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Published in:
Netherlands International Law Review

DOI:
[10.1017/S0165070X11100042](https://doi.org/10.1017/S0165070X11100042)

Publication date:
2011

Document Version
Publisher's PDF, also known as Version of record

[Link to publication in Discovery Research Portal](#)

Citation for published version (APA):
McAuliffe, P. (2011). UN Peace-Building, Transitional Justice and the Rule of Law in East Timor: The Limits of Institutional Responses to Political Questions. *Netherlands International Law Review*, 58(1), 103-135.
[10.1017/S0165070X11100042](https://doi.org/10.1017/S0165070X11100042)

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UN PEACE-BUILDING, TRANSITIONAL JUSTICE AND THE RULE OF LAW IN EAST TIMOR: THE LIMITS OF INSTITUTIONAL RESPONSES TO POLITICAL QUESTIONS

by Pádraig McAuliffe*

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1. INTRODUCTION

The UN's unprecedented decade-plus experience in East Timor in a number of institutional guises represents perhaps the most extensive peace-building operation the world body has ever ventured on. From referendum assistance under the UN Assistance Mission in East Timor in 1999 to two-and-a-half years of interim transitional administration under UN Transitional Administration in East Timor (UNTAET) and a series of subsequent assistance missions, the small half-island has proven an effective laboratory for third-generation peace-building doctrinal theory. In particular, the East Timorese experience tested practically the UN's developing understanding of the triangular relationship between the necessarily long-term process of rule of law reconstruction, the more short-term exigencies of transitional justice and the security-driven imperatives of the nascent democratic polity that emerges from peace-building. The UN's work in these areas has been manifested primarily in (a) successive processes of territorial administration, assistance and capacity-building in the national court system by various UN missions that continue to this day, and (b) the hybrid Special Panels process that ran from 2000-2005 combining international judges and prosecutors with Timorese equivalents to try human rights abuses committed in the period surrounding the 1999 referendum. Despite some significant initial success in prosecuting individuals guilty of committing international crimes and in developing a cadre of capable Timorese judges and prosecutors to serve the million-strong population, there is strong evidence that East Timor has yet to become a rule of law-based state, especially insofar as this is manifested in the separation of powers and respect for the independence of the courts. Though democratic procedures have taken a reasonably firm root at executive and legislative level, at a judicial level persistent governmental interference in politically-sensitive trials has been identified one of the most serious long-term threats to the security of the state.¹

In seeking an explanation for this state of affairs, it is natural to look at the influence (or lack thereof) of the Special Panels and the capacity-building programme of the UN in the past decade, tasked as they were with grounding a rule of law culture in East Timor. Though the latter has been subject to some criticism for the continued reliance of the Timorese courts on foreign expertise,² the hybrid Special Panel process was completed with more widespread condemnation. Behind impressive statistics for convictions relative to contemporaneous transitional trials in other states, there were very serious shortcomings in the quality of the process. As resources became stretched and international attention waned, law was misapplied, defendants' rights were systematically breached,

1. UN Secretary-General, *Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 24 September 2009 to 20 January 2010)*, UN Doc. S/2010/85, 12 February 2010, paras. 80-87 (hereinafter: UN Secretary-General 2010 Report).

2. Freedom House, USAID and American Bar Association Rule of Law Initiative, *Rule of Law in Timor Leste*, June 2007, available at: <www.abanet.org/rol/publications/east_timor_rule_of_law_assessment_june_2007.pdf>, at p. 40.

and a number of bewildering decisions were issued which called into question the overall fairness of the trials.³ Lost somewhat amidst the torrent of criticism was a significant episode of governmental interference in the process, when the prosecution policy ran contrary to policy of the newly-independent Timorese state. The Timorese leadership was active in undermining the indictment of the Indonesian military leader and politician General Wiranto which the UN not only failed to prevent, but also meekly acquiesced in. Many of the problems with the Special Panels process were due to resource constraints and so can be blamed more on UN member states keen to see 'justice on the cheap'⁴ than the world body itself. However, the *Wiranto* episode undermined predictions confidently made in UN peace-building doctrine that the UN's participation in transitional accountability processes could facilitate rule of law-based interactions between emerging post-conflict rulers and the court system in politically-contentious trials.

Analysis of the Special Panels' impact has tended to stop at the date the processes ended in May 2005. However, this approach elides the extent to which the hybridisation of prosecutorial and judicial functions visible first in the Special Panels remains a continuing feature, and how the political interference manifest in the *Wiranto* Indictment set a precedent continues to this day. This article examines the enduring failure of the UN's institutional assistance to the Timorese courts to foster respect for the autonomy of the court system on the part of a government with 'creeping autocratic tendencies'.⁵ It does so in the context of a Timorese judiciary beginning to deal with politically-sensitive cases arising from human rights abuses in the Indonesian occupation, a period of widespread political violence in 2006 that toppled a government, and the attempted assassinations of the President and Prime Minister in 2008. Examining the pervasiveness of political interference in Timorese criminal justice in light of the opportunities afforded by UNTAET's period of International Territorial Administration (ITA) and the principles expressed in the UN Secretary-General's seminal Rule of Law and Transitional Justice Report in 2004,⁶ the article cites a crucial failure of example in the Special Panels apparatus to make effective the relationship between transitional justice, democratisation and domestic rule of law envisaged in peace-building doctrine. UN Territorial Administration and the Report place great faith

3. See D. Cohen, *Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor* (Honolulu, East-West Centre 2006); M. Hirst and H. Varney, 'Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor', International Centre for Transitional Justice (ICTJ) Occasional Papers Series (2005), available at: <www.ictj.org/images/content/1/2/121.pdf>.

4. D. Cohen, "'Justice on the Cheap" Revisited: The Failure of the Serious Crimes Trials in East Timor', *Asia Pacific Issues* No. 80 (2006), available at: <www.eastwestcenter.org/fileadmin/stored/pdfs/api080.pdf>.

5. H. Myrntinen, 'Timor-Leste: A Relapsing Success Story', 5 *Taiwan Journal of Democracy* (2010) p. 219 at p. 222.

6. UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616, 3 August 2004, p. 27 (hereinafter: Rule of Law and Transitional Justice Report).

in transfusions of international staff to bolster the independence of judicial institutions. However, the Timorese experience suggests that institutional responses at a judicial level are unlikely to be successful in either the immediate transitional trial or in the longer-term if they are not accompanied by behavioural or cultural change at a political level among the new national leadership to respect judicial independence in difficult circumstances of socio-political instability.

Section 2 examines the UN's developing understanding of the links between transitional justice, the rule of law and democratisation in post-conflict states. Section 3 examines UNTAET's response to Indonesia's rule of law legacy in East Timor, while section 4 appraises how the Special Panels coped with interference from the national political leadership in their most diplomatically sensitive trials. Section 5 considers the endurance of the example set by the Special Panels in the modern day as the hybridised criminal justice system attempts to investigate, prosecute and punish crimes in politically sensitive trials that might jeopardise the emerging peace.

2. PEACEBUILDING AND JUDICIAL INDEPENDENCE

2.1 Peace-building and the dangers of institutionalism

Historically, the ideal narrative of UN peace operations was essentially straightforward – antagonists were separated, disarmed and demobilised, a transitional government was formed, elections were held and the UN withdrew all or most of its contingent.⁷ However, as a series of missions in the 1990s failed to cope with the post-Cold War phenomenon of failed states, it became apparent that traditional, temporary, *ad hoc* measures were not enough to build sustainable peace.⁸ The UN acknowledged that restoring the capacity and legitimacy of national institutions was imperative and so decided to exercise as many of the standard powers of state as were necessary for as long as was required to restore the rule of law. The Security Council began to give UN missions wide legislative, executive and judicial mandates to carry out their functions and placed a hitherto unseen emphasis on strengthening the rule of law in transitional societies. In Kosovo and East Timor, the UN turned to the unprecedentedly intrusive process of transitional administration. It involved the organisation assuming the centralised executive, legislative and judicial powers of the state on a temporary basis to construct or reconstruct institutions of governance capable of providing citizens with the security from which long-term peace might be ensured. Transitional administration was designed to foster political, social and economic co-operation between previously warring sides who could then coalesce around

7. S. Ratner, *The New UN Peace-keeping: Building Peace in Lands of Conflict after the Cold War* (New York, St. Martin's Press 1995) pp. 117-136 and pp. 209-236.

8. Panel on UN Peace Operations, *Report of the Panel on United Nations Peace Operations* ('The Brahimi Report'), UN Doc. A/55/305-S/2000/809, 21 August 2000.

the interim body to work together in the pursuit of a durable peace. It was to culminate in the juridical transfer of power from the UN transitional authority to Kosovar and Timorese governments.

Transitional administration is a phenomenon with a long history in many guises, but its appearance in any state automatically implies the failure in realising the 'normal' model of local territorial governance.⁹ Wilde posits that international transitional administration responds to two perceived problems.¹⁰ The first, as seen in Kosovo, is a sovereignty problem caused by the acceptability or otherwise of the identity of local actors exercising government powers. International administration deemed necessary in the absence of social consensus on which local actors should enjoy control. The second instance, of more relevance to the initially politically-unified East Timor, is where the identity of the local actors was not at issue, but rather their ability to govern a state competently. Where governance is at issue, Wilde observes that traditionally two of the main policy objectives for peace-building missions were (i) the actual operation of governmental institutions such as the courts, and (ii) the furtherance of democratic processes within those institutions.¹¹ Though intuitively sound, the UN's adoption of this approach is characteristic of the tendency of neo-liberal interventions to define state failure in terms of state capacity. Under such an approach, good governance 'serv[es] simultaneously as the assessment criteria for state capacity and as the objective of capacity-building', thereby embodying 'a technocratic understanding of the state and of state dynamics'.¹² As Koskeniemi puts it, 'the international administration of territory is often discussed as if it involved merely problems of technical governance'.¹³ Unlike in the case of sovereignty problems, institutions become defined by their capacities and functions rather than the political and social conflicts that run through them.¹⁴ The danger with strategies that prioritise capacity in objective and technical terms is that they may 'mask' the inevitably political nature of such projects – influencing the behaviour of national leaders to commit to certain standards takes a subordinate role (if any) to the predominantly technical task of forming new institutions 'from scratch'.¹⁵

9. R. Wilde, *International Territorial Administration – How Trusteeship and the Civilizing Mission Never Went Away* (Oxford, Oxford University Press 2007) p. 192.

10. *Ibid.*, pp. 193-232.

11. R. Wilde, 'From Danzig to East Timor and Beyond: The Role of International Territorial Administration', 95 *AJIL* (2001) p. 583 at p. 593.

12. S. Hameiri, 'Failed States or Failed Paradigm? State Capacity and the Limits of Institutionalism', 10 *Journal of International Relations and Development* (2007) p. 122 at pp. 128-129.

