

CIPL Seminar Series

**Justice in Timor-Leste: the 10th Anniversary of the Independence Ballot**

*Heartbreaking embrace: reflections on the tenth anniversary*

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*Figure 2: Photograph of East Timorese President Xanana Gusmão meets Indonesian Presidential candidate former General Wiranto in Badung Bali on 29 May 2004, © Dadang Tri, /Reuters/Picture Media.*

## **Tears and the embrace**

This photograph, taken on 29 May 2004, shows Timor President Xanana Gusmão and Indonesian Presidential candidate General Wiranto in a friendly embrace in Bali. The picture belies a dramatic background.

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

The Special Panel for Serious Crimes (SPSC) issued a warrant for the arrest of Wiranto on 10 May 2004 after declining a public hearing. General Wiranto was then a leading candidate in the Indonesian Presidential elections (as he was again in the 2009 elections). Several days later Wiranto was pictured above hugging President Xanana Gusmão on the anniversary of Timorese independence. The photograph was published widely in the Timorese and Indonesian press. Gusmão was met when he returned home to Dili with demonstrations and the sound of

hundreds of women weeping.<sup>1</sup> This embrace has become a potent symbol of the complex dilemmas faced by Timor's transitional justice process.

From a realist point of view, Gusmão was given little choice but to reconcile with Wiranto. The February 2003 indictment caused a strong reaction from the Indonesian government. Indonesia blamed the UN for what they saw as a 'politically motivated case'.<sup>2</sup> UNMISSET issued a public statement subtly disavowing the action, declaring that the indictment was issued through the prosecution service of Timor-Leste and not by the UN.<sup>3</sup> The International Center for Transitional Justice stated that the UN statement 'provoked the dismay of those in the Timorese leadership who had expected the UN to show a clear commitment to the justice process and strengthened the view that the UN's support for justice could not be taken for granted'.<sup>4</sup> The Timorese government then countered with a public declaration that the indictment was the work of the UN and not of East Timor.<sup>5</sup> The government also declined offers of overseas aid

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<sup>1</sup> *Lusa*, 'Demonstrators protest Wiranto meeting on Gusmão's return', 31 May 2004. *Tempo Magazine*, 'Xanana and Wiranto meeting reaped condemnations in Timor-Leste', 40:IV, 8-14 June 2004.

<sup>2</sup> Megan Hirst and Howard Varney, *Justice Abandoned? An Assessment of the Serious Crimes process in East Timor*. Occasional Paper Series, International Center for Transitional Justice, New York, June 2005, at p. 25.

<sup>3</sup> United Nations News Centre, 'Timor-Leste, not UN, indicts Indonesian General for war crimes', 26 February 2003. The International Center for Transitional Justice explains that 'while this is technically correct, it did not acknowledge the work of the prosecution service was carried out by a UN unit and staffed by UN employees.' Megan Hirst and Howard Varney, *ibid.* See also *Catholic Institute International Relations*. 'Church network urges UN to press ahead with Timor prosecutions.' 18 March 2003; 'East Timor: General Wiranto said ready for Dili video-conference atrocity hearing', *Lusa*, 4 February 2004 and Mark Dodd. 'Massacres Go Unpunished as UN Crimes Unit Heads for Collapse.' *Sydney Morning Herald*, 1 May, 2001.

<sup>4</sup> Megan Hirst and Howard Varney, *Justice Abandoned? An Assessment of the Serious Crimes process in East Timor*. Occasional Paper Series, International Center for Transitional Justice, New York, June 2005, at p. 25.

<sup>5</sup> Megan Hirst and Howard Varney, *ibid.*

for the funding and staffing of the serious crimes process.<sup>6</sup>

It was in this context that President Xanana Gusmão met the then Indonesian President Megawati Sukarnoputri in May 2004. They agreed that outstanding human rights issues between the countries would not be solved judicially but through a reconciliatory approach.<sup>7</sup> President Gusmão praised the Jakarta trials in his Independence Day national address, and then met personally with General Wiranto to hug him as an act of reconciliation.<sup>8</sup>

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

Before, we were the same in the forest, the mountains, in positions opposing each other. To see us now, it's quite funny. I think now we have become friends. We are two people who understand that war and battles are not good.<sup>9</sup>

