detained, tortured, and continue to gravely suffer the consequences of the torture they experienced.
- People with disabilities due to gross human rights violations are those who have become permanently physically or mentally disabled, either totally or partially, as a consequence of the conflict. Examples are victims who suffered amputations, lacerations, loss of body parts, gunshot wounds; victims with bullets or shell fragments in their bodies, or who have permanent problems due to severe beatings and torture which have left them totally or partially disabled; or victims with disabling mental health problems due to past violations.

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619 Ibid.
- Victims of sexual violence are those women and girls who were subjected to acts such as rape, sexual slavery, forced marriage or other forms of sexual violence; and boys and men who suffered sexual violence.

- Widows and single mothers are women whose husbands were killed or disappeared and who, as a result, are the primary breadwinners for their families. Also included here are women whose children were born out of rape or sexual slavery and consequently became single mothers.

- Children affected by the conflict are defined as children who suffer from disabilities due to gross human rights violations, whose parents were killed or disappeared, who were born out of an act of sexual violence whose mother is single or who suffer psychological damage. Children are only eligible for reparations if they were 18 years of age or younger on 25 October 1999.

In its detailed proposition, the CAVR recommended that a national reparations programme first list and register all victims who had come forward to the CAVR and prioritise them according to the criteria set out in its reparations policy. It then envisaged an additional two-year registration phase, through which it wanted to reach out to victims that were not in a position to participate in the CAVR’s truth-seeking process⁶²⁰. The aim was to engage grassroots facilitators at the district level to help connect victims to the implementing victim assistance services.

### 6.3.3.2.2 Forms of reparation recommended by the CAVR

The CAVR’s final report referenced and recognised all forms of reparation covered by the “Basic Principles and Guidelines”⁶²¹, which were themselves approved by the UN Human Rights Council in the same year the CAVR’s final report was made public (2005). The report explicitly called for compensation, restitution, rehabilitation (in terms of provision of medical and psychological care), and the fulfilment of significant personal and community needs. The aim was to empower those who have suffered gross human rights violations to take control over their own lives and to free themselves of both the practical constraints and the

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⁶²¹ UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Resolution 60/147, UN Doc. A/RES/60/147, 16 Dec 2005.
psychological and emotional feelings of victimhood.\textsuperscript{622} It more generally also called for the restoration of dignity, establishment of the truth, and the reassurance of non-repetition, and measures that contribute to the maintenance of a stable society\textsuperscript{623} directed at individuals or, collectively, at groups of victims.\textsuperscript{624} These measures should be determined in consultation with victims and can take the form of symbolic recognition and/or material support for activities or items identified by victims together. Symbolic reparation was intended through memorialisation, commemoration ceremonies, exhumations and reburials, or marking and honouring of mass graves.\textsuperscript{625} Educative measures should include the development of popular literature, music, and art for remembrance to promote a culture of non-violent resolution of conflict.\textsuperscript{626} In sum, the CAVR based its understanding of reparation on international best practice, reflecting the developments at the international level at the time. It also aimed to locate reparation within a broader transitional justice framework, underlining the importance of complementary continued truth seeking and criminal accountability. An ambitious agenda for reparation had been set out.

The CAVR had also envisaged the creation of an Institute for Memory to implement and coordinate the national reparations programme in cooperation with a range of relevant partners, including the Ministry of Labour and Reinsertion, Ministry of Health, Ministry of Education, and service delivery NGOs and church-based organisations working at national and district levels. It was meant to engage grassroots “social workers” or facilitators at the district level and an advisory board consisting of representatives of victims and victim groups and organisations and individuals with high standing in the community for protecting the rights of victims.\textsuperscript{627} Under the draft laws, the institute would be the central body to assist the Government in designing the reparations and the modalities for their provision. It would be mandated to approach victims and relevant organisations, to identify their needs, and to respond to those needs.\textsuperscript{628}

\textsuperscript{622} CAVR, Final Report Chega !, Part 11 - Recommendations, para. 12.6.
\textsuperscript{623} Ibid., para. 12.7.
\textsuperscript{624} Ibid., para. 12.2.
\textsuperscript{625} Ibid., para. 12.7.
\textsuperscript{626} Ibid., para. 12.12.
\textsuperscript{627} Ibid., para. 12.13.
\textsuperscript{628} See Art. 12 (1) and 13 (1)-(2) of Draft Law No. 19/11 on a National Reparations Framework of 11 May 2010.
To date, the CAVR remains the only transitional justice process that has provided reparation to victims of serious crimes. In the immediate aftermath of the conflict, victims were struggling in the weak economy of Timor-Leste. The Urgent Reparations Programme was a much-needed step and USD 200 can be regarded as a sincere contribution to overcome the most pressing needs. In addition, its final report outlined in detail a reparations scheme for the “most vulnerable victims”. It remains unclear according to which criteria the proposed national reparations law will be able to identify and distinguish between the individual levels of suffering of victims. A positive aspect of the CAVR’s recommendations is its aim of engaging foreign states and business companies in funding a national reparations programme. The CAVR thereby underlined its findings in relation to the moral, if not criminal, liability of these foreign actors for the violations committed in Timor-Leste between 1974 and 1999.
6.3.4 Conclusion

The extensive mandate of CAVR made a major contribution to enforce victims’ right to truth. It allowed for broad community engagement and victim participation, a prerequisite to individualising truth-seeking efforts. Through its focus on the community, the CAVR provided a strong bottom-up approach. It thereby enabled statement-gathering opportunities and brought affected groups and communities together to develop their own narratives. The CAVR thereby gave meaning to the multi-layered experiences and allowed victims to actively seek what the South African TRC called a “personal” and “narrative truth”. These hearings were then used to distribute knowledge on human rights violations within the wider community. Based on quantitative and qualitative data, the CAVR analysed carefully and in-depth the patterns of past violence and unearthed the causes and consequences of these destructive events. It clearly elucidated contextual and structural elements of the violence, the historical underpinnings, and the role of various social and governmental institutions. Due to the high level of involvement of victims, perpetrators, the community, and national leadership, it also made a major contribution to helping society understand the underlying causes of conflicts or widespread violations of human rights. It thereby assisted society as a whole in moving forward, which is of utmost importance for embedding and reflecting victims’ individual experience in the broader societal context.

The CAVR’s contributions to the victim’s right to justice become in particular evident in its findings in relation to its overlapping (in relation to the offences committed in 1999) and exceeding (in relation to the offences committed between 1974 and 1999) “jurisdiction”. In relation to the crimes committed in 1999, the CAVR was, through its truth-seeking process, in a position to highlight the selectiveness of criminal trials held. It was able to demonstrate that those who bore the greatest responsibility had not been brought to account. In relation to the offences committed between 1974 and 1999, it was able to highlight that these far outweighed those committed in 1999 and that justice is still required in relation hereto. The hope is that its detailed account will provide the basis for further discussion on criminal accountability mechanisms. If not, the participation enabled and healing promoted will be undermined by insufficient recognition of truth, inadequate reparation, and lack of follow-up.
6.4 The Community Reconciliation Processes and their effects on victims’ rights

The Serious Crimes Regime and the CAVR were designed as interrelated transitional justice mechanisms. Although premised on very different concepts of justice, they functioned simultaneously and ran parallel to one another, interlinked via the Community Reconciliation Process (CRP). As indicated, this process was created to respond to community needs, after the consultative work of the CAVR Steering Committee had highlighted that communities were most affected by the conflict. Militia members and resistance fighters were often recruited from the same villages and sometimes even the same families; hence, here the need for mediation and reconciliation was particularly acute. It was recognised that sending people to jail would only postpone the issues that have to be resolved before members of the community can continue to live side-by-side. To provide for much-needed interaction and communication, the CAVR designed the Community Reconciliation Process (CRP), a process based on indigenous practices relating to reparation and reconciliation. It thereby introduced an official, authoritative, and restorative justice mechanism into Timor-Leste’s transitional justice framework for “less serious crimes”. What the drafters of UNTAET Regulation 2001/10 created was a process linking adversarial prosecution to victim–offender mediation, the successful completion of which would grant immunity to the perpetrator in regard to the offences dealt with. Conceptually, this process was confined to reconciliation between East Timorese deponents and their communities. It could not compel Indonesian participation.

6.4.1 Traditional justice

In most cases in which traditional justice mechanisms have become part of the official transitional justice agenda, they were inspired by underlying cultural, spiritual, and reconciliation practices and combined with modern human rights standards. Within Timorese culture, various traditional dispute resolution mechanisms had been practiced for centuries and bore the potential for much-needed community mediation. A study of local mediation practices by the Peace and Democracy Foundation identified 63 different forms based on

different dialects and places. A more precise concept of the community reconciliation procedures was developed during the Steering Committee’s consultation process conducted between September 2000 and January 2001. During the consultations, it became evident that local mechanisms drew legitimacy from the inclusion of traditional leaders (or those deemed to be so by the incumbent political authorities) who retained considerable authority and influence over village life in relation to a range of civil and criminal matters. These elders, known as lia nai (lit.: keeper of the word), were still considered men of law who play an important role as both facilitators and adjudicators. Participants expressed the view that lisan ceremonies also respond to a local understanding of the individual as a member of community and therefore engage the interests of wider family groups and communities. The underlying belief is that if an individual has been wronged, other members of that person’s kin group share in the injustice. Because of this wider communal context of injustice, local tradition aims to achieve public demonstrations of reconciliation which then form a crucial part of re-establishing or maintaining social stability. This intact tradition provided a means for the CAVR to open up the commission’s work to the local community and to engage with and seek support from the village elders. In addition, it bore the potential to provide the population with an opportunity to broadly participate and contribute to dispute resolution.

What was introduced subsequently was a mechanism based on a rich cultural tradition of dispute resolution and customary systems of law that had been used to deal with criminal and civil disputes and was well established in Timor-Leste before the arrival of the Portuguese in the 16th century. This local tradition could maintain its importance, as it had remained untouched by and inaccessible to both the Portuguese colonial rule and the Indonesian administration. Both only recognised their formal justice systems as legitimate, which allowed communities the continued use of traditional mediation to solve disputes on a local level without foreign engagement. The fact that most of the population was illiterate effectively prevented the people from understanding and participating in the colonial legal systems. Rather, formal justice was perceived as an instrument of selective oppression rather than a

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632 Ibid., paras. 20-22.
means of protection of the rights of the people. For many centuries, traditional mechanisms therefore provided the only effective medium to resolve disputes for most of the population, particularly those living in remote rural areas.

The *lisam* used within most CRPs was based on the tradition of *nahe biti boot* (lit: spreading the large mat). The process of spreading the mat symbolises the efforts to discuss and settle issues among the interested parties through consensus. The idea is that matters that are discussed and settled on the mat (*biti*) are not brought into the community as they could lead to disharmony. From a traditional understanding, reconciliation is placed in the context of the two ends (*hun* and *rohan*). It is seen as a process conducted to heal past mistakes (*hun*) and aims to bring *rohan*, living in harmony. Admitting past mistakes constitutes the beginning of the process. Its goal is *rohan*, interpreted as “reconciliation”, which was a new term to many East Timorese. These ceremonies usually commence with the gathering of the parties. A mat is then spread, on which the parties take their seats. This spreading of the mat formally marks the opening of the process of dispute resolution. In the tradition of *nahe biti boot*, the mat should not be rolled up again until a resolution has been reached. The procedure is based on an understanding that the participant’s ancestors, who are summoned at the beginning of the ceremony, are witnesses to the *nahe biti boot* ritual and validate the proceedings. Their presence makes the process binding, and any failure to accept the outcome is believed to have serious consequences. Although the rituals and procedures vary significantly between different regions of Timor-Leste, the basic procedure of *nahe biti boot* is a cultural constant across Timor-Leste.