13. M. Koskeniemi, 'Foreword', in O. Korhonen and J. Gras, *International Governance in Post-Conflict Situations* (Helsinki, Erik Castrén Institute of International Law and Human Rights 2001) p. vi.

14. Hameiri, *supra* n. 12, p. 131.

15. J. Meierhenreich, 'Forming States After Failure', in R. Rotberg, ed., *When States Fail: Causes and Consequences* (Princeton NJ, Princeton University Press 2004) p. 153 at p. 153.

2.2 The importance of judicial autonomy in transition

Because of its increased role in the administration of justice, the UN first began to consider the complex interaction of democratisation and the administration of justice as a governance function, both at the time of UN territorial administration and afterwards when the new domestic institutions assumed national responsibility. This interaction came under the loosely defined rubric of rule of law reform, which consistently became integrated into the strategic and operational planning of new peace operations. UN member states now almost universally recognise the establishment of the rule of law as an important aspect of peacekeeping. Among the primary lessons learned since the Cold War is that UN peace operations only yield a sustainable peace if new rulers were willing to respect laws and institutions limiting their power.¹⁶ It is commonly contended that the rule of law, defined by the UN as ‘a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated’,¹⁷ depends on the obligation of political rulers to respect the law at all times at the expense of arbitrary or particularistic action, or wilful disobedience. Though constitutionalisation of independence, jurisdiction over judicial matters and the ability to form or join professional associations contribute to the assertion of independence, genuine autonomy requires more than reform of texts. Rule of law reconstruction is a phenomenon that defies purely institutional responses. As Domingos points out,

‘It would appear that the problem of judicial independence and constitutional control goes well beyond constitutional and legal prescriptions and reflects a deep-rooted lack of rule observance and law-abidingness – and long-established habits of impunity and disrespect for the law.’¹⁸

It requires rulers to act against their immediate self-interest and entrenched concerns. As such, autonomy is more a cultural or behavioural matter of executive self-restraint and constitutional sensitivity than a technical undertaking.

In the conditions that give rise to conflict, rulers govern in neopatrimonialist fashion, claiming to rule for the common good but consider themselves *de legibus solitus*. A key test therefore of the nascent state after transition from conflict, oppressive rule and/or UN administration is whether judges (and indeed prosecutors and lawyers) can exercise truly independent judgment and command the respect of the new political elite for their decisions. In the long-term, the rule

16. See generally M. Plunkett, ‘Reestablishing Law and Order in Peace-Maintenance’, 4 *Global Governance* (1998) p. 61.

17. Rule of Law and Transitional Justice Report, *supra* n. 6, para. 6.

18. P. Domingos, ‘Judicial Independence and Judicial Reform in Latin America’, in A. Schedler, L. Diamond and M. Plattner, eds., *The Self-Restraining State: Power and Accountability in New Democracies* (Boulder, Colorado, Lynne Rienner Publishers 1999) p. 151 at p. 162.

of law and peace will be threatened by corruption, abuses and illegality of unaccountable rulers – a state where judicial and prosecutorial decisions are made solely on the basis of the law applied to the facts of a particular case and not on the basis of outside influence is more likely to enjoy a sustainable peace, especially where it serves to restrain autocratic, repressive or corrupt policy. Increasingly assertive UN missions have moved beyond the mere creation of stable, democratic government and have taken to heart the Madisonian recognition that where accountability of democratic rulers is weak, so too is the rule of law:

‘In framing a government ... the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.’¹⁹

Increasingly, states transition to what are ostensibly democratic, rule of law-based polities. In such systems, the UN promotes the subjection of rulers to vertical accountability where the electorate can enforce standards of good conduct by government at the polls.²⁰ However, studies of the defects of third wave transitions to democracy have shown that elections alone are insufficient to curb the power of executives who frequently return to the corruption, abuses and plebiscitary practices of prior illiberal rule.²¹ Binding rulers to the law by other agencies such as the courts can prove a more effective check on political power than the vagaries of elections, where other interests inevitably cloud the issue. This checking process has been described as ‘horizontal accountability’ by O’Donnell²² and Sklar.²³ Here, the courts uphold the rule of law by checking the validity of all enacted norms. Horizontal accountability demands a degree of equality in as much as we deem the judiciary, executive and legislature as equally worthy of respect. However, Schedler points out that if accountability is to succeed, the accounting party cannot stand on an equal footing with the accountable one – in its sphere of competence, the courts must be more powerful than the executive.²⁴ This is the ‘paradox of accountability’ – where a specialised agency holds accountable actors who are immeasurably more powerful than it except in the narrow sphere of competence of the former. The key to horizontal accountability then is not equality but independence, or, more correctly, autonomy. If this does not exist, the courts cannot succeed in either making rulers answerable or enforcing their judgments. The boundaries of the courts and their decisions

19. J. Madison, *Federalist, No. 51* (1788).

20. S. Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building* (Oxford, Oxford University Press 2004) pp. 126-153.

21. See for example F. Hagopian and S.P. Mainwaring, *The Third Wave of Democratisation in Latin America: Advances and Setbacks* (Cambridge, Cambridge University Press 2005).

22. See generally J. Méndez, G. O’Donnell, and P.S. Pinheiro, eds., *The Un(Rule) of Law and the Underprivileged in Latin America* (Notre Dame, Indiana, University of Notre Dame 1999).

23. R. Sklar, ‘Developmental Democracy’, 29 *Comparative Studies in Society and History* (1987) pp. 686-714.

24. A. Schedler, ‘Conceptualizing Accountability’, in Schedler, Diamond and Plattner, eds., *supra* n. 18, p. 13 at p. 23.

must be respected. Encroachment through control of appointment, interference in criminal cases or systematic amnesty and pardon, vitiates the autonomy necessary for an effective justice system. What any justice system must do is assert its autonomy wherever it is called into question, and insulate itself from overt political influences that can impair the detachment of judges or prosecutors.

2.3 Judicial autonomy and transitional justice

This concern with a culture of executive restraint *vis-à-vis* the courts became apparent in what is the UN's most notable doctrinal document on the rule of law, namely the UN Secretary-General's aforementioned Rule of Law and Transitional Justice Report.²⁵ Its explicit mandate was to inform the Security Council's policy in such matters. Throughout the Report, the long-term prospects for adherence by post-conflict governments to the rule of law was tied explicitly to the success and example of transitional justice, a phenomenon described with appropriate elasticity therein as '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'.²⁶ The reason why successful transitional justice processes are deemed so central to establishing judicial autonomy is in one sense quite simple – nothing could be more in keeping with the independent administration of justice in the formative years of the state than transitional accountability for breaches of domestic and international law by the prior regime. Stripped of any additional utilitarian functions and upholding the rule of law as a value in itself, individual accountability for breaches of the law uphold the regularity, stability and adherence to settled law the rule of law requires. Failure of enforcement, on the other hand, vitiates its authority and adversely affects the prospects for habitual lawfulness.²⁷ In contrast with the arbitrary, politicised law of the prior regime, judgment is demonstrably neither political nor moral, but legal. Among the primary concerns of transitional justice practitioners is the notion of legacy – that the principles and practices of any accountability process will endure in a rule of law-based post-conflict state. To this end, a successful scheme of transitional criminal accountability will normally operate independently of countervailing political influence so as to normalise that independence in the long-term.

While the link between accountability and the rule of law is obvious, the reason why it carries such particular normative and symbolic force in transition is because the exigencies of political transition make de-politicised trial an extremely difficult undertaking. Notwithstanding our intuitions about the connection between accountability for the most senior human rights abusers in the

25. Rule of Law and Transitional Justice Report, *supra* n. 6, Preamble.

26. *Ibid.*, para. 8.

27. '[R]espect for law generally is likely to suffer if it is widely known that certain kinds of conduct, although nominally criminal, can be practiced with relative impunity.' H. Packer, *The Limits of Criminal Sanction* (Stanford, Stanford University Press 1968) p. 287.

past and the prospects for habitual obedience of the law by rulers in future, the experience of transitional justice in countless post-conflict states has been that immediate conditions are such that total or even partial accountability would imperil the transition by fuelling revanchism from elements of the prior regime. Incoming political elites are tempted to interfere with processes of criminal accountability national and international law requires by obstructing prosecutions and passing amnesties before trial, or pardoning those convicted afterwards. While advocates of trials posit that states should be willing to take risks to ensure accountability,²⁸ others realise that ‘many fledgling democracies have simply not had the power, popular support, legal tools or conditions necessary to prosecute effectively’.²⁹ Transitional leniency, more so than transitional justice, is often the dominant paradigm – it becomes an argument for the sacrifice of the rule of law for its antithesis, impunity or leniency, in the interests of stability. Former Argentine President Alfonsín summarised the dilemma as follows:

‘Our common sense seems to support both positions; that a voluntarily committed act is deserving of punishment, and that the social consequences of applying this punishment must be considered. It would be irrational to impose a punishment when the consequences of doing so, far from preventing future crimes, may cause greater social harm than that caused by the crime itself or by the absence of punishment.’³⁰

Zalaquett argues that new rulers in these cases may follow a commendable Weberian ethical maxim of responsibility by considering the predictable consequences of the actions instead of an ethic of conviction about what is right.³¹ The majority of political transitions from conflict or repression to democracy have shared a tendency towards clemency, mass commutations of sentences and general punitive forbearance in the interests of securing the transition. A danger exists where the example set in transitional trials may set a long-term example for treatment of even the most serious periodic violence that typically afflicts ‘young’ peaces. As such, transitional accountability can constitute a defining moment for judicial autonomy, establishing self-restraint on the part of the executive and assertion of independence by actors in the accountability process. In contrast with the arbitrary, politicised law of the prior regime, judgment should demonstrably be neither political nor moral, but legal and exemplary. As the Report put it,

‘Our experience in the past decade has demonstrated clearly that the consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in

28. D. Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Legal Regime’, 100 *Yale LJ* (1991) pp. 2537-2615 and pp. 2548-2549.

29. S. Landsman, ‘Alternative Responses to Serious Human Rights Abuses: Of Prosecutions and Truth Commissions’, 59 *Law and Contemporary Problems* (1996) p. 81 at p. 84.

30. Quoted in C.L. Sriram, *Confronting Past Human Rights Violations: Justice Vs. Peace in Times of Transition* (London, Frank Cass 2004) p. 1.