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

We fought for 24 years and during the struggle we followed many other conflicts, some of them ended, some of them are on the way to [an] end. Two and a half years after independence we are ahead of Guinea Bissau, a former Portuguese colony which was the first to start its independence struggle, and they still face human rights abuses and poverty. With our policy we have security, stability and progress. We have good relations with our big neighbour. NGOs say, on behalf of victims there must be justice. For our process, real

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<sup>6</sup> Megan Hirst and Howard Varney, *ibid.*

<sup>7</sup> Megan Hirst and Howard Varney, *ibid.*

<sup>8</sup> Megan Hirst and Howard Varney, *ibid.*

<sup>9</sup> Matthew Moore, ‘Lay off Wiranto’, *Sydney Morning Herald*, 31 October 2004.

justice was that the international community recognized our independence and helped to achieve it. For all the sacrifices of our people, our obligation is to bring them real independence, meaning social justice and development. East Timor should not live in the past, but look towards the future.<sup>10</sup>

Then President Xanana Gusmão's (now Prime Minister) reconciliation attempts reached their apex with "Operasaun Domin" (Operation Love), which collected \$77,000 from Timor-Leste people for Indonesian tsunami victims, and then presented it as a personal gift to President Susilo Bambang Yudhoyono.<sup>11</sup> (Timorese leadership has always been conspicuously silent on the situation of people in Aceh and West Papua, except to emphasise differences with Timor Leste).

The smiling embrace can therefore be read as a broader symbol of the complex interactions between law and politics, common to studies of transitional justice.

### **The future of justice for East Timor**

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

To end the century and the millennium tolerating impunity for those guilty of these shocking violations would be a betrayal of everything the United Nations stands for regarding the universal protection and promotion of human rights.<sup>12</sup>

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<sup>10</sup> Xanana Gusmão, 'Notes on comments by Xanana Gusmão and Jose Ramos-Horta on dealing with past human rights violations made during a Panel Discussion'. Paper read at German Council on Foreign Relations (Deutsche Gesellschaft für Auswaertige Politik, DGAP), Berlin, *Watch Indonesia*.20 October 2004.

<sup>11</sup> Douglas Keatinge, 'All to play for in East Timor's modest aid gesture', *The Irish Times*, 31 January 2005.

<sup>12</sup> United Nations, 'High Commissioner for Human Rights reports on the situation in East Timor as the Commission on Human Rights considers holding special meeting', *media release*, HR/99/90, 17 September 1999.

In 2009, a decade since the ballot next week, the outcomes of the transitional justice processes set in place by the UN and Indonesia are cause for deep concern in terms of their inadequacy and hypocrisy. Not one Indonesian perpetrator has been punished. The prospect of an international tribunal seems dim but the moral and logical force of the arguments for a tribunal remains undimmed. As journalist Sian Powell stated:

Justice for the thousands of East Timorese who were murdered, raped, assaulted and forcibly exiled in 1999 has been slowly but surely buried in an avalanche of paperwork churned out by tribunals, commissions, panels and committees.<sup>13</sup>

<See charts>

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

These conclusions are broadly correct. The failure of both processes can be traced squarely to dwindling political will on behalf of the main actors, the

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<sup>13</sup> Sian Powell, ‘East Timor forgoes justice for the rape of a nation’ *The Australian*, Jakarta, 1 August 2005.

Governments of Timor, Indonesia and key Member States of the UN.<sup>14</sup> In Indonesia, the pressures of democratic and economic reform influenced the political will in the executive and the legislative sectors. In East Timor, the priority for dealing with these crimes was shared with other, formidable priorities. In other words, the political will at the national level in both States was not up to the level required to see the machinery of justice put into effect.

