

# Contesting International Norms of Transitional Justice: The Case of Timor Leste

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A discussion of the interplay of different concepts of justice and reconciliation in United Nations peace operations in Timor Leste and in the Timorese political leadership. Drawing on research into norm diffusion and concepts of localization and norm contestation to understand how societies deal with their violent past under the auspices of international actors in UN peace operations, the analysis challenges the UN's functionalistic concept of transitional justice as a precondition to state- and nationbuilding in post-conflict societies. As the case of Timor Leste demonstrates, the Timorese leadership has been successful in promoting its own concept of justice and reconciliation, leading to a localized version of state- and nationbuilding that openly contests international approaches.

After the rather sobering experiments with the international ad-hoc tribunals in Rwanda and the former Yugoslavia in the mid-1990s, the United Nations developed a complementary approach to transitional justice consisting of tribunals and truth commissions established within the respective country. This new approach was assumed to better meet the aim of peace operations by having an impact on peace- and statebuilding. However, as this article will demonstrate for Timor Leste, the complementary approach did not have the expected impact. Instead, political leaders have successfully sidelined internationally induced transitional justice initiatives and promoted their own concepts of nationbuilding and reconciliation, which clearly contradict international concepts. The example of Timor Leste shows how much this complementary approach still requires the acceptance of political stakeholders in order to have an impact on reform processes in post-conflict countries. At the same time it proves even more vulnerable to the structural deficits and incapacities typical of a post-conflict situation, which aggravates the risk of reducing transitional justice to an internationally initiated short-term intervention.

After a short introduction to transitional justice in peace operations, I will propose a model of analysis in which the

use of different concepts of transitional justice is traced beyond their application within the respective mechanisms up to their impact on the democratic institution-building process. In order to set the stage for such an assessment of the impact of international approaches to transitional justice in Timor Leste, I will discuss the origins and evolution of narratives on nationhood in Timor Leste. Subsequently, the developments within the field of transitional justice in East Timor are reconstructed up to and including the discussion in the East Timorese parliament about a reparations program and an Institute of Public Memory. As I will demonstrate, internationally induced transitional justice initiatives have been successfully sidelined by political leaders as incompatible with the East Timorese history of resistance, traditions, and world views.

## 1. Transitional Justice in Peace Operations

In the 1980 and 1990s transitional justice was mainly a matter of democratic transitions and exclusively an internal affair for governments (Teitel 2003, 71). Research focused on political constellations to analyze elites' choices with regard to dealing with the past (Huntington 1991; Huyse 1995). It took the events in the former Yugoslavia and Rwanda for transitional justice to become an instrument of intervention and peacebuilding. However, re-

search on the international ad hoc tribunals laid open their incapacity to foster reconciliation, recognize victims' suffering, or acknowledge their rights (Mertus 2000; Akhavam 1998). Jelena Subotic (2009) demonstrated how compliance with international law in Bosnia and Serbia served as window-dressing to avert international pressure. She concluded that this problem exists first and foremost for international tribunals, while a broader approach would prevent transitional justice from becoming a political instrument in the hand of national leaders (383). Since the complementary approach to transitional justice developed in response to this critique was implemented within the respective country it was expected to have a positive impact on statebuilding by demonstrating rule of law and by having a capacity-building effect on national justice systems (Stromseth 2006, 249ff.). Truth commissions were expected to help foster an inclusive national identity and contribute to peacebuilding by facilitating reconciliation (Hazan 2006, 21). In this context ownership was introduced as a new norm of conduct for transitional justice processes (Stromseth 2006; Annan 2004). It is therefore worthwhile to analyze whether this complementary approach has been able to render transitional justice more effective for the UN's peace- and statebuilding agenda.

## 2. Norm Diffusion in Peace Operations

Since the early 1990s, norms have become an explanatory factor for political change on the domestic and international level. Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink (1999) introduced a spiral model of norm diffusion in which domestic and international human rights networks force a repressive regime into tactical concessions followed by the institutionalization of rule-consistent behavior. However, peace operations give a different context to the transfer of norms since international actors can directly influence the agenda of a post-conflict political system and compel domestic actors to institutionalize new norms. This situation involves a high risk of creating a conflict between officially accepted norms and the personal convictions people act upon at the receiving end. Antje Wiener (2004) therefore introduced the concept of norm contestation focusing on the conflictive interpretations actors ascribe to a norm. In Amitav Acharya's concept of

norm localization (2009), domestic actors actively reconstruct new norms to make them fit their own *cognitive prior*. This *cognitive prior* comprises shared systems of beliefs, practices, and ideas of the nation's "founding fathers" (22–23).