31. J. Zalaquett, ‘Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations’, 43 *Hastings LJ* (1992) p. 1429.

the long-term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice. ... Peace and stability can only prevail if the population perceives that politically charged issues ... can be addressed in a legitimate and fair manner.³²

2.4 **Buttressing the autonomy of transitional trial**

While the Report posited that criminal trials ‘contribute to greater public confidence in the State’s ability and willingness to enforce the law’,³³ it also noted the tendency of new governments towards impunity in relation to political and serious crimes:

‘In some cases, State authorities have been more concerned with the consolidation of power than with strengthening the rule of law, with the latter often perceived as a threat to the former.’³⁴

Though the Report recognised that prosecutorial interference and pardon would still constitute threats to accountability, what is striking about the Report is the manner in which it echoes international transitional administration’s faith in the effectiveness of assuming judicial powers to promote democratic practices within institutions. Though the Report acknowledges the need to give ‘dedicated attention to supporting the political aspects of justice and rule of law reforms’, the proposed solutions to the tendency towards transitional leniency addressed more the institutional weakness of the inevitably ravaged justice sector than the cultural and behavioural attitudes of the governments. The Report recommended that future peace agreements and Security Council resolutions and mandates ‘require that all judicial processes, courts and prosecutions be credible, fair, consistent with established international standards for the independence and impartiality of the judiciary, the effectiveness, impartiality and fairness of prosecutors and the integrity of the judicial process’.³⁵ To this end, it posited that the assistance the UN could lend to transitional justice trials would act as a counterweight to those factors militating in favour of amnesty and impunity, by ‘insulating law enforcement from political abuse and mobilising resources for the strengthening of the justice sector’.³⁶

This idea of the international community or the UN using its influence to counter domestic tendencies towards impunity is becoming one of the dominant, if under-appreciated, themes in modern international law. For example, the 1998 Rome Statute’s complementarity regime (whereby the ICC may only commence

32. Rule of Law and Transitional Justice Report, *supra* n. 6, paras. 2 and 4.

33. *Ibid.*, para. 39.

34. *Ibid.*, para. 19.

35. *Ibid.*, para. 64(e).

36. *Ibid.*, para. 19.

proceedings where the relevant state is not investigating or prosecuting the case) represents a recognition that the international community has a role in stimulating or replacing the national justice system where there is an emerging impunity gap.³⁷ Similarly, the internationalised elements of hybrid courts in a majority or minority initially alleviated fears of impartiality or lack of independence that would attach to otherwise purely domestic processes. While purely domestic proceedings are prone to capture by political or ethnic interests, hybridised proceedings were initially predicted by their proponents to be ‘insulated from domestic political factors’³⁸ and able to externalise the political cost of prosecutions that would otherwise tempt the liberalising government to compromise transitional trials with leniency, amnesty or pardon.³⁹ The Report made a strikingly forceful assertion of the need for UN peace operations to over-ride national dispositions towards the leniency that characterised many post-conflict societies:

‘Of course, domestic justice systems should be the first resort in pursuit of accountability. But where domestic authorities are unwilling or unable to prosecute violators at home, the role of the international community becomes crucial. The establishment and operation of the international and hybrid court tribunals of the last decade provide a forceful illustration of that point.’⁴⁰

The Report and the array of operational resolutions that followed it clearly emphasise the strengthening of institutions by adding international expertise in the period of transition over fostering behavioural change at government level or engagement with those political-security issues that tempt the transitional polity to impose fetters on the justice process.⁴¹ Though confident that the example of transitional trial can create a rule of law culture in future, the Report presumes that augmentation of the courts with neutral foreign assistance automatically serves to remedy reluctance on the part of the incoming regime to prosecute in the present. The possibility that it might be necessary for international actors to engage assertively with the political/security calculus that compels leniency appears to be impliedly discounted or underplayed. As noted earlier, the belief of liberal interventionists in placing faith in institutional ‘fixes’ that obviate the need to engage forcefully with day to day politics and society is one that is increasingly criticised.⁴² The East Timorese experience in the years immediately before and after the Report demonstrates the limitations of such approach. The confidence

37. Art. 17 of the Rome Statute of the International Criminal Court, adopted 17 July 1998, 2187 *UNTS* p. 90, 37 *ILM* (1998) p. 1002 (entered into force 1 July 2002).

38. W.W. Burke-White, ‘Regionalisation of International Criminal Law Enforcement: A Preliminary Exploration’, 38 *Texas ILJ* (2003) p. 729 at p. 742.

39. *Ibid.*

40. Rule of Law and Transitional Justice Report, *supra* n. 6, para. 40.

41. See, for example, Office of the High Commission for Human Rights, *Rule of Law Tools for Post-Conflict States: Prosecution Initiatives* (2006), available at: <www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf>, at p. 1.

42. Hameiri, *supra* n. 12, p. 131.

expressed therein that internationally-butressed transitional trials would guarantee an independent criminal justice process in the present, as well as exemplify the autonomy necessary in the future, proved misguided. International involvement in the institutions of justice has ensured that investigation, prosecution and trial proceed with a level of competence and expertise that purely domestic proceedings could not attain. However, at the level where judicial proceedings must interact with executive action, internationalisation has had surprisingly little impact on governmental and presidential tendencies to engage in unduly selective prosecution and pardon where state security is jeopardised.

3. JUDICIAL AUTONOMY UNDER UNTAET

The UN's response to the approximately 1400 murders and 200-250,000 forced deportations that resulted from the Indonesian-backed militia's campaign of intimidation and revenge surrounding the September 1999 referendum was swift and impressive.⁴³ The UN was presented with a power vacuum and widespread destruction after the Indonesian withdrawal. Acting under Chapter VII of the UN Charter, Security Council Resolution 1272 of 25 October 1999 empowered UNTAET to exercise 'all legislative and executive authority, including the administration of justice' during East Timor's transition from Indonesian occupation to full independence, given the generally accepted inability of Timorese actors to take over immediately.⁴⁴

3.1 Creating a judicial system *ex nihilo*

The UN's conception of East Timor was that of a *tabula rasa* 'empty state' in terms of technical, administrative or political skills.⁴⁵ Under Wilde's schema, UNTAET clearly responded more to a 'governance' problem than a 'sovereignty' problem. Aside from its obvious role in safeguarding the new Timorese territorial settlement, UNTAET assumed two other roles typical of all ITAs – the operation of government institutions and the furtherance of democratic practices within them. As a result, an integral part of UNTAET's mission was to support rule of law-based 'capacity-building for self-government'.⁴⁶ It was expected that this process would involve the establishment by UNTAET of institutions run by itself with a remit to prepare locals for taking control before eventually handing it over, in accordance with doctrinal UN peace operation reform.

43. For a summary of these crimes, see UN Secretary-General, *Report of the International Commission of Inquiry on East Timor to the Secretary-General* (2000), UN Doc. A/54/726, 21 January 2000.

44. SC Res. 1272 (1999), UN Doc. S/RES/1272 (1999), 25 October 1999, para. 1.

45. L. Jones, '(Post)-Colonial State-Building and State Failure in East Timor', 10 *Conflict, Security and Development* (2010) p. 547 at p. 558.

46. SC Res. 1272, *supra* n. 44, Section 2(e).

The size of the governance problem as it related to the judicial system in particular was readily apparent. Indeed, it was practically non-existent, a point which was not lost on the UN Secretary-General:

‘...local institutions, including the court system, have for all practical purposes, ceased to function, with ... judges, prosecutors and other members of the legal profession having left the country’.⁴⁷

All Indonesian or pro-autonomy judges, prosecutors, defenders and court administrators on which the justice system was dependent had fled the country after the referendum. There were no East Timorese professionals untainted by association with the prior regime who could immediately ameliorate the human resources deficit, bar one judge who had served in the Portuguese courts and became first President of the Court of Appeal.⁴⁸ The physical infrastructure of the courts was also destroyed.⁴⁹ In time, UNTAET would respond to the administrative vacuum by defining the applicable law,⁵⁰ appointing judges⁵¹ and creating the District Court system in which they would operate.⁵² This approach in East Timor demonstrated the aforementioned tendency of neo-liberal interventions to conceptualise the problem of state failure as essentially one of ‘human resources, administrative and institutional considerations’.⁵³ UNTAET’s ‘institutionalist’ approach understood state-building as a predominantly technical exercise ‘of crafting efficient institutions and policies to create good governance’.⁵⁴ While the UN was successful in improving the functionality of the courts as an institution of governance in the vacuum created by Indonesian withdrawal, the fears outlined earlier that technical advance might be made in abstraction from the political dynamics of state-building were realised. UNTAET and its successors were markedly less successful in furthering democratic relationships between the executive and the courts.

The scale of the task in this regard was daunting. UNTAET was presented with a situation where political interference in the administration of justice was

47. UN Secretary-General, *Report of the Secretary-General on the Situation in East Timor*, UN Doc. S/1999/1024, 4 October 1999, para. 33. See also Chesterman, *supra* n. 20, pp. 170-174.

48. See generally, H. Strohmeyer, ‘Policing the Peace: Post-Conflict Judicial Reconstruction in East Timor’, 24 *University of New South Wales LJ* (2001) p. 171.

49. *Ibid.*, p. 172.

50. UNTAET Regulation No. 1999/1 on the Authority of the Transitional Administration in East Timor, Section 3(1), 27 November 1999.

51. UNTAET Regulation No. 1999/3 on the Establishment of a Transitional Judicial Service Commission, 3 December 1999.

52. UNTAET Regulation No. 2000/11 on the Organization of Courts in East Timor, 6 March 2000.

53. A. Rosser, ‘Rebuilding Governance in Failed States: The Case of Timor-Leste’, in W. Hout and R. Robison, eds., *Governance and the Depoliticisation of Development* (Routledge, London 2009) p. 169 at p. 169.

54. Jones, *supra* n. 45, p. 548.

the norm. The weakness in the justice system can be traced back to Portuguese neglect, though the greatest damage was done when the Timorese judiciary operated either as an instrument of the Indonesian rulers in vindicating and upholding persecutory and discriminatory laws. As they were either excluded from the process under Portuguese and Indonesian rule, the East Timorese had little or no engagement with the fair and impartial operation of law and never enjoyed depoliticised justice. A UNDP report found:

‘[T]he Indonesian Government suborned the legal system to its own ends and corrupted both courts and the judiciary in East Timor – effectively turning the legal system into a servile extension of the Executive.’⁵⁵

Independent experts concluded that as a result of the Indonesian administration of justice, the Timorese people and leadership ‘may be unclear on how a fully independent and accountable judiciary should function’.⁵⁶

What should have been immediately apparent given the weak capacity of the Timorese criminal system and the history of politicisation of criminal justice was the need to prepare a sphere of autonomy for the courts from the executive in the formative years of the new judiciary. This would serve in the long-term interests of the rule of law when UNTAET would give way to inevitably unsteady Timorese self-rule. However, at the time when this occurred, it was clear that while the institutions of justice were firmly established, a sphere of autonomy was not. While UN missions are intended to set a positive, empowering example for local populations, UNTAET itself had no separation of powers. As the Transitional Administrator Sergio Viera de Mello put it, ‘Under Chapter VII of the UN Charter ... the Administrator is authorised to impose directives and policies as well as use force more or less at will. There is no separation of the legislative or judicial from the executive authority.’⁵⁷ This made it more difficult to set a standard of judicial autonomy. In mid-2001, UNTAET acquiesced to demands from the Timorese consultative National Council to allow a Cabinet Member for Justice to re-assign a judge to a position in the Department of Justice.⁵⁸ In a period of ‘co-governance’ before independence, there appeared to be reluctance among the Timorese leadership to accept judicial autonomy, visible most notably

55. UNDP, *Ukun Rasik A'an, The Way Ahead*, East Timor Human Development Report 2002, available at: <http://hdr.undp.org/en/reports/national/asiathepacific/timorleste/East%20Timor_2002_en.pdf>, at p. 39.