By integrating *nahe biti boot* into the work of the CAVR, the CRP successfully introduced an authoritative dispute resolution mechanism that appeared to command the respect of many people. It put perpetrators through long, extremely uncomfortable rounds of questioning and shaming. At the same time, it also symbolised the joyous end to community divisions and suffering. The goal of the procedure involved moving through the heavy and dark evidence of

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what had taken place to a community celebration of the resolution of past divisions. It resulted in official agreements with the purpose of facilitating peace and stability that required on-going commitment to the agreement from all parties. Implementing this traditional process in the CAVR earned the commission significant local credibility. It accorded important formal roles to village chiefs and adopted traditional ritual and ceremony as an active and significant supplement to the legislatively mandated mediation procedures. Foremost, it provided for participation by the entire local community.

6.4.1.1 Participation of victims in the CRP

The CRPs became an important site for expression. They often attracted several dozen to many hundreds of persons. Thousands were provided with an opportunity to tell their stories and listen to the suffering of others. It is estimated that approximately 30-40,000 community members, predominantly male, participated in the CRP hearings. Research undertaken by Pigou revealed that attendance at the CRP community hearings was dependent on accessibility and means of communication and preparation within the community concerned. In addition, social and economic survival remained the priority for many people, especially in poorer rural areas. Time spent attending hearings meant time spent away from the fields and the other necessities of daily survival, such as fetching water or collecting firewood. Pigou explains these limitations with the poor infrastructure of Timor-Leste and the many scattered villages in the remote sub-districts, forcing the CAVR to prioritise. As a consequence, the CRP teams had a limited reach, and securing widespread community participation was a consistent challenge throughout field operations. Nonetheless, in those remote areas where CRP could be conducted, the CRP often remained the only experience of any official

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640 Ibid., 48.
mechanism since the departure of the Indonesian military and thus the only possibility of integration into the transitional justice framework.  

6.4.1.2 Introducing collective victimhood and community justice

In suco justice, committing a social transgression or crimes is perceived less as an act of an individual against an individual. It is rather a community problem affecting the well-being of many. In order to re-establish relationships within the community, a crime or dispute generally attracts the interest of a large number of people who are anxious to establish what has gone wrong. In particular, in the suco environment, where people live in close proximity to one another and to each other’s relatives for their entire lives, the promotion of peaceful relations between individuals and families is of utmost importance. From this understanding, the individual does not perceive his or her interests as separate from the larger group, clan, or community of which he or she is part. Based on this understanding, which defines individuals’ (including victims’) identity as closely entwined with the well-being of the community, the CRP gave preference to community objectives. From a western viewpoint, this seems like a contradiction or conflict demanding from the individual victim a “sacrifice” of what they really want in such a situation. Within Timor-Leste’s society, the self-identification as a victim relates to the larger group, without contradiction or conflict.

6.4.2 Contribution of the CRP to the right to justice

Section 22 of UNTAET Regulation 2001/10 mandated the CAVR to facilitate CRPs in relation to acts committed “within the context of the political conflicts in East Timor between

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25 April 1974 and 25 October 1999”. However, when the Serious Crimes Regime narrowed its focus exclusively on the offences committed in 1999, the CRP, contrary to its broader temporally limited mandate, was required to deal with “less serious crimes” committed in 1999 only. Otherwise, the concurrence of both mechanisms would have led to the unsatisfactory result that the CRP concluded that a serious criminal offence had been committed but the OGP would not have been in the position to deal with the offence due to its conflicting temporary mandate.

The CRPs were entitled – through court order – to impose obligations like the transfer of labour or property. The locally sanctioned process of nahe biti boot demanded a degree of accountability designed to achieve a final status of peace and mutual acceptance. Such an approach to representation offered a means of achieving a non-violent resolution of the conflict and more durable solutions to the domestic reconstruction of state and society. In the nahe biti boot process, this required the acknowledgement of the source of the dispute that generated the conflict in the first place and the making public that this fault is to be redressed. The process thereby included ideas of “shaming” but also “reintegrating” offenders and called on the participation of members of the relevant communities of care to promote a stronger vision of rehabilitation, such as favoured by Braithwaite. By integrating a mechanism to solve disputes and to restore balance within the community, the CRP clearly fostered the local understanding and role of political and civic community after the division and fragmentation and was by no means a neutral process. Its focus was clearly on the offence and the offender as well as on censuring past and changing future behaviour. It was a systematic means of addressing wrongdoings that emphasised the healing of wounds and rebuilding of relationships. The aim was to react with sanctions or outcomes that are proportionate and make things right in individual cases. This required the CAVR to shift away from putting victims in the centre towards putting the deponents and their account of their experiences, personal worldviews, and particular sensibilities in the centre.

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In addition, the CRPs were closely linked to the criminal justice system through its referral mechanism. The referral mechanism was originally designed and promoted as a mechanism to bring those to account within the criminal justice system whose crimes were so severe or whose motivation to resolve the conflict was so limited that other means of accountability (through truth seeking and reparation) were not viewed as sufficient means of redress.\textsuperscript{649} This understanding of the process was enhanced through the CRP’s appearance as a mechanism that had to be formalised in order to produce credible evidence in case of further prosecution. Before conducting a CRP, the panel explained to participants the nature of the CRP as a traditional mechanism with potential judicial outcomes. At the beginning of each CRP, legal provisions were read with significant solemnity. The panel thereby ensured that participants were familiar with formalities as well as their rights and privileges. These included an explanation of the procedures, of consequences of not telling the truth, and of the CRP’s relationship with the OGP. In addition, to create a quasi-judicial environment, the CRP presented itself as an official and authoritative institution, whose mandate was derived from the national constitution.\textsuperscript{650} If the CRP revealed cases involving crimes that were too serious, this matter was publicly discussed and explained to the audience. For many participants interviewed, this formal and authoritative aspect of the CRP and in particular its connection to the OGP and courts were of high importance. As Burgess rightly highlights, by doing so, the “quasi-legal” programme of CRPs “has been the only visible face of the justice system at village level”\textsuperscript{651}.

\textit{Promoting justice for serious crimes}

The drafters of UNTAET Regulation 2001/10 had envisaged three stages of possible interaction and referral of cases from the CAVR to the OGP. Firstly, a referral could follow the initial statement-taking process, in which the CRP Statements Committee considered the nature of the crime and the total number of acts committed and the deponent’s role. Only

\textsuperscript{649} Lia Kent, \textit{Unfulfilled Expectations: Community Views on CAVR’s Community Reconciliation Process} (Judicial System Monitoring Programme 2004), 21.

\textsuperscript{650} The establishment of the Commission was recognised in Art. 162 of the Constitution of the Democratic Republic of Timor-Leste.


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offences such as theft, minor assault, arson (other than that resulting in death or injury), the killing of livestock, or the destruction of crops were considered appropriate cases to form the subject of a CRP under the condition that they did not amount to crimes against humanity or war crimes. In regard to the deponent’s role, those who organised, planned, instigated or ordered the crime were not admitted to a CRP. In this case, the CAVR forwarded its decision with all supporting documents to the OGP. Overall, during its operational period (from July 2002 to March 2004), the CRP received a total of 1,541 voluntary statements that it considered to be appropriately dealt with within a CRP. In 85 cases, the CAVR was *a priori* of the opinion that serious crimes had been committed.

Secondly, a referral from the CAVR to the OGP was also foreseen in cases where deponents did not take part in the CRP or refused to answer questions or credible evidence was submitted that the deponent was involved in more serious offences. In these cases, the CAVR was bound to make a record of the evidence and stop proceedings and refer the matter to the OGP. It is estimated that in approximately 32 cases the CRP revealed that the deponent/s was/were involved in serious crimes. Lastly, a referral from the CAVR to the OGP was also foreseen in cases in which the CRP was successfully conducted but the deponent did not fulfil the so-called Reconciliation Agreement. In theory, the referral of the case to the OGP meant that the deponent was again open for investigation in regard to the wrongdoings reflected in the agreement.

By March 2004, 170 cases had been referred from the CAVR to the OGP. Two months later, in May 2004, when the Serious Crimes Regime had finally reached a sufficient staffing level and had shifted its prosecution strategy from low-level perpetrators to senior leaders, the UN ordered it to begin down-sizing immediately and to complete its investigations. From then on, the SCU completed all on-going investigations (the deadline for completion was 30 November 2004) and did not initiate any new proceedings. Those cases that had been referred from the CAVR were neither factored into the SCU’s investigations nor included in its

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657 Ibid.
completion strategy. Although evidence was at hand, it was basically put *ad acta*\(^{659}\). By May 2005, all work had to be ceased. This meant that out of the 170 cases referred none was further investigated by the SCU or the OGP.

These developments clearly highlight that, while the CAVR and Serious Crimes Regime were designed to complement the work of each other, neither their creation nor their closure was coordinated. They exemplify how the CRP, as a complementary mechanism, was based on false expectations on the functioning of the Serious Crimes Regime. The CRP was based on the expectation that the criminal justice system would become fully operational and be in a position to deal with those cases referred from the CAVR to the OGP\(^{660}\). The failure to do so led to a “justice deficit”, where in particular those people who admitted serious crimes faced no justice at all from either the CRP or the OGP. It led to the absurd consequence that a great number of serious crimes perpetrators had to make less penance to their community than perpetrators of smaller crimes. This apparent “justice deficit” may in the long run significantly undermine the important reconciliation work already carried out. Those that were involved in the CRP will perceive the CAVR as failing to pursue promised prosecutions and re-enforce respect for the rule of law\(^{661}\). This is of particular concern for Timor-Leste’s long-term reconciliation.

Research undertaken by Kent confirmed that many victims regarded the CRP as a “stepping stone” towards the goal of retributive justice\(^{662}\). As within other post-conflict settings, the threat of prosecution provided an incentive to participate in the CRP\(^{663}\). The CRP successfully dealt with more than 1,300 cases of less serious crimes, including assault, arson, theft, and destruction of property, within its voluntary process, which was both public and participatory. It thereby provided a solid base for the reception and re-integration of former opponents into their community. However, due to the weak criminal justice system, the cases referred to the OGP remain unheard. This allows many of those who committed serious crimes to go


unpunished while less serious offenders voluntarily subjected themselves to what was often a humiliating process before the CRP. The inability to bring those perpetrators to account that benefit from the referral to the OGP causes bitterness within local communities. It associates the CRP with negative perceptions due to its referral of cases with no prospect of prosecution. Within today’s political climate victims feel that their emotional injuries have not been healed and that their desire for prosecution and punishment is unlikely to be addressed. The present government is too distracted and divided to address the matter seriously. Consequently, there is little scope for any immediate relief or improvement.664

6.4.3 Contribution of the CRP to the right to truth

In most cases, CRP hearings lasted several hours and sometimes even a few days, involving the majority of the community, its leaders, and up to 55 deponents. Sometimes entire militia groups were involved. During the hearings, the focus was on the individual and the offence under discussion and the events that challenged community reconciliation. In the hearings, offenders had to give a statement disclosing fully their participation in the conflict. The CRP thereby provided deponents with a platform and an opportunity to admit to victims and their peers the details of what they had done but also to clarify what they had not done. This was of particular importance given that the conflict had often been chaotic and information had been distorted, exaggerated, and invented and as there was no other way, namely, through criminal trials, for deponents to recount their version of the truth. By doing so, they were able to fight rumours that had become a substitute for the truth and offer a detailed rebuttal to allegations made against them. In this way, deponents were able to limit the accusations against them to those based on fact.