These approaches place the focus on political leaders in processes of norm transfer – not only in defining the *cognitive prior* of a post-conflict society but also discursively contesting externally introduced norms. This is even more pertinent in a post-conflict context where state structures are weak and political actors enjoy even greater power to interfere in political processes and influence political developments in an ad hoc manner. Therefore, to adequately evaluate processes of norm transfer not only the functioning of political institutions but also political ad hoc practices have to be taken into account. Thus, I will analyze how domestic actors have responded to internationally induced transitional justice mechanisms and how they deal with these mechanisms' outputs, such as the final report of a truth commission or indictments of a tribunal, on a practical and a discursive level. As the article will demonstrate, it is up to political leaders to decide if an internationally induced concept of transitional justice will have an impact on democratic institution-building, by serving as a role model for the justice sector and for how to deal with situations of crisis for example.

## 3. Political Elites and Narratives of Nationhood in Timor Leste

In the following I draw on Antje Wiener's (2009) approach to study the "meaning-in-use" of norms to trace discursive reactions of political leaders to international transitional justice initiatives in Timor Leste. By focusing on speeches and interviews with East Timorese leaders and international actors of the UN peace operations the varying meanings which are ascribed to the same norms by different actors shall be illustrated. In addition, a closer look at political practices and processes of institutionalization will show how actors enact norms while at the same time contesting their validity. In this article, the term "political elite" refers to actors engaged in high level party politics, be it government or opposition. In the case of Timor Leste all of these leaders were part of the resistance movement and draw their legitimacy from their experiences under occu-

pation.<sup>1</sup> Therefore, the broader population perceives them as the “founding fathers” of the nation, providing them with great symbolic authority. The first half of this section gives an overview of the historic developments in Timor Leste that led to the referendum and the different peace operations. The second half will demonstrate how different narratives of nationhood and national identity have evolved over time.

After more than four hundred years under Portuguese rule and a short but brutal civil war, Timor Leste declared its independence on November 28, 1975. Only nine days later Indonesia invaded and forced the leading political movement FRETILIN (Frente Revolucionaria de Timor Leste Independente) to withdraw into the mountains. From there FRETILIN organized the resistance struggle against the Indonesian forces. During the occupation almost two hundred thousand people died from sickness and starvation due to forced resettlement or counter-insurgency operations in which the civilian population was used as human shields (CAVR 2005, 6.1). In 1981, Ray Kala “Xanana” Gusmao became the new leader of FRETILIN.<sup>2</sup> He presented the East Timorese cause as a fight against human rights violations and became internationally even more well-known when he was captured in 1992 (Niner 2009, 161). In the wake of the Asian financial crisis of 1998, President Suharto’s regime in Indonesia collapsed and hopes for independence rose quickly in Timor Leste. A referendum about independence or autonomy within the Indonesian nation-state was agreed upon by Portugal, the UN and Suharto’s successor Jusuf Habibie. When the results of the referendum turned out to be in favor of independence on September 4, 1999, pro-integration militias unleashed a campaign of retaliation, killing almost 1,500 people (UN GA A/54/660, 8).<sup>3</sup> In response the UN de-

ployed the multinational force INTERFRET to restore security, followed by the United Nations Transitional Administration in East Timor (UNTAET). UNTAET was tasked with rebuilding the country from scratch, since more than 70 percent of its infrastructure had been destroyed. After independence on May 20, 2002, two considerably smaller missions were installed; UNMISSET (United Nations Mission of Support in East Timor) and UNOTIL (United Nations office in Timor Leste). However, after a crisis in 2006 a mission with a broader mandate was established: UNMIT (United Nations Integrated Mission to Timor Leste) was entrusted with security sector reform and rule of law development; its mandate ended in December 2012.

Although FRETILIN presented its cause as the struggle of the common people, the civil war of 1974/75 had left a divisive legacy for the political parties in East Timor.<sup>4</sup> When Gusmao gained leadership of FRETILIN and its armed wing FALINTIL (Forças Armadas da Libertação Nacional de Timor-Leste), he stripped the movement of its socialist stance and convinced supporters of the former opposition party UDT (Uniao Democratica Timorese) and the church to join the movement (CAVR 2005, 3.15). This generated support among East Timorese living in exile, many of them UDT supporters (Schmitz 2010, 97). Accordingly, in 1984, FRETILIN declared “national unity” as its political line, which led to frictions between socialist hardliners and their leader (CAVR 2005, 3.15). However, growing international attention proved Gusmao right: the diaspora presented the Timorese cause as a people suffering from human rights violations, a discourse which had greater resonance among the transnational human rights movement (Wise 2004). At the same time political leaders stressed the close connection between the guerilla forces

1 Xanana Gusmao became the first president after independence. Dr. Mari Alkatiri, Secretary General of FRETILIN, was a founding member of FRETILIN in 1975 and the first prime minister after independence in 2002. José Ramos-Horta was Minister of Foreign Affairs in the FRETILIN government in 1975. He received the Nobel Peace Prize for his diplomatic struggle in 1996, together with the bishop of Dili, Carlos Filipe Ximenes Belo.