56. P. Pigou, *Law and Justice in East Timor – A Survey of Citizen Awareness and Attitudes Regarding Law and Justice in East Timor*, USAID/Asia Foundation (2004), available at: <www.asiafoundation.org/pdf/easttimor_lawsurvey.pdf>, at p. 9.

57. Quoted in J. Beauvais, ‘Benevolent Despotism: A Critique of UN State-Building in East Timor’, 33 *NY University of International Law and Politics* (2001) p. 1101 at p. 1101.

58. Yayasan Hak Briefing Paper, ‘Serious Concerns Regarding the Independence of the Judiciary under the United Nations Transitional Authority in East Timor’ (2001), available at: <<http://members.pcug.org.au/~wildwood/01julconcerns.htm>> (date accessed: 14 March 2009).

in the tendency of transitional cabinet ministers regularly criticise judicial decisions.⁵⁹ As early as 2002, the UN Secretary-General noted:

‘The functioning of Timor-Leste’s justice system, of central importance for the stability and development of the State, has been affected by a lack of clarity regarding the separation of powers among the judiciary, executive and legislature.’⁶⁰

Any lurch on the part of the newly independent Timorese government towards interference with the judiciary would be entirely in keeping with the paradigm of executive-judiciary relations in UNTAET.

3.2 Establishing the Special Panels

The need for judicial autonomy became apparent in Resolution 1272. Referring to the widespread human rights abuses surrounding the referendum and recognising transitional accountability as an integral part of the administration of justice, it demanded ‘that those responsible for such acts be brought to justice’.⁶¹ It soon became apparent that Indonesia would not allow the instigators of the crimes be genuinely tried in either domestic or international courts. An Indonesian *Ad Hoc* Human Rights Court for East Timor sat in Jakarta, while UNTAET established a process in East Timor. The former became the paradigmatic example of biased domestic proceedings lacking credibility and ultimately convicted only one relatively low-level Timorese.⁶² Inside the borders of East Timor, dozens of militia members were held in UN custody and rapidly needed to be charged or released.⁶³ When looking at the possibility of domestic serious crimes trials, UN Special Rapporteurs opined that the ‘as yet unformed East Timorese judicial system could not hope to cope with investigations into atrocities of this scale’.⁶⁴ UNTAET Regulation 2000/15 outlined the structure of a hybrid court we know as the Special Panels for Serious Crimes as part of a legal framework for the investigation, prosecution and trials to punish crimes that occurred between 1 January

59. T. Jarvinen, ‘Human Rights and Post-Conflict Justice in East Timor’, UPI Working Papers No. 47 (2004), available at: <www.ciaonet.org/wps/fiia/0001270/0001270.pdf>, at p. 35.

60. UN Secretary-General, *Report of the Secretary-General of the United Nations Mission of Support in East Timor*, UN Doc. S/2002/1223, 6 November 2002, para. 14. In relation to the separation of powers, one UNMISSET officer stated that the Timorese government ‘know very well what they are, we have to assume they choose not to implement them’. Jarvinen, *supra* n. 59, p. 35.

61. SC Res. 1272, *supra* n. 44, para. 16.

62. D. Cohen, ‘Intended to Fail: The Trials Before the Ad Hoc Human Rights Tribunal in Jakarta’, ICTJ Occasional Paper Series (2003), available at: <www.ictj.org/images/content/0/9/098.pdf>.

63. B. Oswald, ‘The INTERFET Detainee Management Unit in East Timor’, 3 *YIHL* (2000) p. 347.

64. UN Secretary-General, *Situation of Human Rights in East Timor: Note by the Secretary-General*, UN Doc. A/54/660, 10 December 1999, para. 72.

and 25 October 1999. The crimes to be tried were a mix of the international (war crimes and crimes against humanity) and domestic (murder and rape).⁶⁵

The division of labour in the Special Panels ostensibly reconciled the UN's desire to involve Timorese actors as much as possible in the process of accountability with a sufficient degree of control to ensure impunity would not be the order of the day. Each Panel was composed of three judges, two of whom were international with one Timorese.⁶⁶ The international majority was designed to alleviate fears of partiality or lack of independence as regards the process on the part of the local population. The international judges were UN staff members but the Special Panels functioned as part of the Dili District Court. On the same day as Regulation 2000/15 was passed, Regulation 2000/16 established a Public Prosecution Service to investigate and prosecute crimes in East Timor.⁶⁷ The Office of the General Prosecutor was headed by a Timorese. Significantly, directly beneath him in the hierarchy was an international, UN-appointed Deputy Prosecutor-General for Serious Crimes (DPGSC).⁶⁸ Though the DPGSC would helm what was to become the investigative and prosecutorial Serious Crimes Unit (SCU), the holder of the position was answerable to the Timorese General Prosecutor, a state of affairs that looked less limiting on paper than transpired in reality.

The hybrid composition of the Special Panel structure and the appointment of an international prosecutor to run the SCU resulted more from the lack of capacity in the non-existent Timorese justice system than as a response to any concerns over the willingness of the Timorese to pursue justice. Nevertheless, the apparent neutrality of international judges and prosecutors involved in the process offered the potential to set an example of judicial and prosecutorial independence that hitherto had not been seen under colonial rule. However, the first two years of the Panels were spent pursuing a 'small fish strategy' of mainly uncontroversial, low-level militia members already in custody.⁶⁹ By the time it could turn its attention to more senior and more contentious indictees, UNTAET ceased to exercise exclusive power as East Timor became an independent state on 20 May 2002, with a functioning presidency and executive. UNTAET ceded responsibility to the less intensive peace-building missions which endure to this day, marking a shift from ITA to assistance missions.⁷⁰ A Constitution was adopted on 22 March

65. UNTAET Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offences, UNTAET/REG/2000/15, 6 June 2000, Sections 4-9.

66. *Ibid.*

67. UNTAET Regulation No. 2000/16 on the Organisation of the Public Prosecution Service in East Timor, UNTAET/REG/2000/16, 6 June 2000.

68. *Ibid.*, Section 14.

69. M. Othman, *Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor* (New York, Springer 2005) p. 112.

70. These were UNMISSET (UN Mission of Support to East Timor), SC Res. 1410 (2002), UN Doc. S/RES/1410, 17 May 2002; UNOTIL (UN Office in East Timor), SC Res. 1599 (2005), UN Doc. S/RES/1599, 28 April 2005; and the more assertive UNMIT (UN Integrated Mission in East Timor), SC Res. 1704 (2006), UN Doc. S/RES/1704, 25 August 2006.

2002.⁷¹ East Timor became a semi-presidential republic with a one-chamber parliament.⁷² The executive was led by Mari Alkatiri's Fretilin party, while former rebel leader Xanana Gusmao became President. Section 69 of the new Constitution defined the principle of separation of powers, providing that 'Organs of sovereignty, in their reciprocal relationship and exercise of their functions, shall observe the principle of separation and interdependence of powers established in the Constitution.' However, in a state where the institutions of governance were only in the process of establishing themselves, President Gusmao enjoyed a personal stature as a rebel leader, prisoner of war, and source of patronage that gave him influence beyond the constitutional limits of his position.⁷³ The Constitution also contained provisions mandating the continuance of the Special Panels.⁷⁴ However, when the workings of the process began to contradict the government's policy of rapprochement with Jakarta, previous assumptions that international assistance would automatically preserve the constitutional autonomy of the transitional trial process were shown to be faulty.

4. PRESIDENTIAL POLITICS AND THE SPECIAL PANELS

The Special Panels process secured far more convictions (albeit exclusively of low-level militia-members) than contemporaneous processes in Sierra Leone, Kosovo and the former Yugoslavia,⁷⁵ and helped prevent retributive violence in the transitional period.⁷⁶ However, since the first UN-run elections in 2002 drastically weakened the UN's influence on the administration of justice, the Timorese government has consistently and successfully pursued a policy of reconciliation with Indonesia over criminal accountability in light of Jakarta's importance to economic development in the nascent state. The failure to secure accountability for the Indonesian military figures who organised the violence has caused considerable dismay. For many in East Timor, the process was fatally compromised from the beginning, given that they saw Jakarta more culpable than indigenous collaborators.⁷⁷

71. Constitution the Democratic Republic of Timor-Leste, available at: <www.etan.org/etanpdf/pdf2/constfnen.pdf>.

72. N. Duff, 'Semi-presidentialism and Stability: Evaluating the Constitutional Design of the Executive in Timor Leste', 20 *Public L Rev.* (2009) p. 129.

73. Jarvinen, *supra* n. 59, p. 62.

74. Sections 160 and 163 of the Constitution, *supra* n. 71.

75. Convictions were secured for 84 out of 87 defendants who came before the Special Panels.

76. *Report to Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999*, UNSCOR, Annex II, UN Doc. S/2005/458, 25 May 2005, Executive Summary, para. 8 (hereinafter: Commission of Experts).

77. P. Pigou, *Crying Without Tears – In Pursuit of Justice and Reconciliation in Timor-Leste: Community Perspectives and Expectations*, ICTJ (2003), available at: <www.ictj.org/images/content/0/9/096.pdf>, at p. 33.

4.1 Dili-Jakarta relations and the lenient tendency

The indifference of the government to the people's demand for justice might best be explained by then-President Gusmao's declaration that 'the relationship between Timor-Leste and Indonesia is far too important for any issue that might arise to discourage us or to derail this relationship'.⁷⁸ The government's first National Development Plans identified the reduction of poverty and promotion of economic growth as the primary goals for what remains a significantly underdeveloped country, and this focus retains its supremacy.⁷⁹ Indonesia has continued to be East Timor's main trading partner and supplies 80 per cent of its energy and food, and as such is critical to the Timorese social stability. In addition to economics, security remains a concern. Though relations with Indonesia have generally been excellent, Jakarta still exerts a subtle threat. Though borders between the two countries are mostly agreed, a contentious 3 per cent of the border yields a number of disputes every year.⁸⁰ Though the liberalisation of Indonesia has continued at a steady pace with direct elections and decentralisation, military figures still exert 'inordinate influence'.⁸¹ Many militia members remain free in West Timor.