Moreover, the CRP provided victims and other members of the public with the opportunity to ask questions about the acts committed by the perpetrators and make comments. By doing so, the CRP provided victims with a means to investigate facts surrounding the conflict and the offences committed against themselves and their relatives – at least in relation to the offences committed in 1999. CRPs thereby attempted to settle these historical divisions. Individual cases became a gateway through which information and opinions on wider issues of concern to the community could flow. For many, the CRP provided the first opportunity to speak publicly about the conflict and the impact it had on community life. Hence, many victims regarded the CRP hearings as de facto truth-telling exercises about serious crimes cases. They viewed the CRP as an opportunity to gather evidence and establish the “truth” in terms of facts and information that may be useful within a court of law.

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667 To avoid one-sided discussion and maintain a certain order, participants were given equal turns to speak.
668 Lia Kent, Unfulfilled Expectations: Community Views on CAVR’s Community Reconciliation Process (Judicial System Monitoring Programme 2004), 21.
The facts established in the CRP then formed the basis of the so-called Reconciliation Agreement, which described the acts perpetrated by the deponent, information about violations that the deponent had neglected to include in his original statement, and a description of the acts of reconciliation determined in the hearing. The Reconciliation Agreement thereby formed an authorised version of an individually established truth. Unfortunately, the reconciliation agreements and the negotiations leading to it were not made public, which left their record widely unknown.

For victims and perpetrators (both referred to in the CRP as deponents) the CRP provided an unprecedented opportunity to re-engage with their communities. By telling their stories, both victims and perpetrators established a “dialogue truth” or social truth, a truth of experience that is established through interaction, discussion, and debate. Perpetrators, victims, and other participants are of the opinion that the CRP contributed significantly to the maintenance of peace in their communities and to openly settling past divisions. One reason given for the positive response is that the CRP provided a forum for an open exchange of information. The process helped victims to understand the motivation and circumstances surrounding the actions of the perpetrators. Forgiveness was described by many as an essential outcome of the process, resulting from the strength of the confession by deponents. In this regard, many victims agreed that it was not the level of punishment that was important for forgiveness. The ability to probe and question was more important. Victims wanted to feel that the admissions made were complete, did not shirk responsibility, and were true and heartfelt.

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672 Christopher Totten, “The International Criminal Court and Truth Commissions: A Framework for Cross-Interaction in the Sudan and Beyond”, Northwestern Journal of International Human Rights 7 (2009): 14; Totten estimates that a further 3,000 perpetrators would have participated in the CRP if it had continued.
673 CAVR, Final report Chega!, Part 9 – Community Reconciliation, para. 114.
6.4.4 Contribution of the CRP to the right to reparation

The concept of reparation in Timorese culture was not simply a western concept introduced through UNTAET and based on international law. Anthropologists have commented on the central role of reparation in traditional Timorese concepts of justice, according to which any violation should be responded to with a measure to correct the offence. In Timorese custom, the obligation to provide reparation by a person who does wrong is called *kasu sala*. This involves a traditional mediation process that establishes who has been wronged by whom and what compensation should be given to the wronged party, with the victim’s family accepting the confession and requesting a payment (which may be compensatory or symbolic). *Kasu sala* was integrated into the design of the CRP and successfully combined with *nahe biti boot*. To victims, it opened an unprecedented way of negotiating individual reparation. The CRP Panel was in a position to propose acts of reconciliation (Reconciliation Agreements), which could include community service, reparations, a public apology, or other acts of contrition.

If the perpetrator carried out his or her obligations, no referral took place and the deponent benefited from immunity from civil or criminal action.

Through the Reconciliation Agreement offenders could be obliged to provide compensation, return of goods, livestock or community service such as the donation of labour in the reconstruction of homes and buildings destroyed, or the improvement and repairing of gardens, school buildings, and churches. In terms of symbolic reparations, the need for acknowledgement of the victims’ suffering was emphasised. Looking at the outcome of the Reconciliation Agreements, acts of reconciliation that victims asked perpetrators to undertake were, in general, significantly less onerous than the CAVR had expected. Initial concerns existed that perpetrators would be required to undertake acts of reconciliation beyond their capacity. The opposite was true. Sanctions required by victims and communities were far more lenient than expected. In many cases, victims did not ask for more than participation in the hearing and a full and heartfelt confession and public apology. Examples of acts that the perpetrators were required to perform included giving traditional beads, providing the victim with an animal, clothes, or other objects, helping to repair the victim’s house, and working for specified periods on community projects such as the repair of a

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674 Ibid., Part 12.5, Recommendations makes reference to *kasu sala*.
675 See Section 27.7 and 27.8 of UNTAET Regulation 2001/10 of 13 July 2001, UNTAET/REG/2001/10.
school, church, or road. In many cases, perpetrators were not asked to undertake any action at all: a complete acknowledgement of the truth and a public apology were held to be sufficient.\textsuperscript{677}

The explanation for this relative leniency is complex and not entirely understood, but interviews conducted by Kent and Burgess revealed that some saw the declaration alongside a “shaming” in front of the community as sufficient. In other cases, there was a genuine acknowledgment that the deponent was only a “small person” and that those centrally responsible for all the violence were senior Indonesian military officers. In other cases, there was recognition of the common perception that the vast majority of perpetrators remain acutely poor and lack the ability to pay any substantial compensation\textsuperscript{678}. Others believe that the acts of reconciliation were strongly influenced by local custom and the views of the local leaders who sat on panels\textsuperscript{679}.

Through the inclusion of the Reconciliation Agreement in the CRP, the CAVR provided so far the only means for victims to seek reparation directly from the perpetrator. It is estimated that 1,371 so-called Reconciliation Agreements were successfully reached and carried out\textsuperscript{680}. In around 100 cases it is believed that the deponent did not consent to or fulfil the Reconciliation Agreement\textsuperscript{681}. The immunity from civil or criminal action provided a meaningful incentive for perpetrators to carry out his or her obligations.

6.4.5 Conclusion

Surveys of public attitudes revealed that 90\% of those interviewed regarded the CRP as positive and had been satisfied with its results. In particular, victims stated that they felt more respected in their communities and that their relationship with the perpetrator had improved.

\textsuperscript{677} Lia Kent, \textit{Unfulfilled Expectations: Community Views on CAVR’s Community Reconciliation Process} (Judicial System Monitoring Programme 2004), 32.


\textsuperscript{679} CAVR, Final Report Chega!, Part 9 – Community Reconciliation, paras. 133-134.

\textsuperscript{680} Ibid., para. 139.

\textsuperscript{681} Ibid., Executive Summary.
The CRP introduced a measure of representativeness, impartiality, and procedural fairness into local reconciliation proceedings. It thereby can be regarded as a successful use of restorative justice practice in the aftermath of violent conflict, typical for which is that those affected by the crime actively participate in the resolution of matters arising from the crime with the help of an impartial third party. It is an example where the transitional justice framework made use of restorative justice practices to focus on the offence and the offender while concerned with censuring past and changing future behaviour. The aim was to react with sanctions or outcomes that are proportionate and make things right in individual cases. It thereby embraced recognition of individual culpability but also included a wider notion of community responsibility for the acts committed. Truth telling and the meeting of victims and perpetrators were crucial to the process as were expressing remorse and making restitution to the victim and his or her family. It was thus a systematic means of addressing wrongdoings that emphasised the healing of wounds and rebuilding of relationships.

Nevertheless, the CRP’s ability to refer evidence to the OGP clearly put the CAVR in tension with the judicial and adversarial method of establishing a “factual” truth and dispensing justice. What was first considered as one of the strengths of the CRP must meanwhile be regarded as weak point, due to the incapacity of the criminal justice system to deal with cases referred. This is clearly feeding back negatively on the success of CRP. Again, it seems complementarity is the source of frustration: while the CRP managed successfully to put in place its practices and procedures in a manner that was complementary to its counterpart, the Serious Crimes Regime was not in a position to respond to this complementarity.


6.5 The Commission for Truth and Friendship and its effects on victims’ rights

The CTF’s mandate was to “to establish the conclusive truth in regard to the events prior to and immediately after the popular consultation in 1999, with a view to further promoting reconciliation and friendship, and ensuring the non-recurrence of similar events.” In order to seek the conclusive truth, the CTF conducted extensive document reviews and organised statement taking, submissions, public and closed hearings, and research and consultation with experts. During a first period of document review, conducted between January and March 2006, the CTF identified 14 priority cases for further fact-finding.

6.5.1 Contribution of the CTF to the right to truth

In order to further explore these 14 cases, the CTF held six so-called “public” hearings between February 2007 and October 2007, out of which five were held in Indonesia (two in Denpasar and three in Jakarta) and one in Dili. The hearings were conducted primarily in Bahasa Indonesian. Interpretation was provided for the few Timorese witnesses wishing to speak in Tetum, and simultaneous translation into English was provided for the audience. According to an (unwritten) consensus on hearing procedures, each witness was permitted 30 minutes to speak freely. Participating in the hearings were 56 witnesses. Carefully selected witnesses, including military, militia members, commanders, and public officials, many of whom had been indicted by the Serious Crimes Unit, provided the majority of testimony. Only 13 victims were heard. Due to this divergence, the hearings were criticised as having provided a platform for those accused of bearing responsibility for international crimes in Timor-Leste to defend their view without being seriously challenged. By doing so, it was

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684 See Article 12 of the TOR and CTF Final Report – Per Memoriam ad Spem, Chapter II: The “Conclusive Truth”.
686 Ibid., 3.3. Summary of Commission’s Activities.
687 Ibid., Attachment 8.
688 The Commission took transcripts of the hearings, but these have not yet been made public.
689 James DeShaw Rae, Peacebuilding and Transitional Justice in East Timor (Boulder, CO: First Forum Press, 2009), 182.
feared that the CTF put a priority on rehabilitating the names of accused perpetrators over justice or compensation for victims.