At the international level, the political will, despite the expressions of outrage and condemnation, and the cogent reports of the UN Commission on Human Rights, simply was not sufficiently strong to bring about the kind of consensus that led to the establishment of ICTY and ICTR. The procedure for convening the extraordinary session of the Commission on Human Rights in September 1999, and the complications surrounding that session, provided clear evidence of the absence of international consensus to handle the crimes through international action. By 2005, the Security Council in Resolution 1599 (2005), acknowledges the improvement of relations between Indonesia and Timor Leste, including the agreement to establish the CTF. The Council also slightly softened its position on the judicial process regarding serious human rights violations in East Timor in 1999, by only reaffirming the need for credible accountability, instead of reaffirming the fight against impunity mentioned in the Resolution 1573 adopted in 2004.

Whether justice will be done for East Timor in the future is unclear. The then Special Representative of the Secretary-General in East Timor, Dr Hasegawa,

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<sup>14</sup> 'Editorial: Indonesia's Generals Take a Back Seat', *Sydney Morning Herald*, Sydney, 2004

stated that with many competing opinions and interests for Timor, one option would be ‘call it a partial victory and close the curtain’ when the UN mission finally departs. He thought the only other option was a full international tribunal costing much more than has been invested in the process so far.<sup>15</sup>

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

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

The reasons are, as you know, there is the Government has the present determination to first, consolidate the process of democracy, freedom and justice in East Timor. Second, to maintain the good relations with Indonesia. At the same time, also giving the opportunity to the Indonesian system of democracy and freedom to be consolidated in that region.<sup>16</sup>

The CTF report was better than expected, but no substitute for justice. The Government will still be under pressure to debate the CAVR report in Parliament and provide ‘reparations’ to victims, as well as persistent claims from its own citizens to pursue justice <see victim’s statements from Liquica and Carrascalao massacres 2009>.

President Jose Ramos-Horta has responded to the recommendation of the CAVR report to pursue indictments of Indonesian military in the following manner:

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<sup>15</sup> Sarah Boyd, ‘Timor justice slow but sure’, *Asia Intelligence Wire*, 29 July 2004.

<sup>16</sup> Tom Iggulden, ‘East Timor plays down damning UN report’, *ABC Radio National AM*, 19 January 2006.

Well, these are very high-sounding statements, but the United Nations were here, from 99 to 2003, with the massive peacekeeping force. They didn't do that. So why should the East Timorese, with our own priorities and concerns, to continue to consolidate peace, reconciliation, creating jobs for our people, reducing poverty -- should pretend to be a sort of Don Quixote de la Mancha of justice, in fighting the mighty Indonesian army?<sup>17</sup>

Often though, to ordinary citizens of Timor Leste, survivors amongst the more than 150 000 people killed from 1975 to 1999, statements like these from the UN and the Timorese leadership must sound like pure and simple hypocrisy.

### **Implications for International Law**

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

In examinations of transitional justice processes, and in theoretical discussions of the role of international law, the political consequences of decisions for leaders

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<sup>17</sup> Sen Lam, 'Timor: No compensation wanted for occupation', *Radio Australia*, 1 December 2005.

and citizens in new States must not be lost. The goal of accountability for *jus cogens* crimes is not unrealistic, but is more difficult to achieve than setting up a UN court by decree. It is therefore very important that international lawyers, when advocating for the implementation of the minimum accountability requirements for *jus cogens* crimes required by international law, pay more attention to the practical realities faced by states in an international relations context. This does not mean that accountability is not possible or realistic, but it does mean that international lawyers must be more strategic and cautious in their push for immediate trials after a conflict. The realist challenge to the obligation to punish imposed by international law, where justice is ‘tradable’, must be fully reckoned with.

Transitional justice models may have moved on slightly from the crude *realpolitik* position of openly bartering justice for peace, but the substantive outcomes of justice mechanisms are still extremely selective and have substantial flaws in terms of competence and fairness.<sup>18</sup> Generally, my research on East Timor suggests the political debates around transitional justice still reflect differing *Realpolitik* versus anti-impunity views regarding the ‘trade-ability’ of justice outcomes, the selective gaze and resources of the international community for justice outcomes, and questions over who is the key audience for those outcomes.

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<sup>18</sup> See further Charles T. Call, ‘Is Transitional Justice Really Just?’ (2004) *Brown Journal of World Affairs* XI(1):101-113.