Because trade and security are dependent on normalisation of relations with Jakarta, of greatest concern to the East Timorese leadership has been the chance that Indonesian democratisation and reconciliation could be reversed. As a result, it pragmatically promotes political reconciliation rather than prosecutorial justice. A democratic government ruling freely of overt control by the very people who organised the repression in 1999 is very much in Dili's security interests. The possibility of trying military figures is widely considered to have the potential to set back these advances. As then-Foreign Minister Horta puts it, the Zalaquettian choice for East Timor was as follows:

'What is more important for us? That democracy is slowly consolidated in Indonesia? Or the blind pursuit of justice at the expense of stability in Indonesia?'⁸²

78. F.D. Unidjaja, 'Dili Says Relations With RI More Important Than Justice', *Jakarta Post*, 5 March 2003.

79. Planning Commission, National Development Plan (2002), available at: <[http://sitere.sources.worldbank.org/INTPRS1/Resources/Timor-Leste_PRSP\(may2002\).pdf](http://sitere.sources.worldbank.org/INTPRS1/Resources/Timor-Leste_PRSP(may2002).pdf)>.

80. International Crisis Group, 'Timor-Leste: Oecusse and the Indonesian Border', Asia Briefing No. 104, 30 May 2010, available at: <www.crisisgroup.org/~media/Files/asia/south-east-asia/timor-leste/B104%20Timor-Leste%20-%20Oecusse%20and%20the%20Indonesian%20Border.ashx>, at pp. 3-4.

81. J. Joliffe, 'Compromising Justice in East Timor', *Far Eastern Economic Review*, April 2006, p. 99. See also, E. Schneier, 'Reformasi and the Indonesian "War on Terror": State, Military and Legislative-Executive Relations in an Emerging Democracy', 15 *Journal of Legislative Studies* (2009) p. 294.

82. José Ramos-Horta, quoted in E. Nakashima, 'Truth buried in unknown grave', *The Standard*, 23 September 2005.

Indonesia, for their part, was extremely keen to quell calls for genuine accountability.⁸³ Under pressure from Jakarta, the Timorese government went beyond reconciliatory measures, moving from unwillingness to pursue justice to vocal opposition.⁸⁴ In March 2005, prior to the conclusion of the Specials Panels two months later, a Commission on Truth and Friendship (CTF) was established by both governments. The terms of reference overtly stated it would seek ‘truth and promote friendship as a new and unique approach rather than the prosecutorial process’ and that the process would not lead to prosecutions.⁸⁵ The CTF was criticised by observers for ‘insufficiently cross-examining or questioning individuals who were allegedly involved or bear responsibility for the 1999 violence’.⁸⁶ The Report of the Commission has been criticised for being too exculpatory of Jakarta’s role since the end of Portuguese decolonisation.⁸⁷ Timorese rapprochement with Indonesia can be understood as a prioritisation of tangible trade and security guarantees essential to the socio-economic development that builds peace over the metaphysical benefits of transitional justice, a trade-off that to a degree accorded with some public opinion.⁸⁸ It is beyond the remit of this article to consider whether the rapprochement policy of the government is correct or not, though subsequent events in 2006 and 2008 (examined in section 5) demonstrate the fragility of East Timor and retrospectively cast the prioritisation of stability at all costs in a more understandable light. Nevertheless, the stated policy of the UN in forming internationalised tribunals and in the Rule of Law Report is that leniency in relation to the punishment of crimes under international law, however understandable in the individual circumstances of each case, is intolerable under the global rule of law it promotes. As will be seen, practice contradicted theory.

As noted earlier, transitional justice is inherently politically transformative, but legality demands independence from political pressure. The supposition is normally that the bench, being the ultimate arbiter in criminal proceedings, would be the most likely to attract (if not the most susceptible to) political interference

83. General Sutarto, Chief of the Indonesian Armed Forces, put it thus: ‘Today’s Indonesia is now embarked in the process of democratisation ... all we ask from Timor-Leste is to understand our effort and not to disturb the democratic political environment we are trying to consolidate.’ Quoted by Xanana Gusmao, Speech of His Excellency Xanana Gusmao on the Occasion of the Handing Over of the Final Report of the CAVR to the National Parliament, 28 November 2005.

84. K. Askin, S. Starr and S. Frease, *Unfulfilled Promises: Achieving Justice for Crimes Against Humanity in East Timor*, Open Society Justice Initiative and Coalition for International Justice (2004), available at: <www.globalpolicy.org/images/pdfs/1104unfulfilled.pdf>, at pp. 46-47.

85. Terms of Reference for the East Timor/Indonesia Commission for Truth and Friendship, available at: <www.etan.org/et2005/march/06/10tor.htm>, Art. 10.

86. UNMIT Human Rights and Transitional Justice Section, *Report on Human Rights Developments in Timor-Leste, August 2006-August 2007* (2007), available at: <www2.ohchr.org/SPdocs/Countries/UNMITAug0607.doc>, at p. 28.

87. M. Hirst, *Too Much Friendship, Too Little Truth: Monitoring Report on the Commission of Truth and Friendship in Indonesia and Timor-Leste*, ICTJ (2008), available at: <www.ictj.org/images/content/7/7/772.pdf>.

88. Pigou, *supra* n. 77, p. 35.

or pressure. It is for this reason that a majority of international judges was deemed imperative in politically-sensitive trials in Kosovo, Lebanon and Sierra Leone. In the Timorese context, the perceived political dangers emanating from the process would not come from the Special Panel judges because Indonesia would never extradite its citizens to trial in its former colony. Jakarta had no express legal obligation to co-operate with UNTAET under Security Council Resolution 1272 and so refused to abide by the commitments entered into in a Memorandum of Understanding with UNTAET on co-operation in judicial affairs, which included enforcement of extradition and arrest warrants.⁸⁹ However, the policy of rapprochement would be jeopardised if and when the SCU switched its attention from the aforementioned 'small fish' strategy to inevitably embarrassing prosecution of senior suspects in the Indonesian military hierarchy. It is regrettable that more progress in prosecuting senior Indonesian officials was not made while UNTAET administered the country and could exercise greater influence over Timorese actors before May 2002, given its near-monopoly of power. Historically, where the transition to liberal rule is introduced exogenously by a foreign power such as the UN, opportunity for rigorous, trial-based punishment senior leaders is greatest.⁹⁰ By the time action was taken in 2003, this opportunity was greatly diminished. When this occurred, the government subjected the Timorese Office of the Prosecutor-General (to whom the SCU ultimately reported) to interference to the degree that pursuit of the indictments to their conclusion was abandoned. While such restraining impulses were envisaged in the Rule of Law Report, the manner in which the UN acquiesced to such interference was not.

4.2 The *Wiranto et al.* Indictment

Section 4.2 of Regulation 2000/16 governing the SCU provided that prosecutors 'shall act without bias and prejudice and ... without improper influence, direct and indirect, from any source, whether within or outside the civil administration of East Timor'. On 24 February 2003, the SCU issued the indictment of eight high-level figures including Indonesian General Wiranto, who at the time was expected to (and subsequently did) run as presidential candidate for Indonesia's biggest party, Golkar.⁹¹ The indictment included more than 280 murders and ten major attacks both before and after the popular consultation. The Timorese government quickly began to distance itself from it. President Xanana Gusmao issued a public statement criticising the Prosecutor-General Longuinhos Monteiro for not consulting him (no such consultation was legally necessary) and went on to state that it was not in the national interest, reaffirming that since

89. The Memorandum of Understanding between the Republic of Indonesia and the UNTAET Regarding the Co-Operation in Legal, Judicial and Human Rights-Related Matters, 6 April 2000, *Official Gazette of East Timor*, UNTAET/GAZ/2000/Add.2, p. 93.

90. J. Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge, Cambridge University Press 2004) p. 49.

91. Case No. 05/2003.

‘relations with Indonesia are of extreme importance, not only for current stability, but for the future of the country’.⁹² The Prosecutor-General, who also served in government as Attorney General, was initially supportive of the indictments but then performed an ‘about-face’, claiming the indictment was not instigated by Timorese and instead was the policy of international actors in the SCU.⁹³ UNMISSET, the successor to UNTAET then denied responsibility for the indictments, transferring it to the East Timorese when the Special Representative of the UN Secretary-General (SRSG) stated:

‘While indictments are prepared by international staff, they are issued under the legal authority of the Timorese Prosecutor-General. The United Nations does not have any legal authority to issue indictments.’⁹⁴

At a later briefing to the press on the same day, a UN spokesman stated to reporters: ‘We hope that in future you’ll say “East Timor indicts” and not “the United Nations indicts”’.⁹⁵ Though this position was technically correct, the denial was hardly in keeping with the principle of fearlessly and impartially pursuing justice that the UN both professed to abide by and, more importantly, aspired to inculcate in East Timor. While the hybrid nature of the Special Panels apparatus should in theory have liberated the UN to robustly assert the independence of the Timorese prosecutor in the interests of setting an example for the future exercise of the prosecutorial function in the nascent state, the will was significantly lacking.

On 10 May 2004, the arrest warrant for the indictment, was issued by an American Special Panels judge. Though President Gusmao professed to respect the independence of the SCU and the independent nature of the courts in the Constitution as an organ of sovereignty,⁹⁶ it was factually established that on issuance of the indictment, Monteiro was summoned to his office.⁹⁷ On 17 May, the Special Panel rejected the Prosecutor-General’s motion under the Panels’ Transitional Rules of Criminal Procedure seeking a retraction of the warrant on the basis that no grounds were provided to amend the indictment.⁹⁸ President Gusmao also criticised the arrest warrant, and in a public repudiation of the SCU,

92. ‘East Timor: Serious Crimes Unit Indicts 48 More Suspects’, *UN Wire*, 1 March 2003.

93. C. Reiger and M. Wierda, *The Serious Crimes Process in Timor-Leste: In Retrospect*, ICTJ Case Studies Series (2006), available at: <www.ictj.org/static/Prosecutions/Timor.study.pdf>, at p. 33.

94. UNMISSET Press Release, ‘Serious Crimes Process in Timor-Leste’, 25 February 2003.

95. Journalist Jill Jolliffe alleges that the SRSG requested the DPGSC to take the *Wiranto* Indictment off the UN letterhead (J. Jolliffe, ‘Timor PM Slams UN on War Criminals’, *Asian Times*, 15 May 2003).

96. Othman, *supra* n. 69, pp. 127-128.

97. Commission of Experts, *supra* n. 76, para. 71.

98. *Deputy Prosecutor-General for Serious Crimes v. Wiranto and Others*, Case No. 05/2003, Decision on the Motion of the Prosecutor General to Review and Amend the Indictment, 17 May 2004.

met with Wiranto in Bali and hugged him.⁹⁹ No arrest warrants issued by the Special Panels were subsequently forwarded to Interpol by Monteiro. No more progress was ever made in prosecuting the organisers of the referendum violence.