In spite of strong criticism of the CTF’s operational phase, its final report *Per Memoriam ad Spem* (From Memory to Hope) comprises rather strong and surprising findings. It consists of around 300 pages, was finalised in May 2008, and was officially presented to the presidents of the two countries on 15 July 2008 in Bali. The recommendations made in the report are in many respects similar to the CAVR recommendations. Still, the CTF does not refer once to the CAVR recommendations, or state how the two sets of recommendations should be prioritised or integrated. They comprise institutional reform in military and security forces, collective reparations, the establishment of a commission on the disappeared, as well as other recommendations to ensure that such violence would not reoccur. In addition, it recommended the creation of a Documentation and Conflict Resolution Resource Centre that would allow developing an understanding about the past, informing about the common history and the share both countries have in the conflict. Regrettably, the report was never translated into Tetum. This demonstrates Timor-Leste’s lack of interest in making the report public and remains a particular obstacle to its accessibility.

Two expert reports by David Cohen, Expert Advisor for international legal issues and Director of the War Crimes Studies Center at UC Berkeley, made a major contribution to the CTF’s final report. Cohen analysed in detail the evidence from the previous trials (in Timor-Leste and Indonesia) as well as the 2,500-page CAVR report and compared these findings with the facts revealed during the CTF’s own truth-seeking process. In addition, Kent observed that over the three-year period of the CTF’s operation, staff and commissioners became increasingly driven by a strong sense of pride in their work and a desire to ensure that their results would be credible. The CTF concluded that crimes against humanity had been

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692 As of March 2014, the Timor-Leste Ministry of Foreign Affairs has made repeated attempts to discuss the establishment of a Commission on Disappeared Persons (CDP) with its Indonesian counterpart. They have remained unsuccessful.


committed in a highly organised, widespread, and systematic manner against civilians in Timor-Leste in 1999. The CTF found that in addition to the direct role of Indonesian-backed Timorese militias, Indonesian institutions including the army (TNI), police, and civilian government were directly or indirectly involved in every phase of the organisation and perpetration of these crimes. Cooperation between the TNI, police, and other Indonesian officials with militias was well established before 1999. Further, the report stated that despite limited investigations, there was credible evidence to indicate that Timorese pro-independence institutions – namely, FALINTIL, the CNRT, and youth groups – were also responsible for murder, illegal detentions, sexual violence, and possibly other crimes696. By doing so, the CTF gained credibility not only with the international community, but also with Indonesia’s as well as Timor-Leste’s citizens. When President Susilo Bambang Yudhoyon endorsed the report findings, this was initially regarded as a breakthrough in Indonesia’s official stance in denying crimes of the past.

Gibson highlights that a key issue for societal transformation is getting people to accept a commission’s version of the truth. A truth that is impartial, signalled by a commission’s willingness to cast blame wherever blame is deserved, gains credibility, especially when backed by leaders who are trusted697. By naming also Timorese institutions amongst those that contributed to the violent conflict of 1999, the CTF produced a truth that was difficult to accept for both the people of Indonesia as well as Timor-Leste. These findings of the CTF demonstrate that the commissioners carried out their work independently, despite the politicised appointment process. In addition, the unexpectedly strong CTF final report suggests that many observers had underestimated the potential of the CTF commissioner’s ability to challenge the narrow terms of reference.


6.5.2 Contribution of the CTF to the right to justice

The CTF was perceived by many as a mechanism to avoid the creation of an international tribunal. By statute, the CTF was prevented from recommending any new judicial body or further criminal prosecution and was vested with the ability to recommend amnesties. Neither did Article 14(c)(i) of the Terms of Reference contain clear criteria under which amnesty was to be granted nor did the provision distinguish between amnesty for serious and lesser crimes and no fair and transparent process had been outlined under which perpetrators could apply for amnesty. Even in cases of crimes with universal jurisdiction, such as crimes against humanity and war crimes, the CTF could – according to its terms of reference – have recommended amnesty, which would have been an infringement on international criminal law.

To the surprise of many of its critics, the CTF completely rejected the notion of amnesty or political rehabilitation for any individuals in regard to whom the CTF found that crimes against humanity had been committed in a highly organised, widespread, and systematic manner in Timor-Leste in 1999. Moreover, the CTF stated in its final report that amnesty would not be in accordance with its goals of restoring human dignity, creating the foundation for reconciliation between the two countries, and ensuring the non-recurrence of violence within a framework guaranteed by the rule of law. It recommended that the government of Timor-Leste acknowledge state responsibility for offences committed by pro-independence groups. Similarly, it called on the government of Indonesia to bear state responsibility for the crimes committed by militia groups with the support and/or participation of Indonesian institutions. It thereby made an important recommendation to strengthen mechanisms for the investigation and prosecution of human rights violations and, unexpectedly, made a clear decision not to recommend amnesty.

700 Ibid., Executive Summary, Chapter XIII, 8.4 Conclusions: Institutional Responsibility, p. 293.
6.5.3 Contribution to the right to reparation

Recommending reparation did not form part of the mandate of the CTF. The non-inclusion of the issue of reparation in the terms of reference of the CTF was clearly a consequence of Timor-Leste’s *Realpolitik*, favouring reconciliation with its neighbour. Nonetheless, the CTF took a clear stand on reparation, stating that its recommendations followed two principles. Firstly, in order to promote reconciliation, it required its recommendations to be inclusive and non-discriminatory. Secondly, all recommendations need to take the form of collective reparations, requiring material and other forms of support from the governments of Indonesia and Timor-Leste. In this spirit, it called for measures of reparative value, amongst them an apology from the Timorese and Indonesian heads of state, acknowledging responsibility for past violence. It also called for survivor healing programmes, investigation of the fate of disappeared persons and children separated from their parents during the conflict, as well as education and scholarship programmes for children who were victims of the violence.\(^{701}\)

Upon presentation of the CTF final report in July 2008, the President of Indonesia immediately declined to issue an apology to victims of the 1999 violence but did express his “regret” for what happened.\(^{702}\) In relation to the recommendations that require the cooperation of both countries, Timor-Leste and Indonesia have held several bilateral meetings to negotiate implementation of the CTF recommendations. A draft “action plan” for implementation has been produced and an agreement has been reached on relatively uncontroversial issues, such as more lenient visa requirements for Timorese wishing to visit Indonesia.\(^{703}\) To date, meetings between the government of Timor-Leste and Indonesia to implement the CTF’s recommendations continue on a more or less regular basis but are often side-lined and directed into other topics (such as, e.g., border control).\(^{704}\) However, no concrete steps have been taken to implement any of the CTF’s recommendations.

At the same time, both Timor-Leste and Indonesia actively promote compensation for Indonesian nationals for assets lost in the devastation of 1999, including land claims and

\(^{701}\) Ibid., Executive Summary, pp. XVII-XX.


individual, corporate, and government assets\textsuperscript{705}. Property rights established under Portuguese and Indonesian legislation continue to be in effect in Timor-Leste and may still enjoy recognition. In addition, pensions for Timor-Leste citizens who served as Indonesian civil servants, military and police remain of priority\textsuperscript{706}. These claims are motivated by Timor-Leste’s national rhetoric of favouring reconciliation with Indonesia – arguing that solving disputes over land, assets, and pensions contribute to friendly relationships between the two countries. Clearly, the rights pursued in these claims are those of Indonesian and pro-Indonesian Timorese citizens and corporations. Those of Timor-Leste’s victims of serious crimes are – once again – not included in this process. To date, the Timor-Leste government’s approach to reparation avoids discussions between the two governments in relation hereto and neglects the fulfilment of victims’ right to reparation.

\subsection*{6.5.4 Conclusion}

From the start, the bilateral Commission for Truth and Friendship was criticised as a deeply flawed process that was welcomed by Indonesian generals and the Timorese leadership to prevent themselves from further justice measures\textsuperscript{707}. When the CTF made public its findings, it took – to the surprise of many – an independent stand in regard to institutional responsibility for the crimes committed in 1999 by Indonesian authorities, the supporting militia auxiliaries, as well as Timorese pro-independence groups. Nevertheless, its inaccessible truth-seeking process combined with Timor-Leste’s reconciliatory approach to transitional justice damages the CTF’s credibility and its ability to deliver justice, truth and reparation to the victim community. The Commission for Truth and Friendship did not consult the views and expectations of victims and survivors during its conceptual or operational phase, either. An outreach programme did not accompany the process. It remained inaccessible due to the limited number of victims heard. Its final report remains safely tucked


\textsuperscript{706} Joint Ministerial Press Statement, Fourth Senior Officials’ Meeting between Indonesia and Timor-Leste, Bali, Indonesia, 21-22 January 2010.

away from public consciousness. Despite its strong findings, the CTF truth-seeking process remains invisible to the public and is regarded as irrelevant by most victims of serious crimes. To many victims, the CTF’s functioning confirmed its aim to fence off justice and to institutionalise impunity. The CTF’s findings were quickly silenced by the Indonesian government’s attitude towards justice together with the Timor-Leste government’s promotion of reconciliation. The completion of the CTF allowed both governments to come to an informal agreement to close further discussion of the past violations and ignore victims’ right to reparation and justice under international law. This misuse of the CTF and its findings also had the side-effect of successfully putting the CAVR and the implementation of its recommendations on ice⁷⁰⁸.

6.6 The non-existent national reparations programme and its effects on victims’ rights

This section will review the efforts undertaken to date by the international community and the Timorese government in providing reparation for victims of the violent conflict. As has been described above, reparation – or **kasu sala** – is a concept broadly accepted within Timorese culture and comprised within national law. Timor-Leste is also a signatory to a number of international treaties that explicitly recognise victims’ right to reparation. Amongst those treaties ratified by Timor-Leste are the International Convention on Civil and Political Rights, the International Convention on the Elimination of all forms of Racial Discrimination, and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. These human rights instruments mention “effective remedies”, “an enforceable right to compensation”, and “fair and adequate compensation including the means for as full rehabilitation as possible” as measures aiming towards reparation. Section 9 of the Timor-Leste constitution automatically incorporates these principles of international law into the domestic legal system. But what efforts have actually been undertaken by UNTAET and the national government to implement this constitutional right to reparation?

6.6.1 Effect on the right to reparation

In order to describe the progress made in Timor-Leste towards reparation for victims of serious crime, the discussion will focus on the following milestones identified by Correa that states need to reach when implementing a national reparations programme. According to Correa, an expert in the definition and implementation of reparations programmes for mass human rights violations, these are: (1) defining victims and beneficiaries; (2) transforming

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709 See e.g. Art. 104 of the Penal Code of Timor-Leste.
710 Art. 8 of the Universal Declaration of Human Rights.
711 Art. 9 of the International Covenant on Civil and Political Rights.
712 Article 14 of the Convention against Torture and Other Cruel and Inhuman and Other Disregarding Treatment or Punishment.
713 Cristian Correa, Senior Associate with ICTJ, provided advice to victims’ organizations, civil society groups, and governments in Peru, Colombia, Liberia, Sierra Leone, Timor-Leste, and Nepal.
6.6.1.1 Defining victims and beneficiaries

One of the biggest challenges in relation to finding a consensus on a national law on reparations was clearly defining Timor-Leste’s victims and beneficiaries. The CAVR had outlined a clear vision of a national reparations programme in its final report. As regards to beneficiaries, it promoted the view that most vulnerable victims of human rights violation suffered between 24 April 1974 and 25 October 1999 should be eligible for reparation. These included victims of torture, physical violence, and sexual violence as well as relatives of those killed or disappeared. Since the publication of the report in 2005, the CAVR’s recommendations made little or no progress towards their implementation, despite continuing calls from civil society groups and victims.