2 When Gusmao took over the leadership of FRETILIN in 1981, he set up a threefold resistance front consisting of a diplomatic, a clandestine, and an armed wing. Before this, the resistance movement had been practically defeated by the occupying forces during the period between 1975 and 1981.

3 The result of the referendum was 78.5 percent in favor of independence. Despite the intimidation tactics of pro-Indonesian militias, turnout was 98.6 percent (Myrntinen 2009, 222).

4 FRETILIN used the term *Maubere*, originally a derogative name for the illiterate population used by the Portuguese, as a unifying label to represent the East Timorese (Traube 2007, 9). However, other parties interpreted this denotation in a highly divisive manner, pitting the racially “pure” East Timorese against the mixed-blood *mestizos* population. This divided FRETILIN from other parties whose supporters were former colonial administrators (CAVR 2005, 3.1).

and the civil population as a suffering but united nation (Niner 2000, 153ff.; Ruak 2000).

This strong notion of a suffering nation gained a different meaning in post-independence political discourse. After the common enemy had vanished, “national unity” proved to be difficult to manage and competition arose over historic ownership of the resistance and the distribution of government positions (Babo-Soares 2003, 144). Political leaders used their resistance record to demonstrate their connection with the population and their readiness for political leadership (Silva 2007, 165). This issue of deservedness contains an inherent logic of reciprocity: on the one hand, the claim for a position of political leadership relies on a person’s role in the resistance (Silva 2007, 168; Hohe 2002, 78). On the other hand, various groups in society demand material compensation from their leaders based on their support for these individuals and on their own contribution to the resistance (Roll 2011, 74; ICG 2011, 4).<sup>5</sup>

Hence, the question who did what during the resistance period gained centrality within the political discourse and became the defining feature for national identity, displacing the “national unity” narrative. This is illustrated by the wording of the constitution of 2002, which lists “valorization of the resistance” as one of the republic’s fundamental principles. The constitution also commits the state to “special protection of all those who dedicated their lives to the struggle for independence and national sovereignty” (RDTL 2002, 11.3).

#### 4. Transitional Justice in Timor Leste

At the time of the establishment of UNTAET, the United Nations had already developed its complementary approach to transitional justice. In 1997, the Office of the High Commissioner for Human Rights (OHCHR) had affirmed victims’ rights to truth and reparations in addition to a “duty to prosecute” (UN Commission of Human

Rights 1997). Truth commissions supplemented the prosecutorial approach, albeit the “duty to prosecute” was still given priority (Trenkov-Wermuth 2010, 28; Bassiouni 2006, 9). On the question of reconciliation, the United Nations Economic and Social Council discussed the application of mechanisms of restorative justice in 1999; the final recommendation was to apply such initiatives only to minor offenders (UN Economic and Social Council 1999).

When UNTAET was established in October 1999, the UN sent a team of special rapporteurs on human rights violations to prepare recommendations on how to deal with East Timor’s violent past. The special rapporteurs stressed that the East Timorese would “continue to seek justice and are unable to come to terms with their sorrow and distress” (UN General Assembly 1999, 12). In other words, they presented themselves as the legitimate spokespersons of the East Timorese suggesting that ignoring this concern would endanger the newly won peace and stability. An international tribunal for the human rights violations committed before and after the referendum in 1999 was proposed but support quickly faded in the light of the great expense of the international tribunals for Rwanda and the former Yugoslavia. Instead, the option of two ad hoc tribunals established in Indonesia and Timor Leste was preferred by the Security Council.

#### 4.1. International and East Timorese Approaches to “Serious Crimes”

In June 2000, UNTAET established a Special Panel within the Dili District Court to prosecute genocide, war crimes, and crimes against humanity (UNTAET 2000). In addition, “Serious Crimes” – defined as murder, sexual offenses, and torture, committed between January 1 and October 25, 1999 – were also to be prosecuted. These offences were added to the offences defined by jus cogens especially to deal with the violence before and after the referendum. UNTAET thereby stressed the importance of prosecutions as a basis for establishing a credible criminal justice system and as a precondition for reconciliation (Larke 2009, 655).<sup>6</sup>

<sup>5</sup> In the post-referendum period various veterans’ groups were formed based on these claims. Groups such as *Sagrada Familia* and CPD-RDTL (Resistance Council of the Democratic Republic of Timor Leste)

recruit members among former guerillas who are discontent with the demobilization program and the lack of material support from their leaders (ICG 2006, 2011; Babo-Soares 2003, 175).

