

# CRITICAL ASIAN STUDIES

VOLUME 38 NUMBER 3 SEPTEMBER 2006

- 179 The Transnational Construction of “National Allegory”:  
China and the Cultural Politics of Postcolonial Indonesia  
*Hong Liu*
- 211 Social Injustice and Economic Dynamism  
in Contemporary Korea  
*Iain Pirie*
- 245 Gendering Moral Capital: Morality as a Political Asset  
and Strategy of Top Female Politicians in Asia  
*Claudia Derichs, Andrea Fleschenberg,  
and Momoyo Hüstebeck*
- 271 **Balancing Justice and Reconciliation in East Timor**  
*Jeffrey Kingston*
- 303 The Social Imperative of Pacifism in Postwar Japan:  
Shimizu Ikutarō and the Uchinada Movement  
*Rikki Kersten*

## DIALOGUE

- 329 China’s New Order and Past Disorders:  
A Dialogue Starting from Wang Hui’s Analysis  
*Claudia Pozzana and Alessandro Russo*

**Thematic Issue Coming in *Critical Asian Studies* 38:4 (December 2006)**

“Recovering Class: Observations from the Subcontinent”  
*Guest editors: Ronald Herring (Cornell) and Rina Agarwala (Princeton)*

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Ronald Herring, and Emmanuel Teitelbaum.

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### CCAS Statement of Purpose

*Critical Asian Studies continues to be inspired by the statement of purpose formulated in 1969 by its parent organization, the Committee of Concerned Asian Scholars (CCAS). CCAS ceased to exist as an organization in 1979, but the BCAS board decided in 1993 that the CCAS Statement of Purpose should be published in our journal at least once a year.*

We first came together in opposition to the brutal aggression of the United States in Vietnam and to the complicity or silence of our profession with regard to that policy. Those in the field of Asian studies bear responsibility for the consequences of their research and the political posture of their profession. We are concerned about the present unwillingness of specialists to speak out against the implications of an Asian policy committed to ensuring American domination of much of Asia. We reject the legitimacy of this aim, and attempt to change this policy. We recognize that the present structure of the profession has often perverted scholarship and alienated many people in the field.

The Committee of Concerned Asian Scholars seeks to develop a humane and knowledgeable understanding of Asian societies and their efforts to maintain cultural integrity and to confront such problems as poverty, oppression, and imperialism. We realize that to be students of other peoples, we must first understand our relations to them.

CCAS wishes to create alternatives to the prevailing trends in scholarship on Asia, which too often spring from a parochial cultural perspective and serve selfish interests and expansionism. Our organization is designed to function as a catalyst, a communications network for both Asian and Western scholars, a provider of central resources for local chapters, and a community for the development of anti-imperialist research.

*Passed, 28–30 March 1969  
Boston, Massachusetts*

# BALANCING JUSTICE AND RECONCILIATION IN EAST TIMOR

Jeffrey Kingston

**ABSTRACT:** As East Timor emerges from a long Indonesian nightmare, it is seeking to balance the agendas of justice and reconciliation. The verdict on justice for East Timor is one of disappointment. The main obstacle to accountability is Indonesia, abetted by an international community that seeks its assistance in the “war on terror.” East Timor’s leaders have emphasized reconciliation while promoting a healing process and good governance. Recent violence reveals just how difficult this task remains. The hybrid tribunal established in East Timor by the UN was once heralded as an important innovation in transitional justice, avoiding the high cost and lengthy proceedings of other international tribunals. However, the tribunal has been unable to hold accountable those who bear the greatest responsibility for outrages committed against Timorese and defendants did not get fair trials or competent defense. A truth commission report released in December 2005, *Chega!* (Enough), emphasizes justice and reparations. The political leadership soft peddles justice because they believe this makes more sense and will better serve the people. Indonesians are now being given a chance to testify in front of the Commission of Truth and Friendship (CTF), but concern is widespread concern that the CTF emphasizes reaching closure, has no judicial mandate, and only ensures impunity for ranking perpetrators. Indonesia and East Timorese can regain dignity and move beyond their shared tragedy through a process of reconciliation that is based on justice and atonement. Germany shows this is possible; Japan, that it is difficult and problematic if neglected.

“Written laws are like spiders’ webs; they will catch, it is true, the weak and poor, but would be torn in pieces by the rich and powerful.” — Anarchis, Sixth Century B.C.E.

East Timor is beginning the process of coming to grips with the horrible experience precipitated by Indonesia’s invasion of 7 December 1975. Under Indonesian occupation for twenty-four years, East Timor suffered the loss of an estimated one-third of its population — nearly 200,000 — from conflict-related causes. In 1999 the Indonesian government agreed to allow the UN to administer a referendum that allowed East Timorese to choose between independence

and continued rule by Jakarta. Despite widespread voter intimidation by militia groups backed by Indonesian security forces, almost all of East Timor's eligible voters cast ballots, and nearly 80 percent chose independence. Announced on 3 September 1999, the result sparked a widely predicted rampage by Indonesia's militia groups that claimed over one thousand lives and involved countless rapes and beatings, the destruction of some 80 percent of all buildings, and the forced exodus of one quarter of the