These calls, together with the CAVR’s recommendations, were largely ignored by the Timorese government as well as the international community. From October 2005 onwards, when the CAVR’s final report and its recommendations was presented to parliament for consideration, the then President Xanana Gusmão distanced himself from the report’s findings and detailed recommendations. It was not until July 2008, when a joint working group on reparations submitted a “Concept Paper on a National Reparations Programme for Timor-Leste” to the Parliamentary Committee for Constitutional Issues, Justice, Public Administration, Local Power and Government Legislation (Committee A), that parliament was forced to deal with the issue of reparation. Three months later, on 9 October 2008, the CTF’s final report was discussed in the parliament, again with no concrete outcome in relation

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716 Comprising civil society groups, the office of the Ombudsman for Human Rights and Justice (Provedor de Direitos Humanos e Justiça, PDHJ), and the UN Human Rights and Transitional Justice Section.

to reparation\textsuperscript{718}. Only one year later, first attempts were made to consider means to follow up on both the CAVR and the CTF recommendations, including those on reparations. As the discussion also drew attention to the uncomfortable issue of prosecution of serious crimes committed, parliament delayed the plenary debate of a proposed resolution by Committee A\textsuperscript{719}. After further attempts at discussion of the draft document failed, parliament produced a new resolution that excluded prospects for further prosecution but called for a program of reparations that would target the “most vulnerable” victims of human rights violations\textsuperscript{720}.

On 14 December 2009, Parliament finally authorised Committee A to develop concrete steps to prepare the vote on and implementation of reparation measures\textsuperscript{721}. In response, Committee A prepared two draft laws, first submitted to parliament in June 2010\textsuperscript{722}. These proposed, in detail, a National Reparations Programme that consists of a National Commemorations Programme, an Individual Reparations Programme, and a Collective Reparations Programme. The National Commemorations Programme would honour and dignify victims and promote education on human rights and Timorese history through symbolic reparations, such as commemoration ceremonies, monuments, search for missing persons, and exhuming and reburying of persons who lost their lives as a result of the conflict\textsuperscript{723}. The Individual Reparations Programme was specifically envisaged to rehabilitate vulnerable victims, through the provision of (mental) health and rehabilitation services and educative and vocational training\textsuperscript{724}. In line with the CAVR recommendations, vulnerable victims were defined as “victims residing in Timor-Leste who continue to suffer from difficulties in the form of physical or mental damages, or from financial difficulties”\textsuperscript{725}. Include here a definition of vulnerable victims see Art. 4 of the draft law The Collective Reparations Programme was


\textsuperscript{723}Art. 9 (1)(a) of Draft Law No. 19/11 on a National Reparations Framework of 11 May 2010.

\textsuperscript{724}Ibid., Art. 9 (1)(b).

\textsuperscript{725}Ibid., Art. 4 (1)(b).
designed to provide material assistance to communities seriously affected by the conflict through the provision of community infrastructure, livelihood projects, and projects for paying tribute to the victims at the community level. Committee A proposed that an Institute for Memory be created to oversee the implementation of the proposed programmes but also to undertake documentation and research and projects relating to human rights and the history of Timor between 1974 and 1999. It also favoured a version of the draft laws following which victims that received pensions or other benefits related to the war (e.g. based on the legislation concerning Combatants for Social Liberation of the State) are not considered eligible for reparations.

### 6.6.1.2 Transforming the recommendations into law

In order to get feedback on the laws, Committee A held hearings with local NGOs and heard victim groups on 6 and 7 July 2010. To follow up, an extraordinary Plenary Session of Timor-Leste’s National Parliament had been scheduled for 8 July 2010, which was re-scheduled to 21 September 2010. After discussing Committee A’s report and its revised draft laws, the plenary voted 41:11, rejecting Committee A’s revisions and accepting the original texts as introduced.

Plenary debate of the original texts was finally re-scheduled for early 2011. However, parliament decided to postpone further debates of the draft laws until issues regarding compensations for veterans were solved. Victim groups reacted with disappointment and anger at parliamentarians’ continued refusal to uphold their rights. It took more than a year until parliament finally re-scheduled a debate on the two laws. It finally held an extraordinary session to consider the draft laws on 1-3 February 2012. It continued discussions on the morning of 21 February 2012. However, Parliament was unable to reconvene after lunch due to a lack of quorum after a Church-sponsored Peace March had brought traffic to a standstill.

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726 Ibid., Art. 9 (1)(c).
729 The amendments proposed mainly referred to the Institute of Memory and its structure. Luta Hamutuk, e.g., proposed that the institute should be created as a public institute so that it can better perform its duties and that the draft laws regulate cooperation with the institute.
The discussion was to resume on Monday, 27 February 2012, but once again failed because not enough MPs were present\textsuperscript{730}. Meanwhile, government announced that the draft law on parliamentary pensions and a land law would first have to be discussed\textsuperscript{731}.

On 1 August 2012, the newly elected president of the Parliament, Vicente Guteres, announced that the new Members of Parliament will prioritise debating the laws on reparation for victims and the creation of the Memory Institute. He claimed the laws were “important to exercise people’s rights”\textsuperscript{732}. This was the last official statement in this respect. At the same time, victims, in particular of crimes committed during the 25 years of occupation, continue to await reparation\textsuperscript{733}. As of March 2014, no progress has been made towards debating the laws in Parliament.

In relation to the milestones set out by Correa, the implementation of a national reparations programme in Timor-Leste came to a standstill after victims and beneficiaries were defined. While this reflects a major effort and contribution towards the creation of a reparations programme and is often one of the most divisive discussions to hold, the reluctance of the national parliament to hold further discussion on the laws is inexcusable.

\textbf{6.6.1.3 Reasons for this standstill}

\textbf{6.6.1.3.1 Lack of support by the international community}

One of the reasons for standstill on the discussion and implementation of the national reparation framework can be found in the lack of support from the international community and donors. The CAVR drew attention to the complicity of Western states by calling on member states of the international community, international agencies, NGOs, and business corporations to provide financial means based on the principle of international responsibility

\textsuperscript{730} Lao’Hamutuk, Proposed laws on Reparations and Memory Institute, \newline http://www.laohamutuk.org/Justice/Reparations/10ReparIndex.htm.


\textsuperscript{732} Diario Nacional, 1 August 2012.

\textsuperscript{733} “Timor-Leste’s Wounds Won’t Heal Until Truth Revealed, Warns Rights Activist”, \textit{Independente}, 23 July 2013.
recognised in the international customary law of torts. Although it regarded Indonesia as primarily responsible for financial support for this fund, it also held governments and institutions that supported the Indonesian regime accountable. The advantage of such an internationally funded reparation scheme would be that it would allow Timor-Leste to overcome its limitations in resources available for the creation of a reparations fund.

As was the case for the work of the Truth and Reconciliation Commission for Sierra Leone, the CAVR’s recommendations for reparations – as well as contributions to finance them – received little in the way of a positive echo or endorsement within the United Nations or the international community. The UN rather distanced itself from the *Chega!* recommendations and remained silent on the CAVR’s recommendation that the UN itself should debate the report. This was in spite of the fact that – as the Secretary-General also highlighted – from the standpoint of victims, reparations occupy a very special place: they are the most tangible manifestation of the efforts of the state or the international community to remedy the harm suffered. It was not until 2006, that the UN Secretary-General in his report on Justice and Reconciliation for Timor-Leste made several recommendations in relation to the implementation of a reparations programme for the victims of the 1999 violence. To respond to the “desire for justice expressed by the victims and their families and the need for closure or finality of cases of serious violations of human rights in conformity with internationally accepted standards”, he recommended

that the Security Council endorse the creation of a solidarity fund by the United Nations to accept voluntary contributions from Member States for the purpose of funding a community restoration programme to support […] victims of serious crimes committed in 1999 and their immediate relatives with collective and individual restorative measures.

Such individual measures should be made available to

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the most vulnerable victims and families of victims of the most serious violations of human
inghts, including such remedies as the provision of artificial limbs, wheelchairs, small
disability pensions, school clothing and food assistance to orphaned children739.

Regrettably, his efforts to promote reparation for victims of crimes were restricted to victims
of 1999 violence as well as to the most vulnerable victims only. He thereby supported a
hierarchy of suffering of victims and excluded those victims from reparations that continue to
suffer from the 25-year occupation.

When Timor-Leste’s human rights record was assessed in October 2010 under the UN
Universal Periodic Review, five states called for Timor-Leste to implement recommendations
made by the CAVR and the CTF. Timor-Leste agreed to consider these recommendations.
Similarly, in a December 2011 report, the UN Working Group on Enforced or Involuntary
Disappearances, which visited Timor-Leste from 7 to 14 February 2011, called on the
Timorese Parliament to debate and pass the two laws740. It gave the government of Timor-
Leste a time limit of 90 days to develop a timetable outlining the steps it intended to take to
implement these recommendations. After the set deadline, no follow up was undertaken. In
May 2012, the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena
Sepúlveda Carmona, encouraged the government of Timor-Leste to introduce measures so
that victims of serious crimes committed during the conflict will be able to access reparations
and to “[E]xpediting the passage of the draft Law on Reparations and the draft Law on a
Memorial Institution”741. Despite these efforts, pressure on Timor-Leste was not increased
and victims are still waiting for the reparation laws to be discussed in the national parliament.

6.6.1.3.2 Competing calls for support for veterans

Another reason for the standstill in regard to an agreement on national laws on reparation can
be found in the national rhetoric of “heroes” and “traitors” and its glorification of the national
resistance. Veterans held a strong position in Timor-Leste from 1999 onwards and continue to
be represented within the current political elite. Yet, UNTAET interpreted its mandate as such

739 Ibid.
740 UN Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances, Addendum, UN
Doc. A/HRC/19/58/Add.1, 26 December 2011, paras. 96-98.
741 UN General Assembly, Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda
that the veteran issue remained beyond its remit. It dealt with veterans as party to a civil war rather than as a victorious liberation movement enjoying wide popular support\textsuperscript{742}. Their exclusion from UNTAET’s transitional justice agenda made them amenable to the influence of the Timorese government. Local politics saw it as a duty to valorise their achievements for the nation\textsuperscript{743}. This allowed veterans to place themselves in the foreground and minimise the suffering of others that amounted to a dynamics that led victims of serious crimes to conclude that recognition of the “others”, the heroes, amounted to a denial of their own victimhood\textsuperscript{744}.

National efforts to acknowledge the contribution and service of veterans to Timor-Leste’s independence began almost immediately after independence. Most notably, the Comissão para os Assuntos dos Antigos Combatentes and the Comissão para os Assuntos dos Veteranos das FALINTIL, both created as early as 2003, registered those who fought in the armed front. In addition, the Comissão para os Assuntos dos Quadros da Resistência registered members of the clandestine front. Overall, 76,063 veterans were registered in a first phase\textsuperscript{745}. This registration process led to the creation of a generous compensation scheme, the so-called “valorisation programme”\textsuperscript{746}. It was designed to identify, recognise, and assist tens of thousands of veterans of the liberation struggle, both military and civilian. The decree law implementing the scheme provides pensions for veterans, benefits for widows and orphans, and educational subsidies. Under this scheme (Pensions for Combatants and Martyrs of the Struggle for National Liberation), the most generous social protection programme of the government of Timor-Leste, veterans can claim pensions back paid to the month of January of the year in which the combatant or martyr was officially recognised\textsuperscript{747}. Parliament dedicated


\textsuperscript{743} The responsibility to provide recognition for (valorização) and tribute (homenagem) to the national heroes, namely, Timor-Leste’s veterans, was even laid out in Article 11 of the Constitution.