<sup>6</sup> This stance was also mentioned in interviews with members of UNMIT’s Serious Crimes Investigation Team and its Human Rights and Transitional Justice Unit.

The Special Panel was intended to consist of international and national judges along with a Serious Crimes Unit (SCU) for investigations. At that time, there were no practicing judges in East Timor, so UNTAET had to train domestic personnel on the job.<sup>7</sup> A Defense Lawyers Unit was only established in 2002, two years after the creation of the Special Panel. From the very beginning the Special Panel had to deal with serious budget cuts. Due to lack of funding and personnel, it was forced to focus exclusively on the violence of 1999, to the detriment of the wider context of the Indonesian occupation.<sup>8</sup> The achievements of the Panel remained modest: it concluded fifty-five trials with eighty-five convictions, all of them low-ranking members of East Timorese militias. Significantly, despite a Memorandum of Understanding with UNTAET, no high-ranking Indonesian military officers were tried, since Indonesia refused to hand over indicted persons.

In addition, East Timor's political leadership presented their approach to the question of accountability for human rights violations which clearly contradicted the UN's approach. Even before independence, Ray Kala Xanana Gusmao stressed the importance of reconciliation through forgiveness.<sup>9</sup> Hence, instead of prosecutions, the repatriation of the more than 250,000 East Timorese who had been forcibly resettled in West Timor was declared the national priority. From 2000 on, Gusmao and José Ramos Horta initiated meetings on the border with West Timor to encourage people to return. For these so-called border reconciliation meetings they allowed indicted militia leaders to safely cross the border in spite of the indictments the SCU prosecutors had issued against some of these individuals (Kyodo News Service 2001). The return and reintegration of high-ranking militia members was justified as a necessary means to restore "national unity" as a precondition for development (Ramos-Horta 1999; Gusmao 1999). In this context, reconciliation was presented as an act of clemency and personal strength on behalf of the victims (Gusmao 2003a). According to such a "reconciliation

through forgiveness" narrative, the pursuit of justice was revenge without moral legitimacy (Gusmao 2003c). In addition, Gusmao claimed that prosecutorial justice was not necessary for a deterrent effect (Lusa 2000). Instead he argued that the people of Timor Leste would only require members of the militias to apologize in order to forgive them. Political leaders also condemned the UN's "Serious Crimes" process as selective, trying East Timorese only. It was criticized for its "excessive" verdicts and for diverting much-needed funds from Timor Leste's development agenda while poverty prevailed for the people (Gusmao 2003b; Lusa 2003). In this context, development and independence were presented as "real justice" for the people, to which the prosecutorial approach of the "Serious Crimes" process posed a severe challenge (Lusa 2003; Gusmao 2003a; Sherif 2009).

Given the lack of any credible court structure in East Timor, UNTAET started to consider mechanisms of traditional conflict settlement to deal with minor crimes committed since April 1974. In 2000, UNTAET's Human Rights Section introduced the idea of a truth commission for Timor Leste. All East Timorese political stakeholders, back then still integrated in the CNRT (Conselho Nacional da Resistência Timorese), supported this initiative, emphasizing the need for a "commission of resettlement and reconciliation" (CNS 2000). Xanana Gusmao also persistently referred to the model of the South African truth and reconciliation commission to stress the idea of amnesty for high-ranking perpetrators, depicting the search for truth as counterproductive for the development of the nation in various statements (Dodd 2000; Gusmao 2003; ABC 2001).

Consultations held by UNTAET on how to facilitate reconciliation concluded that a traditional mechanism for conflict resolution should be applied to minor offences while perpetrators of "Serious Crimes" were to be referred to the prosecutor general (CAVR 2005, 9.1). This stance fitted the

7 After all the East Timorese trained judges, defenders, and prosecutors failed their exams in 2004, internationals had to take over again until 2007 (Braithwaite, Charlesworth, and Soares 2012, 176).