Burned remains of Bishop Belo's house, 1999. Prior to its independence from Indonesian military rule, East Timor had been reduced to a ground zero. [All photos courtesy of the author.]

population to Indonesian-controlled West Timor. On 20 September, under UN auspices an Australian force was dispatched to restore law and order.<sup>1</sup>

From October 1999 until May 2002, the UN governed East Timor while preparing it for independence. This was a daunting challenge amidst unfavorable circumstances. East Timor had been reduced to a ground zero and the full range of administrative institutions had to be created from scratch under a tight timetable.<sup>2</sup>

Given the systematic infringement on human rights under Indonesian rule, and the especially spiteful and brutal denouement unleashed by Indonesian-backed militia groups, a concern about pursuing justice and holding perpetrators accountable was understandable. In October 1999, the UN Security Council adopted Resolution 1272, demanding that "those responsible for such violence be brought to justice." Moreover, the Security Council insisted, "The persons committing such violations bear individual responsibility." The Justice System Monitoring Program (JSMP) notes, "The need for justice was clearly and

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1. See Robinson 2003.

2. The circumstances of ground zero are assessed in Nevins 2005.

universally acknowledged.”<sup>3</sup> The JSMP further reports that “the UN’s International Commission of Inquiry on Timor-Leste and three UN Special Rapporteurs in late 1999 clearly documented the systematic and widespread intimidation and terror, destruction of property, violence against women, forced displacement, and attempts to destroy evidence.”

The UN and the Indonesian Human Rights Commission produced reports that broadly agreed in summarizing the violations and recommending the establishment of an ad hoc international tribunal to prosecute the perpetrators.<sup>4</sup> The UN, however, refused to implement the recommendations of its own Commission and instead accepted the promises of the Indonesian government that it would prosecute those responsible for the outrages.<sup>5</sup> These promises have not been kept. Since then, East Timorese with wavering international support have been pursuing justice with decidedly mixed results.

### Disappointing Justice

The verdict on justice for East Timor is one of disappointment; it remains a distant goal and signs of progress toward reaching it are negligible. The main obstacle to accountability is Indonesia, aided and abetted by an international community that seeks Indonesia’s assistance in the so-called war on terror.<sup>6</sup> Calls for an international tribunal are not welcome in the UN and thus, left to their own devices, East Timor’s leaders have opted for reconciliation and restorative justice while seeking a healing process in advocating good governance and alleviating pressing socioeconomic needs.

As the initial international outrage over Indonesia’s rampage in 1999 has faded, so too has political and financial backing for mechanisms of justice to hold ranking perpetrators accountable. The UN helped establish the Ad Hoc Human Rights Court on Timor-Leste in Jakarta and the Special Panels for Serious Crimes in Dili, but the JSMP, echoing the consensus view among participants, scholars, and civil society organizations, states, “Both these two institutions have unequivocally failed to fulfill their mandates. The processes of the Ad Hoc Tribunal were highly irregular and critically flawed. The SPSC [Special Panels for Serious Crimes] has been under-resourced and starved of international political support and cooperation.”<sup>7</sup>

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3. Judicial System Monitoring Programme [JSMP] 2005a. The JSMP is a human rights organization based in East Timor. See: <http://www.jsmp.minihub.org/reports.htm> (accessed 19 March 2006).
  4. *Report of the International Commission of Inquiry on East Timor to the Secretary-General* 2001; and Komnas HAM 2000.
  5. This UN preference for nationally led, domestically based judicial processes is espoused in *Report of the Secretary-General* 2004.
  6. U.S. Secretary of State Condoleezza Rice announced a strategic partnership and expanded military assistance during a visit to Indonesia in March 2006. She also urged Indonesia to sign a treaty that would exempt each other’s citizens from extradition for prosecution by the International Criminal Court. Neither the United States nor Indonesia has ratified the treaty establishing the court.
  7. Judicial System Monitoring Programme 2005a, 2.

In 2005, the UN Commission of Experts adopted a more measured assessment:

The serious crimes process in Timor-Leste has ensured a notable degree of accountability for those responsible for the crimes committed in 1999. Investigations and prosecutions of the Serious Crimes Unit have generally conformed to international standards. The Special Panels have provided an effective forum for victims and witnesses to give evidence.<sup>8</sup>

The Commission of Experts goes on to acknowledge, however, that [t]here is frustration among the people of Timor-Leste about the inability of the judicial process to bring to justice those outside the country's jurisdiction, particularly high-level indictees. Similarly, there is concern that the overwhelming majority of offenders convicted by the Special Panels are from Timor-Leste. The Commission concludes that the serious crimes process has not yet achieved full accountability of those who bear *the greatest responsibility* for serious violations of human rights committed in East Timor in 1999.<sup>9</sup>

The Commission of Experts dismisses the Ad Hoc Court in Jakarta as being "manifestly inadequate, primarily due to a lack of commitment on the part of the prosecution, as well as the lack of expertise, experience and training."<sup>10</sup> They further argue that there was a "lack of political will in Indonesia to seriously and credibly prosecute the defendants." Terming the Ad Hoc Court proceedings "seriously flawed and inadequate," the Commission goes on to criticize the failure to address the "systematicity of the attacks against the civilian population," and "the relationship between the Government of Indonesia and paramilitary and civilian militias, and the full culpability of those involved in the perpetration of the crimes."<sup>11</sup> Thus, by not exploring the chain of command and control and the policies of the armed forces, high-ranking Indonesian military officers have not been held accountable for egregious human rights violations. Prosecutors failed to produce evidence or witnesses to win convictions, the judges did not uphold international standards of law, and the government has refused to extradite anyone indicted by the Serious Crimes Unit in Dili.