69% of the total social protection budget to this scheme\textsuperscript{748}. Meanwhile, it is estimated that approximately 200,000 persons (amongst them approx. 25% women) benefit from the scheme\textsuperscript{749}.

In order to be eligible for a pension under the scheme, full-time service in the resistance is required. Only the time in the armed front and as a political prisoner counts toward a pension. A “Special Subsistence Pension” can be obtained in the form of a monthly payment applicable to those who served more than eight years and are over 55 years of age, or who are disabled as a result of their participation in the struggle for national liberation. Actual pension levels vary depending on rank, from USD 85 a month to USD 120 a month. Those who have served the longest in the army can claim a “Special Retirement Pension”. Eligible are those that served more than 15 years in the resistance. The law requires that this pension amount to at least three times the minimum civil service salary, or USD 255 a month. For those who served between 15 and 19 years, pension levels vary between USD 255 and USD 340 a month, depending on rank. For those who served 20 to 24 years, levels range from USD 340 to USD 550 a month. These comprise the “generation 1975” and thus most of Timor-Leste’s current political elite.

Once off payments can be obtained as “Exclusive Dedication Subvention” by all veterans who served more than three years exclusively in the national liberation struggle\textsuperscript{750}. Similarly, relatives of deceased can receive a once off payment between USD 120 and USD 200 depending on the rank of the deceased. Not eligible are relatives of those who died following attacks by FALINTIL itself\textsuperscript{751}.

With its one-sided approach, the veterans’ pension scheme is an example for the many post-conflict societies in which sizeable reparations have been made without the intermediation of transitional justice mechanisms of trials or truth commissions. The relatively fast and devoted implementation of the pension scheme demonstrates a clear commitment of politicians and policy makers to embrace the cause(s) of one particular form of sacrifice. Veterans have a

strong lobby in Timor-Leste, are celebrated as the heroes of the struggle for independence, and benefit from the politicisation of victimhood. The thousands of fighters in the long war, including the oldest and best known, the “generation of 1975”, continue to remain an influential group in society. The evolving rhetoric of heroes and traitors makes it difficult to admit that heroes may have been perpetrators at the same time. The promotion of “heroism” is incompatible with the recognition of violations caused by these veterans. It thereby silences victims as the recognition of their victimhood would undermine the rhetoric of “heroism". The scheme in this way puts on hold the implementation the national reparations programme and in particular reparation claims of those victimised by FALINTIL and FRETLIN supporters.752

The way the veterans’ pension scheme was handled reflects the centrality of the resistance and national sacrifice in the government’s approach to dealing with the past. Through the implementation of the veterans’ pension scheme the government demonstrated its preference of a one-sided approach over an inclusive reparations programme. Consequently, victimhood caused by FALINTIL or pro-independence militia members remains unrecognised. It confirms that the victim’s rights compete with local political and other imperatives. These imperatives empower elites at the expense of victims, particularly the most disempowered, who have both the greatest needs and the least access to the language of rights.753 At the same time, victims continue to strive for reparations as a form of recognition or acknowledgement of the contribution they or their relatives have made to the nation’s independence.754

The development is an example of “politicisation” of the transitional justice process favouring the politically strong grouping of veterans over the recognition of victims. This inevitably raises questions about the equality of treatment of victims and fragmentation of the transitional justice process. It is agreed here with the Special Rapporteur on the promotion of

753 Ibid., 78.
truth, justice, reparation and guarantees of non-recurrence that failing to address this form of fragmentation may potentially undermine the whole transitional justice project.\textsuperscript{755}

In many contexts, recommendations for reparations have not been followed up on. Timor-Leste does not stand alone in this respect. Even the highly praised South African TRC made a range of recommendations with regard to reparations in its 1998 final report, of which few have been acted upon to date\textsuperscript{756}. However, Timor-Leste’s prolonged delay in debating and passing the law on reparation and the Institute for Memory shows disregard for the suffering of the victims and their families. With the government’s focus on veterans and their support, victims are entirely dependent on civil society initiatives and support from the international community. Overall, the developments raise questions about the willingness of the government and the international community to ensure justice, truth and reparation for victims of serious crimes committed during Indonesia’s occupation of Timor-Leste.

In light of the national efforts to pay tribute to veterans and their sacrifice for the nation, the non-implementation of reparation measures is particularly worrisome. The national support for veterans can clearly be referred to as one of the major factors for the standstill in regard to the debate of the laws on reparation. Through the parliament, veterans called for the valorisation of their contribution to independence before “traitors” receive reparation for the violations suffered. The plight of those who forfeited parts of their life in the interest of the newly created state was used to promote financial compensation for the sacrifice. This reflects the adoption of a terminology that has become an instrument for one – strong – part of the political arena in which "heroism" and recognition of victimhood have become competing agendas. The ease and the generosity with which the scheme was implemented is, though, a clear betrayal of victims of the FALINTIL violence. This one-sided approach fosters feelings of inequity and injustice among victims. The danger is that if compensation is reserved to one


side of the conflict, this may reinforce the gap in society and frustrations of forgotten victims may boil underneath, waiting to erupt757.

6.6.2 Contribution of a national reparations programme to the right to truth

With its promotion of a version of the past that emphasises heroic and triumphal participation in the conflict, the political elite glorifies the resistance and, in particular, the role of FALINTIL. Kent rightly observed that

[B]y constructing the past as a story of sacrifice, the leadership has attempted to give meaning to suffering and death by writing individuals’ painful experiences into the broader story of the liberation of the nation. In this process, however, and in the shaping of the past to buttress political legitimacy during a formative nation-building period, certain complex and “less palatable” truths have been suppressed758.

By promoting this version of the past, the government of Timor-Leste clearly contradicts the findings of the CAVR and overwrites its final report.

The creation of the proposed Institute of Memory would be in a position to jeopardise the governments’ narrative. Under the proposed law, one of the institute’s functions would be to guarantee ongoing truth seeking. As an independent body, it would also be in a position to conduct research in relation to human rights and the history of Timor between 1974 and 1999 and promote the dissemination of the knowledge and research thus gained759. The findings, in return, would lend legitimacy to collective reparations and a national commemorations programme. The institute’s success in achieving these aims will clearly depend on its members and level of independency from the state and its political factions. The idea is that once it is functional, it would promote a better understanding of the nature, causes, and impact of human rights violations and aid in remembering and honouring those who died in the

759 Art. 5 (1) (c) and (e) Draft Bill no. /II, Establishing the Public Memory Institute (Instituto da Memória) of 15 June 2010.
conflict. Clearly, it could thereby draw attention to uncomfortable issues for Timor-Leste’s current political leadership.

At the same time, the generous support for veterans combined with its explicit exclusion of victims of FALINTIL violence jeopardises a sincere and transparent reparation debate in which objective and well-balanced choices have to be made. Outside the transitional justice framework, the veterans’ pension scheme fails to untangle clandestine networks and establish accountability. It also fails to articulate knowledge on FALINTIL-sponsored violence for the purpose of the architects of the valorisation process. It is therefore of utmost importance that the government of Timor-Leste, with the support of the international community, re-consider the laws on reparation to re-balance discourse within the political agenda. Otherwise, the veteran’s pension scheme will continue to deepen divisions within society.

6.6.3 Contribution of a national reparations programme to the right to justice

The implementation of reparation measures demonstrates recognition, civic trust, and social solidarity, which are the foundation of a meaningful democracy. By supporting reparation measures, governments signal credibility to victims by taking responsibility for the losses they suffered. In Timorese society, the murder of a primary breadwinner, the destruction of a home, or the rape of an unmarried woman can have serious economic ramifications. When Lambourne interviewed victims of the conflict in Timor-Leste in 2004, a majority of the interviewed spoke about the need for jobs, healthcare, safe water, and assistance with school fees or help to start a new business. She spoke to a victim, a former school teacher in Suai, who reported that his sight was impaired because of a militia attack, which meant that he could no longer practice his profession. For him, justice meant financial support that would enable him to buy a pair of eyeglasses. Some interviewees said that perpetrators should themselves provide recompense directly (for example, replace a cow that was stolen or rebuild a house), although victims were aware that perpetrators were often also poor. In cases where the perpetrators were unable to recompense, those interviewed regarded it as the responsibility of the government, and sometimes of the international community, to provide

services and reduce poverty as a contribution to justice, reconciliation, and peace building\(^{761}\). This confirms that reparations in themselves are an essential transitional justice measure, necessary for serving the justice requirement of the transitional justice formula and responding to the conceptions of justice that victims articulate\(^{762}\).

When victims are consulted about their needs arising from past human rights violations, they will necessarily want to see their most urgent demands noted\(^{763}\). In particular, overcoming the continuing violation of the social and economic rights of the poor, when acute, will dominate all other needs. Hence, most victims will prioritise a process that emphasises material aspects over other mechanisms of transitional justice\(^{764}\). Many of Timor-Leste’s victims, particularly those living in remote rural areas, continue to grapple with experiences of profound loss and the limitations imposed by continuing poverty, food insecurity, illiteracy, poor health, and the difficulties posed by geography\(^{765}\). During the study undertaken by Robins the need expressed by the greatest number of families (61%) interviewed was economic support. Robins invited families to talk about their situation, the circumstances they found themselves in as a result of violations, and what needs they saw as emerging from their victimhood\(^{766}\). He observed that the loss of breadwinners has made poor families poorer, and that those who lost husbands and fathers in 1999 are still struggling to make ends meet. Many families are confronted with the daily struggle to afford to send children to school, feed their families, and pay for expensive rituals for the dead as a result of the conflict. Almost a third of families mentioned the need for recognition of their sacrifice as a priority, notably from the state, and linked this to reparation\(^{767}\). This primary call for material compensation was also confirmed by studies undertaken in Uganda, the Congo, and Cambodia, in which the majority of respondents

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\(^{767}\) Ibid., 11-12.
demanded financial support, housing, food, and livestock. In particular, in poor countries such as Timor-Leste, material reparations would make a real difference in the lives of those who lost everything.

6.6.4 Conclusion

In the wake of large-scale violence or repression, reparations could be one of the most tangible manifestations of a government’s recognition of victims’ dignity and rights and of its commitment not to repeat past wrongs. However, the experience from other post-conflict environments has also shown that the implementation of reparation programmes is important in order to achieve other complementary ends. Truth commissions have become the subject of increased criticism for the lack of follow-up on their recommendations, despite the fact that, as temporary bodies, most truth commissions will have ceased to exist at the time of implementation of their recommendations and responsibility to do so lies with the government. However, if a truth-seeking process announces a certain type of reparation, the state has to be very careful to take victims’ expectations seriously. Otherwise, it signals stigmatisation and neglect. Now, almost 10 years after the completion of the CAVR’s work, the non-implementation of the proposed reparations programme clearly has a negative effect on the credibility of the CAVR but mostly of those who were responsible for the transitional justice mechanisms being implemented and for the promotion of their underlying values: victims’ right to justice, truth and reparation.