8 Interview with members of the Serious Crimes Investigation Team of UNMIT in Dili, March and April 2011

9 In June 1999, Gusmao offered an amnesty for militia leaders who renounced violence (Cristalis 2002, 211).

UN's approach to reconciliation and restorative justice but contradicted Gusmao's concept of reconciliation as forgiveness on all levels. On July 13, 2001, UNTAET established the Commission for Reception, Truth, and Reconciliation (Comissao de Acolhimento, Verdade e Reconciliacao, CAVR), including a Community Reconciliation Program (CRP) based on the traditional practice of *nahe bititi* (to spread the mat). For this mechanism of conflict resolution the victim and the alleged perpetrator were to meet on a mat in front of the community to settle conflicts with the mediation of local leaders and a regional commissioner of the CAVR (CAVR 2005, 9.2). Perpetrators were requested to ask for forgiveness and to compensate the victims and their communities. According to observers, the proceedings focused strongly on the rehabilitation of the perpetrators instead of providing a platform to recognize people's suffering. In the absence of high-ranking militia members, perpetrators were able to present themselves as minor offenders who had been forced to join the militias, leaving aside the wider context of the human rights violations (Larke 2009, 661; Kent 2004, 15–16).<sup>10</sup> Since people's willingness to reintegrate minor offenders relied on the expectation that major offenders would be tried in the "Serious Crimes" process, the CRP made the work of the latter even more important. However, due to the immense backlog in the "Serious Crimes" process, hardly any of the cases referred to the prosecutor general have yet been tried (Braithwaite 2012, 212).

The truth-seeking component of the CAVR staged public hearings in all districts and collected accounts from more than 7,800 people. It published its final report in 2005, calling for the prosecution of high-ranking Indonesian generals.<sup>11</sup> The report also issued more than two hundred recommendations for reform of Timor Leste's political and security institutions (CAVR 2005, 11) paying special attention to victims' rights to truth, including the state's obligation to search for involuntarily disappeared people as

well as victims' right to compensation. However, at the report's official handover to the president on October 31, 2005, then President Gusmao decidedly dismissed the report's stance on victimhood :

In general, I must stress that the responsibilities that befell upon us, the sons and daughters of a people whose mission was to guide that people in its march towards liberation, was a tacit acceptance of our own duties. . . . In times of sacrifice we rose to be heroes. Today, in times of peace, we are regarded as victims! Our people, the heroic and forsaken people of Timor Leste, do not deserve to be treated with so blatant a disrespect! (Gusmao 2005)

Gusmao, as well as then Prime Minister Mari Alkatiri, stressed the moral indefeasibility of the resistance movement and dismissed the commission's mandate to establish a comprehensive truth.<sup>12</sup>

This brief look at transitional justice mechanisms in East Timor highlights that their application was highly contested by domestic political leaders. To legitimize their agendas, both sides, international actors as well as East Timorese political leaders, constructed a *cognitive prior* claiming to represent the wishes and concerns of the East Timorese people. The special rapporteurs presented East Timorese voices in order to demand an ad hoc tribunal for human rights violations, and consultations on how to establish a reconciliation mechanism were used by UNTAET to legitimize its approach of prosecutorial justice and reconciliation. On the contrary, Xanana Gusmao claimed that the people would forgive former militia members if only they received an apology. At the same time he presented a reconciliation commission's main task as setting the stage for granting amnesties.

Since none of the national leaders had explicitly called for a mechanism of truth-finding (but only for reconciliation), the final report as the CAVR's main output did not meet their interests and was highly contested by East Timorese

<sup>10</sup> Although the CRP had a mandate to facilitate reconciliation relating to acts committed between April 25, 1974, and October 25, 1999, more than 90 percent of the cases dealt with were committed in 1999 (Interview with Ben Larke, former advisor to CAVR Dili, May 15, 2011).

<sup>11</sup> FRETILIN and its armed wing FALINTIL were declared responsible for 10 percent of the human rights violations of which most were committed during the civil war in 1975 (CAVR 2005, 8.1).

<sup>12</sup> Alkatiri admitted FRETILIN's excesses during the war but rejected the claimed death toll. His biggest concern was that the publication of the report would lead to social unrest and persecutions of alleged perpetrators (Lusa 2005).

political leaders. Notions on victimhood contradicted the official narrative of a “valorization of resistance.” In terms of political practices, José Ramos-Horta and Xanana Gusmao proved successful in their initiatives to convince refugees and militias in West Timor to return. Their move clearly challenged the UN’s initiative for prosecutorial justice through the “Serious Crimes” process.

The prosecutorial approach of the United Nations also suffered from the structural deficits of a post-conflict situation. There was a delay in setting up the Special Panel because the country’s entire infrastructure had to be rebuilt. For instance, the majority of the well-educated workforce had left the country, so local staff had to be trained first. The whole endeavor was seriously constrained by severe cuts in Special Panel’s budget. Therefore, while international actors were committed to present their agenda as a representation of the East Timorese peoples’ interest and to create ownership on behalf of the East Timorese, the budget cuts clearly demonstrated a lack of ownership regarding the United Nations’ concern about the “Serious Crimes” process.

After the preceding sub-section has discussed the establishment of mechanisms of transitional justice and the outputs they have produced in Timor Leste, the following part presents government initiatives and political practices, which reflect transitional justice mechanisms as well as cases where an institutionalization of the mechanisms’ output has been averted.