Bringing Indonesia's high-ranking officers and their goons to justice has been frustrating largely because the political will in Indonesia to hold them accountable has been insufficient. The Ad Hoc Tribunal established by Jakarta did conduct trials and there were some convictions and sentences, but all but one of these convictions have been overturned on appeal and the remaining defendant remains free while his appeal is pending. Not only did the big fish get away, even the designated scapegoats have walked.

Neither in Jakarta nor Dili have ranking perpetrators faced accountability. Consequently, when the UN-sponsored Special Panels for Serious Crimes

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8. *Report to the Secretary-General of the Commission of Experts* 2005, iii.

9. *Ibid.*, iv.

10. *Ibid.*, 78.

11. *Ibid.*, 88.



Poster montage of those deemed responsible for Indonesia's invasion and brutal occupation. Displayed at CAVR Exhibit 2005.

ceased operations on 20 May 2005, the JSMP released a press statement, entitled "Justice for Victims Still Elusive," saying, "None of those who bear the primary responsibility for crimes committed in Timor-Leste during 1999 have yet been held to account for their acts by the SPCC or any other tribunal."<sup>12</sup> In calling for an international tribunal, the JSMP reminded the international community that Resolutions 1264 and 1272 in 1999 insisted on accountability and that justice be done for crimes against humanity.<sup>13</sup>

### **Experimenting with the Rule of Law**

These recent damning assessments tally with earlier concerns raised by international experts involved in establishing and implementing the mandate of the serious crimes process in East Timor. Hansjorg Strohmeyer, a German judge, was the UN official in charge of establishing a functioning judiciary in a country that had none.<sup>14</sup> Due to Indonesia's scorched-earth policies in East Timor, the preexisting legal infrastructure was destroyed, including judicial facilities, archives,

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12. Judicial System Monitoring Programme 2005b.
  13. See *Report of the Secretary-General 2004* for a discussion of the importance of reestablishing the rule of law and creating legitimate structures for redressing grievances. This report highlights the difficulties in implementing transitional justice in war-torn societies but cautions against "international substitutes for national structures." Here the growing ambivalence in the UN toward international tribunals is clearly evident.

books, and other legal resources. In addition, no experienced lawyers or judges were available to serve in a new justice system. In short, Strohmeyer faced the task of creating a judicial system, including the regulatory framework, before he could get on with his ostensible job of administering it. Ground zero, thus, meant a rule of law vacuum that severely compromised efforts toward transitional justice.

Eventually as peace was restored, a small pool of credentialed East Timorese lawyers returned and applied to serve in the judicial system. However, none had any experience serving as judges or prosecutors. In this context, Strohmeyer's decision to quickly appoint local judges and grant them jurisdiction over ordinary crimes seems, in retrospect, to have contributed to the flawed judicial process criticized in the recent assessments cited above.<sup>15</sup> In his own defense, he argues that doing so carried great symbolic importance by meeting local expectations for self-rule, namely, "that the international community would demonstrate an immediate commitment to domestic involvement in democratic institution building."<sup>16</sup> He also argues that it was a pragmatic way to promote capacity building and prepare for the day when international funding for international legal experts would dwindle.<sup>17</sup> His options were limited since international legal professionals were not lining up to assist in the creation of a judicial system. As well, the budget to attract and retain professionals was insufficient, and resources to provide practical support to a large international legal contingent were inadequate. Thus, in this difficult context Strohmeyer initiated a rapid handover of judicial authority to local legal professionals, inexperienced as they were.

UN attempts to build a functioning judiciary in East Timor were hampered by insufficient resources and the dire need for capacity building. There is a consensus that a fair and effective judicial system is a priority for post-conflict nations because it is important to restore the rule of law, rebuild trust, promote accountability, and prevent any resort to extrajudicial retribution. However, what everyone agrees needed to be done did not happen because of insufficient resources and political will. Thus, the development of institutions, practices, and inclinations supportive of the rule of law was very limited.

East Timor was initially heralded as an important experiment in administering justice. Given the expense and slow course of justice associated with the international tribunals in Yugoslavia and Rwanda, the UN Security Council has no

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14. He served as the deputy principal legal advisor to the UN Transitional Authority in East Timor. See Strohmeyer 2001a, 46–63; and Strohmeyer 2001b, 171–82.

15. The UN retained control of the Serious Crimes Unit and the Special Panels. East Timorese judges served on the Special Panels alongside international judges.