7. Conclusion

The description and discussion of Timor-Leste’s transitional justice system aimed to highlight two dynamics: 1. Although the transitional justice mechanisms were designed to be complementary, the outcomes produced were not. 2. Where the mechanisms failed to produce complementary outcomes, this was largely due to local political interests overriding victims’ rights.

UNTAET designed the transitional justice agenda so that the co-existent transitional justice mechanisms were each in a position to produce complementary outcomes. What it had not considered was that if the mechanisms themselves were ill functioning, they could neither produce outcomes themselves nor respond to the outcomes achieved by their counterparts. Overall, the outcomes achieved by UNTAET and the local government in relation to “transitional justice” are clearly imbalanced and far from holistic. In retrospect, the CAVR can clearly be regarded as the most successful mechanism as regards victims’ rights. On the other hand, the outcomes achieved in relation to the victim’s right to justice and reparation remain limited.

7.1 Right to justice

The mechanisms created to adhere to the duty to prosecute serious crimes committed in Timor-Leste between 1974 and 1999 clearly fell short in enabling victims’ right to justice. The Serious Crimes Regime had limited effects due to its design as well as its (de facto) temporary and subject matter mandate. Due to its limited financial and human resources, it was required to concentrate on the offences committed between January and October 1999 exclusively. For all other crimes committed in relation to the 25-year conflict, which outweighed those committed in 1999, it was not in a position either to fulfil its duty to prosecute or to realise victims’ corresponding right to justice. In addition, the prosecutorial strategy implemented hampered the Serious Crimes Regime’s ability to address war crimes, sexual violence, and torture.

Structurally, the Serious Crimes Regime was also designed in a manner such that it was unable to bring to trial high-level Indonesian perpetrators residing within Indonesia. It was not
vested with any means to force Indonesia to cooperate. Its open cases against senior-level perpetrators constitute a considerable amount of unfinished business in regard to victims’ right to justice. The limited processes were held in such a manner that they provided limited space for victims to participate in the proceedings, which had negative implications on victims’ access to and understanding of the process and ultimately their right to justice. To date, the biggest challenge to victims’ right to justice is posed by the reconciliation discourse, which calls for closure of criminal investigation in favour of friendly relations with Indonesia. It prevents acknowledgement of victims’ suffering and perpetuates impunity.

The Indonesian *Ad Hoc* Human Rights Court has had no effect in promoting victims’ right to justice. The trials held were a mere formality, hindering rather than promoting the interests of victims in regard to truth and justice. State agents engaged in deliberate attempts to obstruct the criminal process. They failed to introduce or admit crucial evidence and refused participation of victims in the criminal proceedings. In the view of the Inter-American Court of Human Rights such processes deny victims (and their relatives) their rights to truth and justice. In addition, the above analysis has highlighted that the existence of the court did not only pose a challenge to truth and justice within Indonesia; it also posed a major obstacle to the pursuit of justice within Timor-Leste.

On the other hand, the complementary truth-seeking mechanism made a major contribution to victims’ right to justice by gathering and preserving huge amounts of evidence relating to crimes committed between 1974 and 1999. It was the only transitional justice mechanism that investigated in detail the offences committed amongst Timorese factions in 1974 and extensively collected evidence in relation to violence committed by pro-independence FALINTIL fighters. In addition, it collected oral statements in relation to sexual violence, torture, and war crimes, in relation to both 1999 and the 25 years of occupation. With its quasi-judicial proceedings, the CAVR was in a position to undertake investigations similar to preliminary, criminal investigations and to refer this evidence to the OGP. Unfortunately, to date, the CAVR’s efforts in complementing the criminal justice system have not resulted in any prosecution, neither in relation to the cases referred following the CRP nor in relation to the evidence gathered through its truth-seeking process. If the duty to prosecute and enforce

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victims’ right to justice will ever be adhered to, this evidence will be indispensable for criminal proceedings.

As it stands, in contrast to the government’s understanding of reconciliation as forgetting and forgiving, for Timor-Leste’s victims, the limited degree of justice is a major obstacle to reconciliation among Timorese and between Timor-Leste and Indonesia. Victims continue to feel frustrated that those with the greatest responsibility have not been held accountable and are demoralised that the prospects for justice are remote.\textsuperscript{771}

7.2 Right to truth

The CAVR applied a multi-level victim-centred approach to truth seeking. Its various truth-seeking efforts, undertaken on the national and community level, ensured broad participation and actively engaged the voice of victims. Gathering and conveying the truth meant listening to victims, fostering community, and relying on the stronghold of indigenous conflict resolution methods, through which offenders could share their version of the past. With this emphasis the CAVR clearly fostered victims’ right to truth in relation to the atrocities committed between 1974 and 1999, and, with these processes, it was in a position to dismantle a truth that went far beyond the ones established through criminal proceedings. As its mandate was not restricted to 1999, the commission could investigate the root causes of conflict, the Indonesian state apparatus enabling war crimes and crimes against humanity as well as the offences committed by the FALINTIL/FRETILIN resistance movement. To date, it remains the only transitional justice mechanism that could establish that torture and sexual violence was a means of warfare.

The Serious Crimes Regime as well as the Indonesian \textit{Ad Hoc} Human Rights Court presented the 1999 violence as a conflict between different Timorese factions. The outcomes in particular of the Serious Crimes Regime indicate, falsely, that the conflict of 1999 was a consequence of discrete incidents that engaged low-level Timorese pro-Indonesian militia members. Although various indictments issued by the Serious Crimes Regime confirm the findings of the CAVR in relation to the involvement of high-ranking Indonesian military forces in creating, training, funding, and arming anti-independence militias, no convictions of

those regarded as most responsible followed. Instead, subsequent court cases confirmed low and mid-ranking Timorese militia involvement and thereby contradicted the findings of the CAVR. FALINTIL engagement in the violence as well as the systematic and widespread nature of the crimes committed are absent from the courts’ records, as are war crimes committed in the form of sexual violence and torture. This narrative feeds national politics that have an interest in obscuring responsibility for past crimes committed by the pro-independence resistance. Similarly, the deeply flawed processes at the Ad Hoc Human Rights Court made no contribution to victims’ right to truth. Moreover, the processes are an example that illustrates how impunity profanes justice through the abandonment and denial of truth. They confirm how the manipulation of judicial processes actively distorts reality and how important accountability is to speak of justice772.

The different truths established within the various transitional justice mechanisms are difficult to harmonise. They blur understandings of the connections between Timorese anti-independence militias and the Indonesian military. They lead to confusion over the social dynamics and the myriad divisions among Timorese that were generated and exploited by the Indonesian state. The trials thereby increased mistrust among citizens and suspicion of those in power today773. They leave post-conflict Timor-Leste with unresolved issues not only in relation to official acknowledgment but more so in relation to victims’ right to truth.

7.3 Right to reparation

The Serious Crimes Regime and its subsequent processes did not provide any reparation to victims, although they would have been, legally, in a position to do so. The CAVR was in a position to grant reparation to 712 victims with most urgent needs. In addition, its Community Reconciliation Process included the negotiation of a Reconciliation Agreement through which victims were entitled to seek direct reparation from perpetrators, be it symbolic through apology and remorse. It is estimated that around 1,300 Reconciliation Agreements were reached and fulfilled. The CAVR also made broad and detailed recommendations in relation


to a national reparations programme. As described above, no final vote has been held on the national laws on reparation. Rather, calls for compensation for those who fought in the struggle for independence, Timor-Leste’s veterans, have taken priority and geared the debate over reparations towards standstill. So far, the CAVR’s efforts towards reparation remain the only realisation of victims’ right to reparation. Much remains to be done in regard to victims’ right to reparation.

7.4 What are the synergies resulting from this imbalance?

Within Timor-Leste, the truth-seeking mechanism formed the centrepiece of and between the transitional justice processes. It was, by law, entitled to refer evidence to the criminal justice system with the recommendation for prosecution and was mandated to recommend reparations. Both functions it fulfilled responsibly. It gathered evidence through quasi-judicial proceedings and established a clear vision of a national reparations programme. However, more than 8 years after the completion of the CAVR’s work, its recommendations for prosecution and reparations have not been followed up on. Does this have a negative influence on the success of the CAVR? The answer is yes, for two reasons: The non-prosecution of the cases referred from the CAVR to the criminal justice system has the effect that those who committed less serious crimes were brought to account through the CRP. They went through the process of shaming and blaming and responded to victims’ call for reparation. The CAVR is in this respect perceived as increasing injustice in regard to those who stood trial as compared to those with higher responsibility for the crimes committed that did not. In addition, the non-implementation of the reparations recommended by the CAVR leads to disappointment by those who came forward to the CAVR and shared their experience of suffering in the expectation of reparation. Victim empowerment through the opportunity to provide testimony to the CAVR is meanwhile overwritten by dissatisfaction over the lack of follow-up with prosecutions of serious crimes and reparation.

In his first annual report to the UN General Assembly, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence emphasised that truth, justice and reparations are related to one another; to trade them off against one another is both unacceptable and unlikely to succeed. The four measures are meant to complement one another, helping to compensate for the deficits that each faced vis-à-vis the immensity of the
task of redressing gross violations of human rights and serious violations of international humanitarian law. The Timor-Leste transitional justice framework was designed, by law, in a way that the CAVR and the Serious Crimes Regime complement each other through a referral mechanism. This referral mechanism connected the formal court system and national prosecution service with the CAVR. It enabled the CAVR to refer evidence with a recommendation for prosecution. Vice versa, the OGP was heard to consent to the holding CRPs, which, if successfully conducted, would bar criminal prosecution. This relationship was crucial and on the part of the CAVR and CRP operated effectively.

The Community Reconciliation Process itself combined methods of truth seeking, reparation, and bringing perpetrators to account. The processes were based on restorative justice principles that allowed for victim-offender-mediation and aimed at providing reparative justice through legally enforceable Reconciliation Agreements. They highlighted that justice, truth and reconciliation are not necessarily combatants competing for the same resource pie but can be integrally related and constitute inseparable partners in a common enterprise.

While the CRP itself clearly was complementary, this complementarity was not responded to by its counterparts: The CRP identified more than 140 cases that concerned serious crimes that it was not eligible to address. In relation to these, the best it could do was to refer the evidence to the criminal justice system – its counterpart designed by law to respond to the findings of the CRP. However, the complementary criminal justice system was never in a position to appropriately deal with these cases of serious crimes. Due to the closure of the Serious Crimes Regime and the failure of the state of Timor-Leste to comply with its duty to prosecute, none of these cases have ever been followed up on. The evidence against them remains safely tucked away. In retrospect, what was first considered as one of the strengths of the transitional justice mechanism developed into one of its major shortcomings.

The failure of the Serious Crimes Regime to complement the work of the CAVR/CRP ultimately interferes negatively with the success of the CAVR. Those who committed less serious crimes went through the process of truth seeking, reparation and justice, faced their victims, and fulfilled their commitments reflected in the reconciliation agreement. Those who committed serious crimes benefit from an impunity gap and – once again – remain untouched.