#### 4.2. The Impact of Transitional Justice Mechanisms on the Domestic Level

Although the outbreak of the crisis in 2006 cannot be explained with reference to controversies about the nation’s past only, it still demonstrated the risk of violent outbreaks around these issues. In January, 159 members of the F-FDTL defense forces (FALINTIL-Forças Defensas Timor Leste) signed a petition complaining about recruitment, promotion, and disciplinary measures. The soldiers

claimed to be discriminated against based on the allegation that people from the Western part of Timor Leste had formerly collaborated with the occupation forces while people from the East had fought for independence (ICG 2006, 6). In March 2006 the group, which had grown to nearly six hundred soldiers, was dismissed from the armed forces. The protest of these so-called “petitioners” became a catalyst for all sorts of dissenting groups expressing frustration over employment opportunities, living conditions, and government benefits and turned into a major conflict between the Western-dominated police and the Eastern-dominated defense forces. The conflict brought long-standing grievances between different political figures to the surface, some of them dating back to the 1980s when Gusmao opened up the resistance movement to other political factions (ICG 2006, 4). The crisis left thirty-eight dead, hundreds of houses burnt, and more than one hundred thousand internally displaced. Prime Minister Mari Alkatiri was forced to step down and was replaced by José Ramos-Horta until elections were held in 2007. Since the crisis demonstrated the discontent of various groups in independent Timor Leste, the government enhanced its benefit scheme in order to meet grievances concerning housing and medical care.<sup>13</sup> This move was crafted according to the “valorization of resistance” narrative and in 2007 Gusmao as newly elected prime minister made the payment of veterans’ pensions the priority of his government. Contrary to the notion that everybody had somehow contributed to the resistance movement (see Ruak 2000), the respective law, enacted in 2006, pronounced an exclusive definition of who qualifies as a “veteran” and who is therefore eligible to pensions: only persons with more than eight years of full-time service in the resistance movement’s armed wing and family members of those who had fought for more than fifteen years were eligible for pensions (RDTL 2006). After vociferous protests from members of the clandestine front,<sup>14</sup> a one-off payment was introduced for people who had served the resistance outside its armed wing (ICG 2011, 7; RDTL 2009). The limitation of deser-

<sup>13</sup> The connection between the crisis and the broadening of the benefit schemes was referred to in interviews with representatives from UNMIT Department of Political Affairs as well as representatives

from various NGOs working on good governance and security sector reform in East Timor.

<sup>14</sup> The clandestine front comprised persons who secretly supported the resistance movement while

officially collaborating with the occupation forces. Given the secrecy of their missions it is difficult for members to prove their service.

vedness to an exclusive group of veterans can also be observed on a symbolic level, with medals handed out in “recognition ceremonies” (World Bank 2008, 21) and the establishment of so-called heroes’ cemeteries, where exclusively veterans are buried.

The crisis of 2006 constituted a serious test for rule of law development in Timor Leste. A Commission of Inquiry set up by the UN proposed the prosecution of several individuals for crimes against humanity (UN 2006). Some of these alleged perpetrators were tried but the way the government dealt with the crisis reflected the narrative of “reconciliation through forgiveness” rather than the prosecutorial approach of the UN. In May 2008, President Ramos-Horta pardoned ninety-four individuals, among them seven former militia fighters involved in the violence in 1999, and in August 2010 he reduced the sentences of twenty-six persons convicted of involvement in the crisis in 2006 (Interpress Service 2008).<sup>15</sup> He presented this move as part of his reconciliation policy to leave behind the violent past (Presidential decree no. 31/2010, see CIGI 2011, 3). In December 2006, a reconciliation ceremony was held in Dili to officially end the crisis. Leaders from all parties sat together on a huge mat, officially admitted their mistakes and hugged each other (Braithwaite, Charlesworth, and Soares 2012, 326). Reconciliation meetings were also organized for the defense forces and the police as well as for refugees on their return to their communities (ibid.). This approach to reconciliation has also been institutionalized through the Department of Peacebuilding and Social Cohesion, whose task is to establish “peacebuilding mechanisms and procedures in the national government” and to “strengthen conflict-resolution capacity and mechanisms at the community level” (Muggah and LeBrun 2010, 33).

Drawing from this example, the traditional practices which formed the basis for the Community Reconciliation Program were used officially to deal with a situation of crisis: political leaders institutionalized the concept to be applicable on the political level. In addition, the practice of

pardons and reduction of sentences has rendered the impact of the “Serious Crimes” process concerning the demonstration of a functioning rule of law system practically nil.