16. Strohmeyer 2001a, 54.

17. The problems plaguing the Serious Crimes Unit and the Special Panels are examined by one of the first prosecutors in the SCU: Linton 2001, 185–246; Linton 2002, 93–119. Also see: Chesterton 2002.

backing to create similar bodies in other post-conflict societies.<sup>18</sup> The reality of international ambivalence toward international tribunals means that even if one could be established it is uncertain whether it would muster the political will and resources needed to succeed.

In this unpromising context the UN developed the concept of hybrid tribunals that would share judicial functions between the UN and the national government. These hybrid tribunals were designed to “combine the strengths of the ad hoc tribunals with the benefits of local prosecution.”<sup>19</sup> These tribunals combine UN authority, funding, resources, judges, and prosecutors with local participation, creating a process that is potentially more meaningful to the victims, less politically divisive, and more effective in capacity building. The tribunals have been criticized, however, for combining the weaknesses of both the UN and the local government.<sup>20</sup>

Suzanne Katzenstein delineates the reasons why the hybrid tribunals did not realize their potential in East Timor.<sup>21</sup> She points to Indonesia’s failure to cooperate with the Serious Crimes Unit (SCU), refusing to comply with extradition requests or assist in investigating crimes. In addition, she lists the following factors: (1) East Timorese judicial inexperience; (2) lack of funds; (3) inadequate capacity-building programs; (4) lack of domestic political support; and (4) inadequate support from the UN. For example, the UN budget for the SCU and the Special Panels in East Timor amounted to \$6.3 million in 2001 compared to \$178 million for the International Criminal Tribunal for Rwanda (ICTR) and \$223 million for the International Criminal Tribunal for Yugoslavia (ICTY) in 2002–03.<sup>22</sup>

Katzenstein argues that Strohmeyer’s desire to promote capacity building was never realized because the training programs were poorly designed and the East Timorese legal professionals were overburdened by other work obligations. She also questions whether the transfer of authority to East Timorese and their inclusion in the serious crimes process actually gave them a sense of ownership and participation. Morale among East Timorese involved in the SCU, the public defenders office, and the judiciary was a problem because they often felt sidelined by their international colleagues who were often too busy or disinclined to spend time mentoring and collaborating with their local colleagues.<sup>23</sup> Moreover, judges made no significant contributions to international jurispru-

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18. See *Report of the Secretary-General* 2004.

19. Katzenstein 2003, 245–78.

20. *Ibid.*, 246.

21. *Ibid.*, 245. The hybrid tribunal in East Timor has three components: (1) the Serious Crimes Unit responsible for investigations and prosecution, staffed and funded by the UN; (2) the Special Panel of Judges, funded by the UN and jointly staffed by the UN and East Timor, and (3) the Public Defender’s Office, funded and staffed by East Timor.

22. *Ibid.*, 258.

23. *Ibid.*, 256.



President Xanana Gusmao, December 2005. "Gusmao criticizes the CAVR report for embracing what he terms 'grandiose idealism' and the insistence on prosecution, retribution, and reparations."

dence, as their rulings were perfunctory if not worse. Thus, the intended benefits proved illusory.

Aside from not holding those most responsible for the crimes accountable, the hybrid tribunals also failed to provide minimum standards of due process in the cases it did try.<sup>24</sup> Over time the SCU did improve its effectiveness in investigating and prosecuting cases, but this only highlighted the ongoing problems with the defenders unit and the judges. Legal professionals involved in conducting or monitoring the tribunals convey concerns that the defenders did not get fair trials or competent defense and that prospects for appeals are uncertain now that the SPCC has been shut down.<sup>25</sup>

William Schabas, director of the Irish Centre for Human Rights, in noting the tendency toward privileging the prosecution over the defense,

raises important questions about the low acquittal rate of international tribunals, writing, "The imperatives of conviction are given disproportionate priority."<sup>26</sup> In his view, condoning a system in which the playing field tilts in one direction imperils the rule of law and principles of fair justice.

Assessing the hybrid tribunal experiment, David Cohen concludes:

The deeply flawed process in East Timor makes clear that the United Nations should not proceed "on the cheap" so as to avoid the excessive expenditures of the ICTR and the ICTY. In doing so it does an injustice to those individuals convicted without a fair trial and undermines the very standards of justice and rule of law that the tribunals are supposed to advance."<sup>27</sup>

He further argues, "Above all, the United Nations must not, as it has in East Timor, use the hybrid status of the tribunal to justify its failure to meet international standards of judicial fairness and integrity."<sup>28</sup>

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24. Ibid., 252.

25. The problems facing defendants in international tribunals in the context of "satisfying" victims are explored in Schabas 2004, in Thakur and Malcontent 2004, 154–68.

26. Ibid., 166.

27. Cohen 2002, 7.

28. Ibid.

Indeed, the hybrid tribunal in East Timor undermines the UN's reputation. The sense of outrage at crimes against humanity that propelled support for justice at any cost has been superseded by a penurious approach that casts doubt on the entire enterprise. Is such tainted justice worth pursuing? If those most responsible for these crimes are not held accountable and only those from the lower echelons are prosecuted without competent defense, what messages are being sent and what lessons learned? This sorry state of affairs has stoked justified and widespread skepticism about pursuing justice in the courts and undercut efforts to restore respect for the rule of law. The Jakarta sham trials have further eroded trust in the courts as a means to achieve justice. There, the theater of justice has facilitated a whitewashing of the military's role in orchestrating and carrying out crimes against humanity. And the Indonesian government has flouted its agreements with the UN with impunity, confident that in the post-9/11 world, pressures to pursue accountability are trumped by desires to cultivate Jakarta as a moderate Islamic ally in the war on terror. Sadly, this promising experiment in promoting the rule of law and transitional justice never had a chance, doomed by shifting political realities.