A proper grasp of political challenges is even more of an imperative for a 'strategic feminist legalist' attempting to assist the promotion of gender-inclusive transitional justice processes and the restoration of a rule of law that protects women. It is tempting to analyse the transitional justice processes as an overall failure, and accede some ground to the realist viewpoint. This would merely accord with the pragmatism on transitional justice matters from the Timorese leadership, and there is no guarantee this view has afforded Timorese women a positive future. Too many Timorese women who were herded as refugees into West Timor in 1999 are living as internally displaced persons in their own country in 2009. Many women are among the 20 000 still living trapped and in poverty on the Indonesian border as the tenth anniversary of the ballot approaches.<sup>19</sup> Within the overall failure of the transitional justice process then, it is still crucial to consider how these transitional justice processes have had a gendered impact. It is even more crucial to start thinking creatively how to gain material benefit for women in a post-conflict state. It is in this light I propose a veteran strategy.

### **Women become veterans?**

I argue in my forthcoming book that the well-being and ability of women to claim their rights in a transitional justice setting is related to their status socially and legally, and this status needs to be addressed in post-conflict states. Within Timor, there is ambivalence about the idea of women as contributors to independence during the occupation, even though women made up more than 60

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<sup>19</sup> Miki Perkins. 'Forgotten victims of East Timor's independence' *The Age* (Melbourne), 16 June 2009.

per cent of the clandestine movement. One simple but perhaps far-reaching proposal is to expand the definition of veteran in the Veterans Law of East Timor, in order to re-characterise female survivors of violence and their children as ‘veterans’ of the conflict, with the same status as the former Falantil guerrillas. This would serve the purpose of both providing a pension and acknowledging the status and contribution these women made through their bravery to independence., at the ballot box and through the long years of occupation. It would also have the effect of putting the situation of these families squarely into current transitional justice debates in Timor.

Such a proposal, if implemented, could work to counter the prevailing inertia and patriarchal attitudes that account for much of the hardship these survivors and their babies face, while drawing strategically on other nationalist imagery currently at a premium in post-independence East Timor. In part, the reluctance to incorporate a concern with gender-based violence into existing mechanisms for legal redress in East Timor is due to the ambivalence about the idea of women as fighters for independence during the occupation, with special discomfiture reserved for those seen as ‘wives’ of Indonesian military and children termed ‘orphans’ who are children born of rape with Indonesian fathers. The language still used to describe these women is filled with euphemism and the assumption of consent through formal rituals such as ‘marriage’ and ‘wives’ — even more pronounced than terms like ‘comfort women’. Likewise, the language used to describe the offspring of these unions is, at worst, one that invokes shame and

illegitimacy, and at best one that evokes pity for their status as 'orphans' despite the fact that they may be in the custody of their mothers.

The issue of proper support for veterans and the question of who is a veteran has been hotly debated in Timor since independence and is enshrined in Section 11 of the Constitution. The main source of tension is that the UN Mission did not convert the majority of Falantil veterans into the new standing army or reserve. Instead, the East Timor Defense Force (ETDF) is small but well-trained, consisting of 1500 regulars (31 of whom are women) and 1500 reservists. <see generally the work of my colleague Bu Wilson>. Over 7000 people applied for the last round of 428 places, leaving many disgruntled veterans without a position.<sup>20</sup> Women veterans indicate that they are generally highly regarded in their communities,<sup>21</sup> and Maria Paixo, an ex-fighter, is a member of Parliament. However, no female combatants have been included in any formal Disarmament, Demobilisation and Reintegration (DDR) programs.<sup>22</sup> Gusmão's biographer Sara Niner reports that even today, Gusmão is unable to admit that women bore arms in the struggle. She also notes that the Timorese Resistance Archive and Museum appears to overlook women's involvement in the conflict, focussing instead on elite men.<sup>23</sup>

On 8 June 2004, then President Gusmão formally presented to the National Parliament the report of the Veterans Commission, which recommended forms of

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<sup>20</sup> Joe Havelly, 'Timor's army marches out of the jungle'. *CNN.Com*. 19 May 2002.

<sup>21</sup> Susan Blackburn, 'The aftermath for women warriors: Cambodia and East Timor', IIAS Newsletter 48: Women Warriors, Summer, Leiden, 2008.