#### 4.3. Dealing with Victims’ Rights on the National and Bilateral Level

In 2001, Indonesia agreed to set up an ad hoc tribunal in Jakarta to deal with the crimes of 1999. However, the proceedings turned into farce when of the eighteen accused only six were convicted and given very short sentences (UNSC 2005, 41ff.). In May 2005, a UN Commission of Experts reviewed the work of the Special Panel and the ad hoc tribunal in Jakarta and recommended setting up an international tribunal because the proceedings had been politically interfered with in both countries (62). The plan of the East Timorese and the Indonesian government to set up a bilateral truth commission must therefore be understood as an initiative to sideline further demands for investigations and prosecutions, as many observers have argued (JSMP 2005; Asia Pacific Solidarity Net 2007).<sup>16</sup>

The aim of the Commission of Truth and Friendship (CTF), installed in May 2005, was to establish the truth about human rights violations before and after the referendum in 1999 and prepare recommendations to “heal the wounds of the past and to strengthen friendship” between the two nations (CTF 2008, i). Accordingly, the commission was given a mandate to grant amnesties. Although the commission was criticized as an attempt to put an end to further investigations, the commission’s output was surprisingly blunt: it found the Indonesian military responsible for the human rights violations, and did not recommend amnesties, because none of the alleged perpetrators had fulfilled the criteria of full cooperation with the commission (CTF 2008: 296). While the Indonesian government had rejected the findings of the CAVR, it was now compelled to accept the findings of the CTF and therefore to officially acknowledge responsibility, albeit on an institutional instead of an individual level (Antara News 2006).

Given its bilateral nature, the CTF can be seen as an institutionalized contestation of the prosecutorial approach

<sup>15</sup> Of the nine high-ranking persons convicted for their role in the 2006 crisis, seven were pardoned or

got their sentence reduced which led to their immediate release in 2011 (CIGI 2011, 14).

<sup>16</sup> Interview with Edward Rees, Peace Dividend Trust, Dili, March 10, 2011



of the United Nations.<sup>17</sup> The commission's mandate fitted the "reconciliation through forgiveness" narrative since it was assigned to grant amnesties to the highest level of perpetrators. At the same time it paid tribute to the "valorization of resistance" narrative as the basis for Timor Leste's national identity because the mandate covered the events of 1999 only and therefore did not investigate resistance members' responsibilities for human rights violations. However, the output of the commission, its final report, presented a strong stance for victims' right to truth about the events in 1999 and therefore served the goals of the international actors' agenda better than expected.<sup>18</sup>

To return to the output of the CAVR, its final report was handed over to the UN Security Council on January 23, 2006. However, President Gusmao refrained from publication within Timor Leste, pointing to other priorities for the country's development and suggesting that its content was too sensitive for publication (Gusmao 2006). To this day, the report has not been discussed in the East Timorese parliament but international and local NGOs used the report's recommendations as a starting point to promote the establishment of an "Institute of Public Memory" (Instituto Público da Memória) entrusted with the supervision of the implementation of the CAVR's recommendations (RDITL 2010). The Human Rights and Transitional Justice Section of UNMIT also started to lobby for such an institute in order to create "at least some sense of justice for the victims."<sup>19</sup> A "National Consensus Dialogue" conducted from 2008 to 2010 brought these issues back into the political arena. Thereby, in 2009, political leaders agreed upon the development of the respective draft laws for a reparations program and an "Institute of Public Memory", on the condition that none of the initiatives would result in the prosecution of veterans.<sup>20</sup>

The draft law on reparations comprises mechanisms of symbolic and collective reparations with a clear emphasis on infrastructure, education, and psychosocial counseling as a contribution to development and inclusive nation-building. Its definition of who qualifies as a victim is independent of a person's political affiliation and therefore also grants victims of human rights violations committed by members of the resistance the right to reparations. This issue poses a serious problem since in the eyes of many East Timorese, supporters of the integration with Indonesia do not deserve to be compensated for any harm done to them.<sup>21</sup> Several attempts to stage a discussion of the two draft laws in parliament have been postponed.<sup>22</sup> In February 2011, a coalition of parliamentarians requested that 75 percent of the veterans should be registered for the pensions program before a law about reparations for the victims could be passed in parliament.<sup>23</sup> As the following statement by one FRETILIN member of parliament shows, this notion reflects the logic of deservedness:

There are those who fought and those who didn't fight but supported the resistance and then there are those who did not support the resistance. First, we have to take care of those who fought, then we can care about those who didn't fight, and when they are doing well we can take care of the others.<sup>24</sup>

The draft law about the "Institute of Public Memory" reiterates these tensions. The institute would have the mandate to search for involuntarily disappeared persons, collect information about human rights violations within the period from 1974 to 1999, and engage in public education about this period. This poses a threat to the independence movement nostalgia on which the "valorization of the resistance" narrative is based. Consequently, especially the period of examination which includes the civil war in 1975 was criticized.<sup>25</sup> Parliamentarians also argued that the institute would divert much-needed funds from other pro-

17 In several interviews in the East Timorese Foreign Ministry, the bilateral nature of the CTF was presented as a ground-breaking development in international politics and as a more effective means than any prosecutorial mechanism (interviews in Dili, May 2011).