### Truth

“We are charged to unearth the truth of our dark past, to lay the ghosts of our past, so that they will not return to haunt us.” — Bishop Desmond Tutu

East Timor's 924,000 citizens are finding that the truth does not set them free and that justice and reconciliation are elusive. The final report published by East Timor's Commission of Reception, Truth and Reconciliation (CAVR is the commonly used Portuguese acronym) at the end of 2005 estimates that conflict-related deaths ranged between 102,800 and 200,000 during Indonesia's brutal occupation between 1975–99.<sup>29</sup> By comparison, there were “approximately 18,600 unlawful killings and enforced disappearances of East Timorese non-combatants perpetrated between 1974–1999.” The CAVR reports that “many people died from hunger and illness in excess of the peacetime baseline for these causes of death.” It further finds, “The overwhelming number of these deaths occurred in the years 1977–78,” and during large-scale Indonesian military attacks in the interior and later in Indonesian detention camps and resettlement areas where food and medical care were grossly insufficient. The report also charges that starvation and rape were used as weapons. Responsibility for this carnage, in addition to widespread torture and rape, rests largely with the Indonesian military. (A small proportion of the toll, the CAVR determined, was due to internecine violence among the four main East Timorese parties, including the ruling Fretilin party, and reprisals against those who collaborated with the Indonesian military.)

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29. Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR) 2005.

Finally in 1999, when a referendum on independence was held under UN auspices, the world paid attention. Despite widespread intimidation and violence, almost all East Timorese courageously voted and overwhelmingly chose independence from Indonesia. As promised in the event of such an outcome, Indonesian-controlled militia razed towns, villages, and churches, while brutalizing the population and forcibly relocating some 250,000 Timorese to Indonesian-controlled West Timor. The CAVR report, entitled *Chega!* (Enough!), concludes that there is credible and extensive evidence that planning for and knowledge of this scorched-earth campaign extended to the highest echelons of the Indonesian military.<sup>30</sup>

On 20 December 2005, the CAVR dissolved amidst controversy and recriminations. This is because President Xanana Gusmao postponed making the report public, generating widespread dismay within East Timor and the international community. Opposition leader Mario Carrascalao termed the government quarantine of the CAVR report “a grave mistake,” adding, “The government is worried about the impact on foreign relations. This is normal. But the report presents the voices of victims and their demand for justice and the government should respect this by releasing it.”<sup>31</sup> Human rights organizations sent letters to Gusmao urging him to make the report public immediately, as did members of the CAVR commission. Gusmao shrugged off this criticism, explaining to me,

I accept the report from A to Z and will not change anything. I believe that the public has the right to be informed. We must disseminate it in the proper way, we are not a human rights organization. Everything will be done in the right way in the right time. At the end of January [2006] I will present the report to the secretary-general in New York and will stop in Tokyo on my return to request financial assistance for a series of workshops aimed at disseminating and socializing it in 2006.<sup>32</sup>

### And Consequences?

The CAVR report equates justice with reparations and judicial proceedings. It calls for setting up a reparations program for victims of the conflict, to be funded not only by Indonesia, but also by the foreign governments and weapons dealers who were complicit in the invasion. It demands Indonesian cooperation in prosecuting ranking perpetrators and insists that educating Indonesians about this sordid history is crucial to the process of reconciliation.<sup>33</sup>

Jill Jolliffe, an Australian journalist who has covered East Timor since the mid-1970s, understands the need for justice expressed by those who testified to

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30. The CAVR report is available online at <http://etan.org/news/2006/cavr.html>.

31. Interview with Mario Carrascalao, 16 December 2005.

32. Interview, 16 December 2005. All subsequent quotes of President Gusmao are from this interview.

33. In September 1999 I gave a lecture on East Timor at Merdeka University in Malang, East Java, and discovered just how little Indonesian students knew about the consequences of the invasion and occupation. There was an inclina-



Foreign Minister Jose Ramos-Horta, December 2005. “Responding to criticism leveled by international human rights organizations, Ramos Horta says, ‘It’s great for the human rights activists to be heroic in Geneva and New York where they don’t have to live with the consequences of their heroism. They say we don’t care about the victims? We care, the president and I have lost relatives, friends and comrades over the years. We know the cost of war, the value of peace and the necessity of reconciliation.’”

the CAVR. “There has been no rule of law in East Timor for the life of an entire generation,” she says. “It is important to restore peoples’ faith in the rule of law by pursuing justice.”<sup>34</sup> In her view, the victims have not been served by the discredited efforts toward justice and accountability described above, but it is not too late to redeem the process through an international tribunal.