This clearly does not reflect the complementation that was hoped for. Rather, it confirms a statement of Duane Ruth-Heffelbower\textsuperscript{775}, who concluded as early as 2001 that Timor-Leste’s options are “restorative justice or impunity. That is the choice facing us in Timor”.

Similarly, the CAVR’s efforts in relation to reparation remain without response. In 2005, the CAVR outlined in detail a national reparations programme. It envisaged a process of victim registration as well as an implementing body that, together with grassroots organisations and victim services, would ensure the proper implementation of the proposed reparations scheme. During its process, the CAVR placed reparations at the centre of its framework and linked them closely to truth and justice\textsuperscript{776}. It promoted a version of truth seeking that was driven by an understanding “that lasting reconciliation cannot be achieved without establishing the truth, striving for justice, and providing reparations to victims. Reparations were regarded as necessary to restore the dignity of victims and to repair damaged relationships within our society”\textsuperscript{777}. The CAVR was therefore perceived as a commission that in all aspects of its work sought to have a reparative effect. During hearings at national, sub-district, and village levels and at healing workshops conducted with survivors of human rights violations from all districts individual victims and communities told the CAVR clearly and repeatedly of the need for ongoing healing and work to repair damage caused by human rights violations\textsuperscript{778}. The CAVR encouraged victims to make recommendations, often after giving a statement or at the end of oral testimonies during hearings. It provided a broad and inclusive platform for victims and witnesses to come forward and share their experience. Clearly, it increased expectations that reparation would follow. In return, this requires from those responsible for the transitional justice process that they acknowledge victims’ expectations, take the statements seriously, and address the needs expressed.

The discourse leading to the creation of reparation measures is equally important to victims. It demonstrates how those who can put through reparations manage and deal with their delivery. By supporting reparation measures, stakeholders demonstrate credibility to victims through taking responsibility in regard to the losses they suffered. As a product of a broader social

\textsuperscript{775} Associate Professor of Peacemaking and Conflict Studies, School of Humanities, Religion and Social Sciences; Director of the Center for Peacemaking and Conflict Studies Fresno Pacific University; from 1999-2001 he had been training Indonesians and Timorese in ‘reconciling injustices process’

\textsuperscript{776} CAVR, Final Report Chega !, Recommendations – Part 11, para. 12.2

\textsuperscript{777} Ibid., para. 12.5.

\textsuperscript{778} Ibid., para. 12.4
context and political processes, a national reparations programme would communicate to victims a common effort to alleviate their suffering. It symbolises an admission of guilt, benevolence, care for citizens, and willingness to pay back – at least to some extent – what has been lost. Reparations represent to victims a societal community willing to take responsibility for the past. They thereby play an important role in assisting victims to feel a greater sense of integration, recognition, and acceptance in society\textsuperscript{779}. Yet, Timor-Leste is not alone in the non-implementation of reparation measures. Few countries have implemented a substantial reparations programme upon recommendation of a truth commission. In most cases, governments have responded slowly or with tepid interest. Typically, it takes a number of years before a reparations programme is implemented and usually these years are filled with frustration for those hoping to receive some form of reparation\textsuperscript{780}. Very few examples exist in which recommendations have been taken seriously\textsuperscript{781}.

However, almost 10 years after the completion of the CAVR and its recommendation of reparation to parliament it is high time to re-open the discussion on reparation for victims of serious crimes. The psychological benefits of testifying are short lived and unfulfilled expectations and disappointment soon become dominant feelings\textsuperscript{782}. The non-implementation of the proposed reparations programme clearly has negative effects on the credibility of the CAVR.

Much needs to be done in regard to victims’ right to justice and reparation. Both are far from being realised. The CAVR gathered evidence, evaluated it in relation to those who allegedly committed the offences, and thereby established an enormous archive. It thus ensured that detailed and well-researched evidence is preserved. By doing so, it gathered an encompassing picture of victimhood and established an enormous record on who should be entitled to reparation. By this means it guaranteed that the voices of victims would not be lost and contributed to a culture of memorialisation and remembrance. It thereby provides a safeguard


against revisionism and denial – essential given the long duration and non-linearity of social reconciliation and integration processes.\(^{783}\)

Nevertheless, even the ideal truth commission has serious limitations in relation to justice and reparation. Recognition of the existence and status of victims, acknowledgement of wrongs, payment of reparations, rehabilitation, and other modes of compensation are all essential ingredients of any healing and reconciliation process. They need to be part of every holistic or complementary method of dealing with serious and widespread violations of international humanitarian law and human rights. This requires that truth commissions be accompanied with efforts in relation to criminal justice and reparations. Without some form of justice, through the court, reparations will be perceived as bolstering a process of false reconciliation. Without justice, survivors tend to see reparations as an attempt to silence them or to force them into colluding with a state’s lack of will to prosecute those responsible for violence against them.\(^{784}\) Unfulfilled needs for justice and reparation combined with the sense that rights are worthless may remain an open wound, and reconciliation may be thwarted. Overall, what the relevant UNTAET Regulations designed as “complementary” and what had been regarded as an unprecedented innovative legal framework of complementary transitional justice resulted in a framework in which one process complemented its counterparts. However, it could not compensate their dysfunctionality.

### 7.5 Concluding remarks

Overall, the Indonesian government has failed to deliver justice, truth and reparation for past violations. The outcomes achieved in Timor-Leste by the UN and local governance in regard to victims’ right to justice and reparations are extremely worrisome. As was said, one of the reasons to focus this study on Timor-Leste’s transitional justice framework was the involvement of the United Nations in the process. For the UN the non-implementation of the right to justice and reparation for Timor-Leste’s victims of serious crimes is a very poor record. It contradicts its efforts to foster the implementation of victims’ rights domestically. It


erodes the promotion of standards if the very same organisation promoting them does not adhere to their implementation. It confirms that the UN has in regard to its own processes, aimed at implementing victims’ rights, rarely conducted effective follow-up research to assess and call for a continued progress of implementation. It reflects a short-term agenda, an attitude of “done and dusted”.

UN-sponsored transitional justice initiatives are often presented as the “optimal” blueprint; as internationally sponsored “rule of law” initiatives, they are, however, likely to ignore the difficult, long-term political discussions and negotiations that are required to build an inclusive political community. Timor-Leste’s experience, in particular in relation to criminal justice and reparation, demonstrates that policymakers often view transitional justice mechanisms as “technical” projects, designed as short term in nature, that embody “universal” values transferrable to a variety of locations. Timor-Leste’s experience has confirmed that this tendency can be problematic in that it fosters the perception that trials and truth commissions can be orchestrated from “above” the political sphere without taking into account the extent to which both mechanisms are the product of compromise, limited domestic choice, and conflicting policy agendas.

The transitional justice framework evaluated in this thesis puts victims and their rights at the centre of transitional justice. This approach, promoted in the UN and in particular in its human rights divisions, reflects the depoliticisation common to human rights scholarship and its promotion of universal values. Such depoliticisation was introduced into the field of transitional justice to ensure that transitional justice efforts maintain the legitimacy and integrity of universal values in politically divided societies. This study demonstrated that whilst the rights to justice, truth and reparation are universal, the practices in relation to them remain far from it. Further implementation of the right to justice and reparation has come to a stand-still due to the lack of political overriding competing political interests. On an international level, such depoliticisation is required for establishing the legitimacy of investigations and for demonstrating independency. However, in the context of Timor-Leste, due to such depoliticisation and the international agents’ reluctance to engage in political discourse, transitional justice efforts were ill equipped to face the political factions causing these standstills. The UN-sponsored transitional justice process was institutionally incapable

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of engaging with the difficult national and bilateral political discussions about how to address the violence of the past. Rather, this inability increased a contradictory attitude of the government of Timor-Leste towards criminal trials and reparation. It confirmed that the legitimate claims for justice and reparation expressed were too often understood as threatening the exigencies of establishing negative peace or order. Refraining from political discussion opened up an arena for the political leadership to use the platform created (through the UN transitional justice framework) for an uncontested promotion of its interests. The search for justice and reparation in fragile post-conflict environments became a matter of compromise or political convenience. This experience demonstrates how the theoretical discussion of the role of international law must re-connect with the political consequences of decisions for leaders and citizens in new states. It confirmed that universality opened the arena for local political actors to disseminate their opinion on justice, truth seeking, and reparation and the version of the past connected to it. Instead of shielding transitional justice efforts from politicisation, the non-engagement of UNTAET (and its follow-up missions) with local actors drew attention towards political contexts emerging alongside the transitional justice agenda. In response, transitional justice mechanisms and those promoting them were not in a position to take on a critical role to challenge emerging denial, to expose systematic dimensions of past wrongs, and to advance ongoing processes. It is, with Leebaw, contended here that it will be important to counter the prevailing logic of depoliticisation associated with contemporary transitional justice. The field will have to acknowledge, affirm, and critically evaluate the role of political factions and their political judgement in its moral and legal responses to political violence.

Such ongoing and politically sensitive negotiations unsettle the view that transitional justice is a normative and apolitical process that can be introduced and implemented based on universal values while ignoring interests of national politics. They challenge, too, the linear notion of “transition” that underpinned the UN’s transitional justice rhetoric, which suggested that these mechanisms created would help to bring about a rupture with the past and foster a new, democratic, order. It is emerges from this case study that “dealing with the past” is a dynamic,

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fluid, and ongoing process, rather than confined to an immediate “transitional” period. It is therefore very important that when advocating for the implementation of justice, truth and reparation, more attention is paid to the practical realities faced by states in the context of international relations. Timor-Leste’s experience confirmed that political challenges to the duty to prosecute and provide reparation imposed by international law must be fully reckoned with. Otherwise, non-compliance vitiates the authority of law itself.

Victims’ rights provide a constant transitional justice agenda. The ways, in which these rights are conceptualised, they survive transitional justice agendas and political change. They do not cease and can continue to be called for. If the transitional justice agenda engages with political factions carefully and strategically, victims’ rights should not be seen as an obstacle to pragmatic political change. Rather, politicians and those in power will be challenged to find ways to move forward while ensuring justice, truth and reparation to victims of serious crime. This requires long-term, sustainable processes embedded in a transforming society and the adoption of individual perspectives on transitional justice. It requires long-term processes that make use of sequencing and timing of different initiatives as a strategy for a particular context. This means that the political attitude of the local government needs to be reconnected to the transitional justice discourse. However, for now and foremost, the right to justice, truth and reparation of Timor-Leste’s victims of serious crime require the international community and those responsible locally to challenge the attitude of “done and dusted”.

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Annex 1: Dealing with the Past Framework (Swiss Federal Department of Foreign Affairs/Swisspeace)


Schotsman, Martien, “‘Blow Your Mind and Cool your Heart’: Can Tradition-based Justice fill the Transitional Justice Gap in Sierra Leone?”, in *Critical Perspectives in Transitional*


Weitekamp, Elmar and Stephan Parmentier (et al.), “How to Deal with Mass Victimization and Gross Human Rights Violations. A Restorative Justice Approach” in Large-Scale