The Prosecutor-General's actions in the *Wiranto* episode clearly show how political obstruction by the Timorese government took precedence over the independent exercise of his responsibilities, notwithstanding the infusion of international support. A report by a Commission of Experts established to review the Special Panels demonstrated how little influence internationalisation of the unit he headed served to counter-balance government policy:

'The Commission has benefited from a frank discussion with the Prosecutor-General. Dr. Monteiro advises that he faces extraordinary challenges in both supporting the SCU and at the same time managing his Office with an eye to Government policy. ... [S]ince his government has to support the arrest and transfer of suspects outside Timor-Leste, he has to take the Government's policies into consideration. He denies direct interference in the work of the SCU, but has been advised that his internal policies cannot be inconsistent with those of the State.'¹⁰⁰

In promoting and deferring to nationally-led strategies of transitional justice, the Rule of Law and Transitional Justice Report (which was being drafted at the time) accepted the danger that this might manifest itself in leniency and amnesty, and so re-iterated the UN's role in negating the short-term self-interest in impunity. The *Wiranto et al.* episode constituted an accumulation of events envisaged in the Report – the UN investigates a crimes in a third state, identifies those who should be made accountable under international criminal law, the prosecution of whom occasions opposition from the leadership of the state concerned. However, the faith expressed in the Report and implied in the UN's support for internationalised courts and tribunals that an infusion of foreign staff could effectively counteract national reluctance to pursue destabilising prosecutions proved unduly optimistic. While the internationalisation of judicial responses to past human rights abuses was designed to preclude the possibility that government policy could impinge on the administration of justice, a UN Commission of Experts appointed to review the Serious Crimes Process baldly concluded that the Office of the Prosecutor-General could not function independently of the government, regardless of the weight of supranational influence on prosecution policy.¹⁰¹

From a peace-building perspective, the toleration of political interference in the trials was antithetical to the expectation that transitional trials would exemplify the rule of law, not men, in the formative years of the new state. The faith placed in transitional trials as a rule of law tool is largely explained by the example set of independent and autonomous judgment of politically-sensitive crimes (where previously the norm was interference and impunity) to draw the most

99. Askin, Frease and Starr, *supra* n. 84, p. 40.

100. Commission of Experts, *supra* n. 76, para. 69.

101. *Ibid.*, Executive Summary, para. 12.

public line possible between the courts' beholden past and more autonomous future.¹⁰² Frease appeared to summarise the UN's position in East Timor at the time when she argued that the failure to pursue accountability for the Indonesian figures most responsible for the crimes of 1999 'are rooted in politics, not the rule of law'.¹⁰³ However, this position is untenable – the overt interference of politics into the constitutionally independent functions of an institution of the justice system is *the* core rule of law issue in a state where such interference has historically been the norm. A key principle of UN peacebuilding doctrine is that such selective and security-contingent enforcement of the law, even where motivated by concern for the repercussions of an action on the emergent peace, unacceptably blurs the difference between legal judgment and political decision-making.¹⁰⁴ Far from setting a standard of judicial independence, the experience of governmental interference with the institutions of justice is one that has been repeated in the years since the Special Panels ended in 2005. It begs the question of whether the *Wiranto* episode has served to legitimise the practice.

It is tempting to wonder how the indictment might have fared under UNTAET's exclusive administration of the courts before May 2002 and to query whether the failure to do so itself represents a fear of political contestation. One inference to be drawn from the episode is that as the UN helps develop the capacities and legitimacy of post-conflict governments and progressively weakens its own peace-building missions *in situ*, it becomes gradually less able to resist the compromises of transition that peace-building doctrine and the Rule of Law Report declare themselves so opposed to. Rule of law reconstruction might fit the logic of peace-building and democratisation, but the timetable of peace-building and democratisation do not necessarily complement transitional justice. While a perceived national interest in restraining accountability or pardoning socially divisive crimes may remain constant, the UN's asserted ability to over-ride it does not. Perhaps an explanation for the reluctance of UNTAET and UNMISSET to interfere in the justice system was the need to justify the significant power they wielded as neutral, uncolonial and apolitical, given repeated criticisms that their structures were neo-monarchical¹⁰⁵ and a benevolent despotism.¹⁰⁶ As UNMISSET's successor missions replicated the UN's tendency to conceive of ongoing capacity-building processes as technocratic forms of 'anti-politics',¹⁰⁷ such timidity would become the norm in future.

102. J. Mendez, 'In Defence of Transitional Justice', in J.A. McAdams, ed., *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame, Indiana, University of Notre Dame Press 1997) p. 1 at p. 1.

103. S. Frease, 'Playing Hide and Seek With Justice: What Went Wrong in Indonesia and East Timor', 10 *ILSA Journal of International and Comparative Law* (2004) p. 283 at p. 283.

104. R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge, Cambridge University Press 2005) p. 196.

105. J. Chopra, 'The UN's Kingdom of East Timor', 43 *Survival* (2000) p. 27.

106. Beauvais, *supra* n. 57, p. 1101.

107. K. Jayasuriya and K. Hewison, 'The Antipolitics of Good Governance', 36 *Critical Asian Studies* (2004) p. 571.

5. THE NORMALISATION OF POLITICAL INTERFERENCE, 2006-2011

The judicial structure in East Timor is largely the same as that instituted by UNTAET in 2000 and consists of a Court of Appeal and four District Courts.¹⁰⁸ However, since the end of the Special Panel trials, the Timorese courts have required transfusions of international assistance on the bench and in the Office of the Prosecutor. Because for most of the relevant period there were only thirteen national judges and fourteen national prosecutors,¹⁰⁹ the hybridity visible in the Special Panels recurred:

‘Despite ... remarkable progress, however, the judicial system is likely to remain dependent on international judges and public prosecutors, especially at higher levels, and on international mentoring programmes for some time.’¹¹⁰

As a result, foreign transfusions of assistance have remained a feature of the Timorese justice system years after the conclusion of formal territorial administration, though not always on the strict 2:1 basis of the Special Panels. While some judges are UN employees, the organisation primarily coordinates exchange staff from donor countries.¹¹¹ Indeed, far from gradually phasing out international involvement and empowering local lawyers and judges as was originally expected, the Special Panels served more to ground a norm whereby the more serious and divisive a crime is, the less likely it was that Timorese lawyers and judges will exercise ownership over the prosecution or trial of them. Independent UN observers warned against the dangers of a dependency syndrome,¹¹² though the fact that a full panel of Timorese judges tried the presidential assassination case (examined later) is an encouraging sign.¹¹³

108. UNTAET Regulation No. 2000/11 on the Organisation of Courts in East Timor, UNTAET/REG/2000/11, 6 March 2000.

109. P. Rapoza, et al., *The Justice System of Timor-Leste: An Independent Comprehensive Needs Assessment* (2009), available at: <www.scribd.com/doc/21945587/Justice-System-in-East-Timor-An-Independent-Comprehensive-Needs-Assessment-2009>, at pp. 30 and 35. Since 2009, there have been a total of 51 judges, prosecutors and defence counsel.

110. UN Secretary-General, *Report of the UN Secretary-General on UNMIT (for the period from 27 January to 20 August 2007)*, UN Doc. S/2007/513, 28 August 2007, para. 35. At the most recent estimate, there is backlog of 4847 pending cases, though international actors are being slowly moved out of ‘line functions’. UN Secretary-General, *Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 21 September 2010 to 7 January 2011)*, UN Doc. S/2011/32, 25 January 2011, paras. 40 and 43 (hereinafter: UN Secretary-General 2011 Report).

111. UN Secretary-General 2010 Report, *supra* n. 1, para. 89.

112. UNDP Mid-term Evaluation Team, *UNDP Strengthening the Justice System in Timor-Leste Programme: Independent/External Mid-Term Evaluation Report*, September 2007, available at: <erc.undp.org/evaluationadmin/downloaddocument.html?docid=1460>, at p. 59.

113. OHCHR, *Facing the Future: Periodic Report on Human Rights Developments in Timor-Leste: 1 July 2009-30 June 2010*, available at: <<http://unmit.unmissions.org/Portals/UNMIT/>>

In short, ever since the Special Panels process ended, the UN has found itself repeating its Special Panels-era role in investigating, punishing and convicting politically-motivated violence as the divisions of the Indonesian occupation give way to a ‘relapsing’ democracy where divisions emerge over power and patronage.¹¹⁴ In theory, this constitutes a strong position in which to repair the damage of the *Wiranto* episode and lend force and example to the constitutional provisions on the rule of law.¹¹⁵ However, notwithstanding East Timor’s dependence on international actors to administer justice, familiar patterns of interference on the part of a government prioritising stability over all else have re-appeared on a consistent basis to frustrate internationally-driven processes of accountability. Much like the Special Panels period saw President Gusmao elevate bilateral relations with Jakarta above the pursuit of justice, the past five years of instability have seen a his successor prioritise the importance of fostering ‘national unity and dialogue’ over accountability.¹¹⁶ Utilising the same stability-based arguments that traditionally animate transitional leniency, prosecutorial interference remains the norm, while a systematic policy of pardon applies to those convicted of serious crimes. These trends are most apparent in the 2006 Crisis and the attempted assassinations of the President and Prime Minister.

5.1 The 2006 Crisis

What is widely labelled ‘the 2006 Crisis’ began as a conflict within and between elements of the military (F-FDTL) and police (PNTL) of East Timor over discrimination within their ranks, and expanded to feature general violence that convulsed the country intermittently for a month.¹¹⁷ The spark for the violence was a four-day demonstration from 24-28 April 2006 in Dili between a group of army soldiers who alleged discrimination by their superiors. The most serious crimes were committed when internecine violence resumed between 22-25 May between elements of the police, military and non-state paramilitary groups, a conflict which itself may stem from the UN’s reconstruction of the security institutions in isolation from Timorese politics and society to ensure its professionalism.¹¹⁸ Australian army and police personnel were deployed to quell the Crisis. The events in late April and late May must be kept in perspective. There were isolated bursts of serious violence, but it never constituted a rebellion or

Human%20Rights/UNHR%20Report%202010%20for%20website.pdf>, at p. 19.

114. Myrtinnen, *supra* n. 5, p. 219.

115. Section 119 provides that Courts are independent and subject only to the Constitution and the law.

116. UN Secretary-General 2011 Report, *supra* n. 110, para. 2.

117. See generally Special Commission of Inquiry for Timor-Leste, *Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste* (2006), available at <www.ohchr.org/Documents/Countries/COITimorLeste.pdf>.