President Gusmao criticizes the CAVR report for embracing what he terms “grandiose idealism” and the insistence on prosecution, retribution, and reparations.<sup>35</sup> He argues that it is not possible for the government to act on the recommendations to pursue justice given the absence of international support for

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tion to portray East Timorese as ungrateful for Jakarta’s development assistance and accusations that they were trying to “steal” Indonesia’s oil and gas wealth. My basic overview of what is widely known outside Indonesia about gross human rights violations met with hostility.

34. Interview, 17 December 2005. She is currently working on a videotape project interviewing former prisoners, all of whom were tortured. Preserving their painful memories is a way of contributing toward accountability and preventing future denials.
35. Cobban (2006) points out that reconciliation can be impeded by insistence on retribution. Gusmao shares her concerns that rigorous prosecution may perpetuate cleavages and place human rights and peace at risk.

such an endeavor. He also expressed concerns about the potential for destabilizing East Timor and Indonesia. Dwelling on East Timor's agonizing past, he fears, carries the risk of finding reasons in old grievances for renewed violence.

Gusmao also opposes reparations, asking, "How can we go to the world community, one that was indifferent to our plight for too long, when it did finally help us achieve independence and made enormous contributions exceeding \$1 billion to help us cope with our emergency situation? We still need their help and should not be ungrateful for what they have contributed. They are making amends for their mistakes." This conflation of development aid and reparations does not sit well with critics who say that this allows donors to sidestep their responsibility. The CAVR report also distinguishes between development assistance and reparations, both necessary but not substitutes since reparations involve symbolic atonement.

The president believes that there is no support within the UN Security Council for an international tribunal and thus East Timor needs to seek another way forward to sustain the process of reconciliation. As a Timorese he sympathizes with the conclusions regarding accountability, but as a leader he insists that the national interest is not well served by remaining fixated on the suffering Timorese endured during their long struggle for independence. In his view,

We can best honor that struggle and these sacrifices by building a better democracy here, improving governance and providing better services to the people. We also must respect the courage of the Indonesians in accepting our independence and not disrupt their progress toward democratization by demanding formal justice. The political situation remains fragile in Indonesia and there is a risk that we could help unite forces opposed to SBY's [President Susilo Bambang Yudhoyono] reform agenda. It is absolutely in our interest to see our huge neighbor succeed in these reforms; this is our best protection.

Gusmao also expressed concern that "going down the path of prosecuting Timorese for their past actions during our struggle for independence will open old wounds, divide people at a time when we need unity and lead to chaos. This is dangerous because it could become a policy of political persecution."<sup>36</sup>

Recalling his days as the leader of the armed resistance and the profound sadness he felt on losing soldiers, Gusmao said:

In 1981–82 every time I lost a soldier I cried like a child — I was so miserable. I wondered how can I assure myself that we can endure and prevail. I cried thinking of those who lost their lives fighting for independence. My men respected my sorrow but one day a platoon leader came to me and told me to stop crying. He said they already died. Now your duty is not to cry for everyone who dies. Take care of us that are still alive. This is a good lesson in how to look at the current situation. I understood his wisdom

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36. For the risks of prosecution as persecution and an impartiality deficit see Amann 2005.

and believe that it is important now that we have independence to show respect for those who gave their lives by taking care of those who survived. Foreign Minister Jose Ramos Horta, a Nobel laureate, rhetorically asked me, Why didn't the UN establish a tribunal here back in 1999 when they had 7,000 PKO [peace-keeping operation troops] here who could have arrested the culprits in West Timor? There is not much we can do to bring Indonesians to trial by ourselves. This isn't only pragmatism. I sincerely believe that Indonesia is making progress on democratic reforms and strengthening the rule of law. However this takes a long time and the situation is fragile. SBY is weak and does not fully control the military and can't challenge them in this way without risking that his opponents would gang up on him. It is important that we do not destabilize the slow process of democratization in Indonesia because it is our best guarantee. They have shown the courage to accept our independence. Knowing that the situation is so difficult and that the UN Security Council doesn't want an international tribunal it doesn't make sense for us to pursue it.<sup>37</sup>

Eduardo Gonzalez, senior associate at the International Center for Transitional Justice (ICTJ), also expresses disappointment that the UN secretary-general and the Security Council have failed to match their rhetoric of transitional justice with backing for effective judicial mechanisms.<sup>38</sup> In his view, the UN has failed to act on several occasions when it could have intervened to promote justice and the prosecution of perpetrators.

Left unsaid, but undoubtedly on the minds of East Timor's leadership, is the recent resumption of military cooperation between the United States and Indonesia. Gonzalez observes, "The geopolitical setting has changed dramatically since 9/11. Now Indonesia is a valued ally in the global war on terror. Because of that there is little inclination in the international community to press Indonesia hard on what happened in 1999. Sadly, such geopolitical considerations create double standards of justice."<sup>39</sup> Unlike East Timor's leaders, he strongly supports prosecution of perpetrators, arguing that the failure to do so "erodes the quality of independence and democracy in East Timor."<sup>40</sup>

The CAVR report is inconvenient because it opens old wounds between domestic political groups that fought a civil war and engaged in violent interne-cine reprisals beginning in 1974. Fretilin, the ruling party, was involved in such conflicts and its responsibility is detailed in the report. The president conveyed to me in no uncertain terms that he is most concerned about the frank discussion of internal conflicts. In his view, prosecuting those who committed such

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37. Interview, 13 December 2005.