<sup>22</sup> Sara Niner, 'The contested place of women in post-conflict Timor-Leste', unpublished, on file with author, June 2009.

<sup>23</sup> Sara Niner, *ibid*.

recognition and material benefits to the veterans identified through a long registration process. More than 37 000 people have been registered as having fought for independence during the occupation, and are nearly all male combatants. Tensions about the long process led to a demonstration outside the Parliament dispelled by tear gas, led by Cornelio Gama (known as L7) of 120 veterans on 19 July 2004.<sup>24</sup> An August 2004 interview with President Gusmão shows a Government willing to empathise and negotiate with this group:

GUSMAO: 'I can understand the position of those former veterans, you know they previously were very clear about who the enemy was, it was the Indonesian military. They had a role as heroes in fighting against that enemy. Nowadays who are they? You know they haven't been given any special recognition from government, they're not clear about what their role is in determining the future of their country. So I think it's very understandable that they are feeling marginalised now and disgruntled with the government and expressing that through demonstrations.'

[INTERVIEWER] WERDEN: 'Well what do you think the government should do with people like L-7?'

GUSMAO: 'I think it's really important that the government sit down and listen to what they're saying and really make a special effort to respond in some way, either with training or employment opportunities for these people, not just because they have the potential to disrupt stability in the future, but

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<sup>24</sup> See also the *Progress Report of the Secretary-General on the United Nations Mission of Support in East Timor (29 April to 13 August 2004)* UN Security Council S/2004/669, 13 August 2004, at para 5.

because they really are genuinely deserving of attention and special support.’<sup>25</sup>

The situation for veterans is still fraught. In April 2006, more than one-third of the country's armed forces had been discharged over a mutiny linked to claims of poor service conditions and biased promotion.<sup>26</sup> Violent riots ensued, particularly in Dili. Despite repeated attempts at appeasement, there was an assassination attempt on Ramos Horta in 2008. This group of veterans is a credible threat, has links with the leadership and the ability to make itself heard,<sup>27</sup> but women survivors and their war babies do not. And yet, why should the needs of ex-combatants necessarily be prioritised over these women and children? <We are seeing women's rights being used as expendable pawns in electoral power-games in Afghanistan at present.> Charles Schreiner believes the ‘model of ‘big men’ not being held accountable for criminal acts now permeates Timorese society, often breaking out into violence and retaliation facilitated and encouraged by the expectation of impunity’<sup>28</sup>

Policy proposals that would reconstruct women as wartime veterans, rather than current labels which produce shame and stigma, will not resolve their situation overnight. However it may provide a language and a framework in which women's groups and progressive elements within Timorese civil society can

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<sup>25</sup> ABC Radio Australia Asia-Pacific. ‘East Timor: First Lady calls on PM Alkatiri to respond to L-7’ Broadcast, 6 August 2004.

<sup>26</sup> International Crisis Group, *Resolving Timor Leste's Crisis*, Asia Report No. 120. Brussels: International Crisis Group, 2006.

<sup>27</sup> Edward Rees, *Under pressure: Falintil - Forças de Defesa de Timor Leste: three decades of defence force development in Timor Leste 1975 -2004*, April 2004.

<sup>28</sup> ‘Justice for Timor-Leste remains an Unfulfilled International Obligation’ LH Bulletin August 2009.

engage in work to promote greater social inclusion for these families, and such terminology may be validating to the survivors and their children themselves.

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

I will not... hold office like these important men who once fought together with us. All I ask for is my right to a decent life as the family member of a fighter. I got this way because my husband and children disappeared. The important men are not permitted to forget us [just because they] now have a strong chair stuck on the ground. In the past, when their positions were not yet certain, we fought together.<sup>29</sup>

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

On 30 August I will remember these women and honour them, and this speech is dedicated to their bravery.

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<sup>29</sup> BK from Fatubessi, quoted by Galuh Wandita, Karen Campbell-Nelson, and Manuela Leong Pereira. 'Learning to Engender Reparations in Timor-Leste: Reaching Out to Female Victims' Ruth Rubio-Marín (ed), *What Happened to the Women?: Gender and Reparations for Human Rights Violations* New York: Social Science Research Council, 2006, at p. 319.