118. Jones, *supra* n. 45, p. 561; D. Kingsbury, ‘Policing, Rule of Law, State Capacity and Sustainable Peace in Timor-Leste’, 14 *Journal of International Peacekeeping* (2010) p. 353.

civil war. Nonetheless, in addition to 38 killed and 69 injured, 1650 houses were destroyed and 150,000 people were internally displaced.¹¹⁹ The latter statistic may seem extreme given the overall violence, but it can be explained by ‘a deeply ingrained fear of any form of political contention’ in East Timor after the widespread internecine violence at the time of Portuguese decolonisation and what happened in 1999.¹²⁰ The fear of instability visible in the Special Panels process was both justified and magnified by the events of 2006. What is particularly significant is the extent to which agencies of the state and senior Fretilin (government) politicians were found to be complicit in the most serious violence, most notably the illegal distribution of weapons by the Ministers of the Interior and of Defence to non-state paramilitary groups and competing factions within the police and army.¹²¹

Political, ‘vertical’ accountability followed immediately. Prime Minister Alkatiri and Interior Minister Lobato were forced to resign over distribution of arms to civilians. Efforts to reform the army and police began immediately with international assistance. Alkatiri was succeeded by non-Fretilin Foreign Minister Jose Ramos-Horta as Prime Minister. Ramos-Horta later swapped jobs with his ally President Gusmao after elections in 2007 in which Fretilin was soundly defeated. However, ‘horizontal’ judicial accountability was paramount. As with the 1999 violence, the UN Secretary-General mandated a special UN Commission of Inquiry to ‘clarify responsibility’ for the aforementioned crimes. To this end, the Commission named about 60 individuals using a standard of ‘reasonable suspicion’, defined as ‘a reliable body of material consistent with other verified circumstances tending to show that a person may reasonably be suspected of involvement in the commission of a crime’.¹²² The violence was aptly explained by the Commission of Inquiry as being the product of the weaknesses of the nascent Timorese state, finding that ‘The Crisis that occurred in Timor-Leste between 28 April and 25 May can be explained largely by the frailty of state institutions and the weakness of the rule of law.’¹²³

The task set for the hybridised units of the Timorese justice sector was to investigate, prosecute, defend and try individuals recommended for prosecution by the Special Commission of Inquiry. Imbibing the doctrine of the Rule of Law Report, the Commission stated that these tasks ‘should be viewed as the foundation upon which the capacity-building and strengthening of State institutions should rest’.¹²⁴ Acknowledging the interference in the Special Panels process, the UN was advised by independent justice system monitors that prosecution of 2006 Crisis crimes be carried out by international actors, reasoning that ‘although the

119. Special Commission of Inquiry, *supra* n. 117, para. 101.

120. UN Secretary-General, *Report of the Secretary-General on Timor-Leste pursuant to Security Council Resolution 1690 (2006)*, UN Doc. S/2006/628, 8 August 2006, para. 31.

121. Special Commission of Inquiry, *supra* n. 117, paras. 88-96.

122. *Ibid.*, para. 11.

123. *Ibid.*, para. 18.

124. *Ibid.*, para. 222.

Prosecutor-General himself is not active in individual prosecutions, the fact that he retains the ultimate control of the prosecution service means that the prosecution service as a whole is vulnerable to political pressure'.¹²⁵ Internationalisation of the judicial response was once more urged to militate against political interference or disregard for judgments:

'The use of international judges, prosecutors and defenders operating within the domestic legal system accompanied by the Timorese actors is the main venue to ensure accountability. ... For such to occur, significant reliance should be placed on international judges, prosecutors and public defenders in order to secure the capacity, independence and impartiality of those involved in this process.'¹²⁶

As in the Special Panels, the initial prospects for accountability looked healthy when in May 2007, the Court of Appeal with an international majority confirmed the conviction of Minister Lobato for the crimes of murder and weapons offences.¹²⁷ The convictions were commended as 'a very positive step for the future of development of the legal system in Timor-Leste'¹²⁸ and as 'important signals to the population that Timor-Leste is committed to applying the law in an impartial manner and to combating impunity'.¹²⁹

The optimism occasioned by the arrest and trial of Minister Lobato that the law would be applied to all equally, regardless of power and influence, was dashed in the following months and years. Systematic restraint of the prosecution function and pardon became the dominant governmental responses to the investigations recommended by the Commission of Inquiry. Pursuant to Article 85(i) of the Constitution, the President of the Republic can grant pardons and commute sentences after consultation with the government, and this avenue is one that has consistently been pursued.¹³⁰ Adopting the language of transitional leniency ('To know how to forgive is a virtue that we need to cultivate in our hearts. Let us recognise the day of pardon and clemency among Timorese'),¹³¹ Presidential Decree No. 53/2008 of 19 May 2008 provided that named convicts, among them Lobato and a number of people convicted for crimes against humanity by the

125. Judicial Systems Monitoring Programme, 'JSMP Submission to the UN Independent Special Commission of Inquiry for Timor-Leste, September 2006' (copy on file with author).

126. Council of Coordination for the Justice Sector, 'Additional Needs of the Timor-Leste Justice System: Upholding Service Delivery in the Timor-Leste Justice System During the Crisis' (2006), p. 13 (copy on file with author).

127. Judicial Systems Monitoring Programme Justice Update (Press Release), 'Appeal Decision in the Case of Rogerio Lobato', 17 May 2007.

128. Judicial Systems Monitoring Programme Press Release, 'Rogerio Tiago Lobato Sentenced to 7 Years 6 Months Prison', 8 March 2007.

129. UN Secretary-General, *Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 21 August 2007 to 7 January 2008)*, UN Doc. S/2008/26, 17 January 2008, para. 31.

130. It provides: 'It is exclusively incumbent upon the President of the Republic: ... i) To grant pardons and commute sentences after consultation with the Government.'

131. 'East Timor minister to be pardoned', *Sydney Morning Herald*, 23 April 2008.

Special Panels, were entitled to either pardons or commutations of sentence.¹³² Indeed, more than half the total prison population received pardons or commuted sentences,¹³³ including the last of the 84 militia members convicted by the Special Panels who had not already enjoyed earlier presidential commutations.¹³⁴ As one Timorese justice NGO pointed out at the time,

‘The Amnesty Law [*sic*] is more political than judicial in nature and appears to have been created and approved with the intention of protecting certain individuals and groups who wish to evade prosecution.’¹³⁵

A similar reluctance to pursue accountability for paramilitary violence was seen in the case of senior army and police figures found by the Commission of Inquiry and international prosecutors to be responsible for many of the offences committed in the Crisis. The November 2007 sentences of between ten and twenty years given to four soldiers by the Dili District Court for the murder of eight unarmed, surrendering police officers during the Crisis was commuted by the President in 2010.¹³⁶ The commutations ‘were purposely calculated to result in the immediate release’ of the soldiers, and effectively constituted pardons.¹³⁷ Once more, the language of reconciliation was used – ‘Our State offers a gift of reconciliation in order to place in the past the sadness and pain that the crisis of 2006 caused our country.’¹³⁸ The Minister of Defence and the Commander of the Defence Forces have never been indicted despite being recommended for prosecution on charges of illegal weapons transfer by the Commission of Inquiry.¹³⁹ There is evidence of executive restraint of prosecutorial activities in investigations of political figures allied to the Gusmao/Horta axis.¹⁴⁰ As with the Special Panels, the more

132. Presidential Decree No. 53/2008, text available at: <www.eastimorlawjournal.org/Presidential_Decrees/Decree_of_the_President_53_of_2008_presidential_pardons.html> (accessed 5 August 2009) Arts. 1, 2 and 4.

133. UNOHCHR, *Report on Human Rights Developments in Timor-Leste: The Security Sector and Access to Justice, 1 September 2007-30 June 2008*, available at: <www.ohchr.org/Documents/Countries/UNMIT200808.pdf>, at p. 12, para. 45.

134. L. Mallinder, ‘Amnesty Law, Trials and the Promise of Complementarity?’, Transitional Justice Institute Research Paper No. 10-10 (2010), available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1630418>, at p. 27.

135. Judicial Systems Monitoring Programme Justice Update, ‘The Amnesty Law Protects Perpetrators of Crimes Committed During the 2006-2007 Crisis’, June 2007.

136. Presidential Decree No. 31/2010.

137. Center for International Governance Initiative (CIGI), *Security Sector Reform Monitor Timor-Leste* No. 4 (2011), available at: <www.cigionline.org/publications/2011/1/security-sector-reform-monitor-timor-leste>, at p. 4.

138. *Ibid.*

139. Special Commission of Inquiry, *supra* n. 117, para. 134.

140. International Crisis Group, *Timor-Leste: Security Sector Reform*, Asia Report No. 143 (2008), available at: <www.crisisgroup.org/~media/Files/asia/south-east-asia/timor-leste/143_timor_leste_security_sector_reform.ashx>, at p. 18; UN Secretary General 2010 Report, *supra* n. 1, para. 11.

senior the offender, the less likely it was that he would come before the courts. The disregard for the autonomy of the judicial institutions the UN helped build has had a chilling effect on prosecutions and trials. At the time of writing, out of the approximately 60 Crisis-related investigations launched with significant international assistance in the Crisis offences, not a single individual remains in detention after nine pardoned convictions and 43 acquittals.¹⁴¹ Observers credibly posit ‘a lack of motivation on the judges’ part to properly conduct full trials due to the certainty of presidential pardons’.¹⁴²

5.2 The February 2008 attacks

On the morning of 11 February 2008, the President was shot twice and almost killed by rebel intruders under the leadership of one Major Alfredo Reinado. Reinado’s deputy Lieutenant Gastao Salsinha and some of his followers fired on a column of vehicles containing Prime Minister Gusmao, with a similar lack of success.¹⁴³ Reinado was a soldier whose prosecution was recommended by the Commission of Inquiry after he and his followers attacked police and army officers, killing five and injuring ten in violence during the 2006 Crisis.¹⁴⁴ Reinado, initially a supporter of the President, had gone on the run and was furnished ‘freedom of movement’ letters by the President and Prosecutor-General ordering Australian and UN military and police to cease the hunt for him, which were declared invalid by an international judge in the District Court.¹⁴⁵ Reinado was killed in the attack. The episode once more brought home the weakness of the rule of law most dramatically. It has been widely suggested that the apparent state policy to tolerate political violence with restraint of the prosecutorial function and systematic pardon emboldened the attackers. For example, Amnesty International argued:

‘The attempted killings of President Ramos-Horta and Prime Minister Gusmao yesterday are a direct consequence of this continuing failure of the government and the international community to rebuild the national criminal and civil justice system effectively. Alfredo Reinado, who was facing criminal charges for having taken part in the 2006 violence, shouldn’t have been still at large, threatening the stability of the country.’¹⁴⁶

141. CIGI, *supra* n. 137, p. 14.

142. *Ibid.*

143. S. Mydans and T. Johnston, ‘President of East Timor Wounded in Rebel Attack’, *New York Times*, 11 February 2008.

144. Special Commission of Inquiry, *supra* n. 117, para. 117.

145. ‘East Timor’s acting Prime Minister halts search for fugitive rebel soldier’, *Associated Press*, 23 April 2007.