38. Interview, 28 December 2005.

39. Ibid.

40. In Bacau, on 22 December 2006, I spoke with a man who echoed these remarks, asking, "If we don't pursue justice for what these people did to us, how can we be sure the government won't do the same to us?"



Market in Los Palos, December 2005. President Gusmao “has made a political choice that trying perpetrators must be subordinated to improving living conditions, governance, healing, and social justice.”

crimes carries significant potential for reviving dormant antagonisms and causing a descent into renewed chaos.

Given that East Timor’s twenty-four-year struggle for independence is an object lesson in the value and rewards of idealism in the face of impossible odds, some critics are baffled by the government’s pragmatism in its pursuit of justice. However, as Joseph Nevins argues, the failure of the international community to follow through on achieving justice leaves them little choice. He writes, “East Timor’s political leadership is severely constrained by the need to maintain a working relationship with Indonesia...the pursuit of justice is, first and foremost, an international responsibility.”<sup>41</sup>

### **Reconciliation and Justice**

The UN Commission of Experts sent by Secretary-General Kofi Annan to assess the progress of justice in East Timor cites a 2004 poll in which “52 per cent of the population responded that justice must be sought even if it slows down recon-

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41. Nevins 2005, 212. Gahima (2005) argues that the role of the international community in pursuing accountability depends on local choices, but in the case of East Timor the choices of local leaders have been constrained by the choices of the international community. Without sustained international support a choice by East Timor to pursue accountability would amount to an empty and reckless gesture.



Woman fetching water; boy selling squid. Reverend Agostinho de Vasconcelos, a Presbyterian who served as a commissioner on the CAVR, observes that the needs and demands of the victims vary: “We have lots of victim’s statements requesting a tribunal but others ask for help with housing, medical care, education, etc. There are many paths to justice.”

ciliation with Indonesia, while 39 per cent favoured reconciliation even if it meant significantly reducing efforts to seek justice.”<sup>42</sup> The Commission further concludes that justice must be pursued, arguing,

No violation of human rights, no invasion of human dignity and no infliction of pain and suffering on fellow human beings should be allowed to go unpunished. While recognizing the virtue of forgiveness...forgiveness without justice for the untold privation and suffering inflicted would be an act of weakness rather than strength. The international community is fully aware of the story of murders, rape, torture and enforced disappearances of East Timorese in 1999 and before. The Report of the Commission of Experts may provide the last opportunity for the Security Council to ensure that accountability is secured for those responsible for grave human rights violations and human suffering on a massive scale and delivery of justice for the people of Timor-Leste.<sup>43</sup>

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42. Commission of Experts 2005, 90.

43. Ibid., 125. These sentiments appear to be out of step with the more carefully circumscribed commitment to international judicial proceedings, emphasis on alternative forms of justice and greater reliance on nationally led solutions, evident in the *Report of the Secretary-General 2004*.

In contrast, President Gusmao clearly wants to move beyond the devastating tragedy and accelerate both healing and reconciliation. He is skeptical about the international community's commitment to translating the rhetoric of the UN Experts into an effective pursuit of justice, and he concurs with Ramesh Thakur: "Justice is not an absolute goal that trumps every other goal. Politics in the broadest sense, and in the good sense of the concept, must sometimes override or at least temper justice."<sup>44</sup>

The president is also inspired by the example of South Africa where amnesty was exchanged for truth. He echoes the view that "a conciliatory mechanism like the commission can only deliver what society has come to desire, and that desire is shaped in the first instance by leadership. To move forward is a political choice that requires accepting a degree of injustice in any traumatized society."<sup>45</sup> Gusmao likens East Timor's situation with that of Mozambique, which has not sought reparations from South Africa nor sought to prosecute those responsible for crimes against Mozambique's citizens. There, South African-backed armed groups inflicted great destruction and loss of life. "But," President Gusmao observes, "now Mozambique enjoys peace and people tend their fields without worry about attacks. Peace is their reward."

In his view, the national interest is not well served by remaining fixated on the suffering Timorese endured during their long struggle for independence: "We can best honor that struggle and these sacrifices by building a better democracy here, improving governance and providing better services to the people. By combating corruption and all social and political diseases. Compensation is material — how does one evaluate the loss of a husband?"<sup>46</sup>

He spoke of other countries that won independence after long armed struggles, but failed to build democracy. He insists that it is crucial for East Timor to develop a functioning democracy, warning, "The problem of power — and not giving up power — from this every mistake can come."

In Gusmao's view, "The best justice was when the international community — the powerful countries that helped Indonesia exterminate us — finally recognized their responsibility and helped us to achieve independence."

When President Gusmao handed the CAVR report to UN Secretary-General Kofi Annan on 20 January 2006, the BBC reported that "Indonesia has dismissed the report, saying it is time for the two countries to look to the future."<sup>47</sup> Indonesia's state secretary Yusril Ihza Mahendra stated, "We have agreed to co-operate for reconciliation and for solving our problems, therefore there is no need to look into the past because that does not help." The BBC further reported:

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44. Thakur 2004, in Thakur and Malcontent 2004, 273.