18 Interview with Louis Gentile, Head of the Human Rights and Transitional Justice Section of UNMIT, Dili, March 6, 2011

19 Interview with Louis Gentile, see note 19.

20 Interview with an advisor to the national parliament, Dili, April 19, 2011.

21 Parliamentarians, NGO representatives, and members of UNMIT identified the draft law's victim definition as the most sensitive issue. None of the victims of the occupation I was able to talk to accepted that former supporters of the integration with Indonesia should be granted reparations.

22 A discussion was staged for September 2010, February 2011, October 2011, and April 2012.

23 This alliance mainly comprises parliamentarians who are closely connected with veterans' associations but also includes members of all major parties.

24 Interview with David Dias Ximenes, MP, Dili, April 16, 2011.

25 Interview with David Dias Ximenes and other MPs who prefer not to be identified.

jects which are better suited to support the nation's development. However, in comparison to the veterans' pensions program the institute has a comparatively small budget.<sup>26</sup>

As these developments show, domestic political actors have been able to sideline the norms institutionalized within transitional justice mechanisms when it comes to their adoption on the domestic political level. Despite efforts to fit the reparations law into the government's nation building and development agenda, the draft laws have not been passed by the parliament. Especially the reparations law's inclusive definition of victims contradicts the "valorization of resistance" and the inherent concept of deservedness. The same problem can be observed for the "Institute of Public Memory". Its initiative to seek information about the deeds of the resistance movement creates a fundamental threat to the common resistance nostalgia.

##### 5. Conclusion: What Is Left of Transitional Justice in Timor Leste?

As has been demonstrated in this article, the impact of transitional justice initiatives on the long-term goals of peace operations crucially depends on political leaders' willingness to adopt international concepts of transitional justice on the domestic level. Therefore, the UN's functionalistic approach of transitional justice as having an impact on the rule of law and the formation of an inclusive national identity has not proven to be effective. Instead, political leaders in Timor Leste have successfully promoted their own exclusive version of nationbuilding, which is based on a narrative about a morally indefeasible resistance. Additionally, the aim to demonstrate the functioning of rule of law through prosecutions has been adapted by domestic leaders to include acts of clemency and forgiveness in order to leave behind the violent past. The CAVR's final report was prevented from having an impact on inclusive nationbuilding since its recommendations concerning victims' rights have not been implemented. Since the parliament has refused to discuss its contents, the report has been sidelined in the political discourse and the nar-

rative to "valorize the resistance" has been disseminated on symbolic and material levels instead. While narratives of "national unity" could have precluded an exclusive definition of national identity, post-referendum political dynamics have led to the structuring of the political discourse and the government's willingness to provide welfare according to issues of deservedness.

Therefore, Subotic's expectation (2009), that a complementary approach to transitional justice would avert window-dressing activities of political leaders cannot be confirmed. The example of Timor Leste demonstrates that a post-conflict situation is not only an arena for international actors to transfer their norms but much more for domestic leaders to promote their interests and norms. Transitional justice, regardless whether applied inside or outside the country, still needs the willingness and ownership of domestic political actors if it is to be taken beyond an adoption in mechanisms of transitional justice and have an impact on political institution-building. This is especially the case in a post-conflict situation where state structures are weak and political leaders enjoy authority due to their personal history. While international actors were focusing on creating ownership for their transitional justice initiatives they were not aware that there already existed ownership on the part of the political leadership for a different understanding of justice and reconciliation. The fact that the complementary approach to transitional justice is based within the respective country enhances the possibilities for domestic actors to interfere in the justice process and to render an internationally designed agenda meaningless. At the same time weak post-conflict infrastructure makes even more ownership on the part of international actors necessary, which was not granted in the case of Timor Leste. For Timor Leste this means that an institutionalization of norms of transitional justice concerning victims' rights on the domestic level will require a new generation of leaders who are willing to overcome the narrow definition of national identity based on the "valorization of resistance."

<sup>26</sup> Interview with Vicente Guterres, Vice-President of the Parliament, May 4, 2011. The planned budget of the public memory institute was \$1.5 million per

year. The veterans' pensions, however, comprised 8 percent of the 2011 state budget, or \$68 million.

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