146. Amnesty International Press Release, ‘Timor-Leste: End Culture of Impunity’, 12 March 2008, available at: <www.amnesty.org/en/for-media/press-releases/timor-leste-end-culture-impunity-20080212>.

As in 1999 and 2006, investigations and prosecutions were restrained by the government. A leaked UN report found the National Investigation Department, augmented by an international prosecutor, had encountered ‘political and military interference’, as well as a lack of cooperation from the government.¹⁴⁷ On 3 March 2010, 24 defendants were found guilty of committing crimes and were sentenced to terms of imprisonment ranging from nine years and four months to sixteen years.¹⁴⁸ The court held that the defendants, together with the deceased Reinado, were illegally armed to carry out attempted murders. However, it appeared at all stages that trial would be futile because any punishment handed down by the hybridised Dili District Court convened to try them would be circumvented by a government keen to make peace with the rebels. Over a year before the trial in February 2009, President Ramos-Horta appeared to perpetuate the climate of impunity and political interference by making clear any convictions by the courts would be negated:

‘I met Mr. Salsinha and some of his friends and I don’t want them to be held responsible for the crisis that occurred because they weren’t the leaders. I can’t give a pardon before the legal process is done. After the legal process I can give a pardon, but before that I can’t do anything.’¹⁴⁹

Within what should have been the courts’ sole sphere of competence, the President of the Court of Appeal found himself in the invidious position of calling on the President to delay the inevitable grant of pardon until after it heard the defendants’ appeal.¹⁵⁰ Ultimately, the aforementioned pardon for the four soldiers on 20 August 2010 also included Salsinha and the rest of Reinado’s followers involved in the attacks.¹⁵¹ Again, the language of reconciliation and stabilisation was used. President Horta justified the pardon by reference to the need to ‘strengthen national unity’, adding that ‘The Petitioners and Salsinha were victims as well. So after some discussions with the Government and Opposition Leaders I have decided to end the 2006 problem.’¹⁵²

147. UNMIT Internal Review Panel, *Report on the UN Actions in Response to the Attacks on the President and the Prime Minister on 11 February 2008* (2008), para. 99 (unpublished, previously available on wikileaks, copy on file with author). Discussed on ABC Radio Australia, 11 August 2008, transcript available at: <<http://timorleste.livejournal.com/155590.html>>.

148. No transcript in English for the case exists. For a summary, see Judicial Systems Monitoring Programme Press Release, ‘Final decision issued by court in 11 February case fails to prove who shot the President of the Republic’, 10 May 2010, available at: <<http://easttimorlegal.blogspot.com/2010/05/jsmp-final-decision-issued-by-court-in.html>>.

149. N. Da Cruz, ‘E Timor on a knife-edge one year after President’s shooting’, *Gulf Times*, 11 February 2009.

150. CIGI, *supra* n. 137, p. 6.

151. Presidential Decree No. 31/2010.

152. ‘Ramos-Horta Pardons Attackers’, *East Timor Law and Justice Bulletin*, 24 August 2010, available at: <<http://easttimorlegal.blogspot.com/2010/08/ramos-horta-pardons-attackers.html>>.

Though the President of the Republic can grant pardons and commute sentences after consultation with the government, the consistent exercise of this power in relation to crimes committed in 1999, 2006 and 2008 ‘demonstrate that open political intervention in the justice system by the government leadership on the grounds of reconciliation and political necessity is clearly considered an acceptable action’.¹⁵³ Though these sorts of pardons and amnesty are anathemised the Rule of Law Report, institutional responses like investigatory commissions and the significant international role in the investigation, prosecution and trial of these crimes appears have little impact on respect for judicial autonomy. Notwithstanding the dependence of the Timorese justice system on international actors, UN missions have singularly failed to engage the government at a political or diplomatic level. Criticism is generalised and tepid,¹⁵⁴ most notably the recommendations of an Independent Comprehensive Needs Assessment exercise it sponsored for the justice system which merely recommended greater transparency and victim participation in the pardon process.¹⁵⁵

One Timorese judge has recently opined that ‘Politicians do their job and judges do theirs; an institutional culture is needed which recognises the independence of the court.’¹⁵⁶ It can be surmised that over a decade of intrusive UN involvement in judicial institutions has failed to create such a culture. As the UN itself concedes,

‘The formal justice system is characterised by a lack of public confidence underpinned by perceived impunity ... the principle of separation of powers has not always been respected. ... More recent Presidential pardons and commutations of sentences involving a number of cases from 2006 and others have further contributed to perceptions of impunity.’¹⁵⁷

153. CIGI, *supra* n. 137, p. 17.

154. See for example UN Secretary-General Report 2010, *supra* n. 1, which notes the problem at paras. 10-12, 80-87 and 101-105, but offers no solutions in its 2010-2012 plans dealing with the justice issues (paras. 88-95) or the culture of democratic governance (paras. 106-112).

155. Rapoza, et al., *supra* n. 109, p. 85. Perhaps the most damning indictment of the UN’s blind faith in institutions abstracted from the politics of the day was its most curious response to the 2006 Crisis, namely the formation of a Serious Crimes Investigation Team (SCIT) to resume the investigative functions of the SCU for crimes committed in 1999 (SC Res. 1704 (2006), UN Doc. S/RES/1704, 15 August 2006, para. 4(a)). The Team was created notwithstanding the facts that all those convicted earlier by the Special Panels have been pardoned and that the 2006 violence bore no relation to what happened in 1999. As of January 2011, 184 investigations out of 396 outstanding cases had been concluded, without any convictions being secured (UN Secretary-General Report 2011, *supra* n. 110, para. 35).

156. CIGI, *supra* n. 137, p. 9.

157. UN Secretary General 2010 Report, *supra* n. 1, para. 24.

6. CONCLUSION: THE LIMITS OF CO-OPERATION

The Timorese experience in one sense affirms the UN's understanding of the triangular relationship between the process of rule of law reconstruction, the exigencies of transitional justice in post-conflict states and the security-driven imperatives of the nascent democratic polity that emerges from peace-building. The reluctance of an incoming government to jeopardise stability by pursuing prosecutions was one specifically envisioned by the UN as it wrestled with the complexities of intrusive peace-building missions in failing states. The principle expressed in the Rule of Law Report that impunity weakens the emerging peace may not be universally applicable, but was in this instance borne out by the East Timorese experience. As the state advanced from the Special Panel trials to the 2006 Crisis to the 2008 assassinations, successive waves of impunity appear to embolden the commission of serious politically-motivated crimes.

However, what the last decade also shows is that peace-building's reliance on demonstrably neutral and apolitical institutional responses like teams of inquiry, hybridised courts and transfusions of international assistance alone are insufficient to guarantee the autonomy of reconstructing court systems in politically contentious trials without a corresponding willingness to assert it forcefully on the political and diplomatic level. As Hameiri argues, 'The significance of institutions resides not in their capacity per se, but in the sort of interests they promote or marginalize, and in the sort of conflicts they give expression to, or structure out of politics.'¹⁵⁸ In the Timorese context, successive UN missions have opted out of such conflicts. They have been consistently unwilling or unable to use the weight of East Timor's dependence on them to enforce a culture of respect for the autonomy of the judicial institutions it built and staffed among East Timor's political leadership. While the bench has proven committed and able to uphold the principle of accountability, it is consistently undermined by pardon. Impunity in the guise of reconciliation remains preferred to accountability as a response to organised political violence, indulged by a government successfully seeking the compromises internationalisation was thought to render impossible over adherence to the law of the state. International assistance may be necessary for the independence of the judiciary to take root in weak states emerging from war or repression, but it will rarely prove sufficient as the peace-building doctrine appears to imply.

As always, a complex of historical, economic and socio-political factors determines whether lenience and pardon become state policy, and it would be foolish to argue the *Wiranto* episode made certain what happened later. Nonetheless, in the context of a newly – independent East Timor, one can with a degree of certainty point to the *Wiranto* Indictment as the episode where political exigencies first took priority over the independence of the courts and the pursuit of accountability. It may demonstrate the Rule of Law Report's confidence that a process

158. Hameiri, *supra* n. 12, p. 140.

of transitional justice can have a significant impact on the quality of the emerging rule of law, but not in the manner it expected. One may hypothesise how a stronger defence by UNMISSET officials of the SCU at the time of the *Wiranto* Indictment could have sent a strong message to new government that the politicisation so normal under Indonesian rule would not be tolerated. Equally, it is tempting to ask in recent years how the co-operation of international judges and prosecutors on whom the state remains dependent could have been suspended pending guarantees that prosecutorial independence would be respected and pardons eschewed.

It is necessary to remind ourselves why the response has been so consistently supine. In transition, the path of least resistance is tempting for the simple fact it constitutes an easier course for an unstable, democratising leadership reluctant to mortgage future progress for past justice. The short-term imperatives of a security-conscious government will often win out at the expense of more principled, long-term and frequently politically inconvenient respect for the autonomy of the institutions of justice on which peace is built, unless genuinely assertive international support for the latter is forthcoming in the political sphere where courts are weakest. As Chopra notes, the shallow resolve of international organisations can rarely hope to succeed against determined local opposition.¹⁵⁹

Notwithstanding the strengthening of institutions with international expertise, the rule of law that peace-building missions are mandated to inculcate cannot exist where either rulers or ruled (or both) feel free to ignore them. These are cultural commitments, radically different from what went before, when it was wielded arbitrarily by the former and resented by the latter. It has been noted in post-conflict societies that 'without a widely shared cultural commitment to the idea of the rule of law, courts are just buildings, judges are just bureaucrats, and constitutions are just pieces of paper'.¹⁶⁰ The practice of the Special Panels and successive UN missions, by focussing only on institutional matters and wilfully disengaging from the more contentious cultural, behavioural and cultural aspects of the rule of law,¹⁶¹ have left the Timorese justice system as a hollow shell with little more weight than an easily-circumvented bureaucracy.

159. J. Chopra, 'Building State Failure in East Timor', 33 *Development and Change* (2002) p. 979 at p. 995.

160. J. Stromseth, M. Wippman and R. Brooks, *Can Might Make Rights? Building the Rule of Law After Military Interventions* (Cambridge, Cambridge University Press 2006) p. 76.

161. As one UN official put it, 'UNTAET was busy developing institutions. They didn't work on the political culture' (Jarvinen, *supra* n. 59, p. 36).