45. Roger Cohen writes about Nelson Mandela's key political role in shifting popular desires for retribution and revenge toward reconciliation: *International Herald Tribune*, 11–12 March 2006, 2.

46. This perspective is similar to that espoused in *Report of the Secretary-General* 2004, 9.

47. Web: <http://news.bbc.co.uk/2/hi/asia-pacific/4630122.stm> (accessed 20 March 2006).

The governments of both East Timor and Indonesia have consistently said they wish to leave the past behind and look to the future. Mr Gusmao said the report's main objective was to remind future generations and the international community that they should not commit the same mistakes again. He argues that as a small territory, dominated by its giant neighbour, East Timor has to achieve good working links with Indonesia. But critics of the government's approach say attempts to prosecute those responsible for abuses in East Timor have achieved little, and that justice needs to be done.

Nevins is one of these critics. He argues that "truth commissions have become a manner by which to avoid legal justice. Thus far this has proven to be the case in East Timor."<sup>48</sup> In his view, truth commissions tend to be flawed because they facilitate impunity. He advocates truth commissions gathering information for future prosecution and argues that reconciliation is no substitute for accountability and justice.

Ramesh Thakur, the vice rector of the United Nations University, expresses a view more in line with Gusmao's, writing,

Truth commissions provide a halfway house between victors' or foreigners' justice and collective amnesia. The ad hoc tribunals have helped to bring hope and justice to some victims, combat the impunity of some perpetrators and greatly enrich the jurisprudence of international criminal and humanitarian law. But they have been expensive, time-consuming and contributed little to sustainable national capacities for justice administration. Truth commissions take a victim-centered approach, help to establish a historical record and contribute to memorializing defining epochs in a nation's history.<sup>49</sup>

### **Commission of Truth and Friendship**

Clearly, the past resonates loudly in contemporary East Timor and at issue is how to balance accountability, justice, and healing. The president believes that the way forward is based on getting at the truth of what happened, granting amnesty where appropriate, and turning the page on this dark chapter. In contrast, the church, civil society organizations, and many victims emphasize breaking the cycle of impunity and prosecuting those responsible for committing crimes. As one NGO inveighed,

reconciliation and friendship must be based not only on establishing the truth about the atrocities committed in Timor-Leste, but also on justice for those crimes. The Commission of Truth and Friendship [CTF] falls far short in both these areas. By providing impunity to perpetrators and denying victims' access to future justice, and by delimiting its work to the year 1999, the CTF comes at the high cost of truth, accountability and respect for human rights and international law.<sup>50</sup>

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48. Nevins 2005, 169.

49. Thakur 2005. In a similar vein, see *Report of the Secretary-General* 2004, 17.

Aerial view of East Timor's capital, Dili, after it was razed in September 1999. "Understandably, victims will be disappointed by what portends to be a frustratingly slow and fitful process, but, as Gahima [2005] reminds us, total satisfaction for them is impossible. Modest satisfaction entails recognition of their suffering, acceptance of responsibility by Indonesia, clear signs of contrition and atonement, and cultivating a common historical memory of what happened in East Timor in the final quarter of the twentieth century."



In an attempt to defuse tensions by getting the Indonesian perpetrators to reveal the truth, the CTF was launched in the summer of 2005. Concern is widespread that the CTF emphasizes reaching closure, has no judicial mandate, and only ensures impunity for ranking perpetrators. It must also contend with the CAVR recommendation that "nothing should compromise the rights of victims to justice and redress."<sup>51</sup> The CTF is enjoined to act "with a view to strengthening, not weakening, the chances of criminal justice." And amnesty should only be granted "if this is based on judicial due process consistent with international standards." This means that those guilty of serious crimes would be ineligible for amnesty.<sup>52</sup>

The Catholic Church in East Timor held a workshop on 10 December 2005 that pilloried the CTF because it was established without public consultation

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50. *The La'o Hamutuk* [Walking Together] *Bulletin* 2005, 16.

51. Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR) 2005, 187.

52. For the UN's position on amnesty, see *Report of the Secretary-General* 2004, 5, 21.

and offers scant prospects of truth or justice for the victims. One organizer told me that the CTF is a doomed effort to promote collective amnesia.<sup>53</sup> In the court of public opinion, the CTF lacks credibility and seems more likely to fan antagonisms than improve bilateral relations or promote reconciliation.

What are the prospects for the CTF? In the court of public opinion, the CTF has little credibility.<sup>54</sup> It is seen as a deeply flawed process aimed at burying the past before it is fully examined and heading off recourse to justice. There is also concern that the East Timorese commissioners will be overwhelmed by their more experienced counterparts and will have little success in eliciting the truth precisely because there remains no political will in Indonesia to hold perpetrators responsible. I was told that only the Indonesian generals who committed crimes welcome the CTF.

The CTF's terms of reference are inadequate and this is another cause for concern. Unlike the process in South Africa where there were very specific criteria for granting amnesty — in the end a relatively small portion of applications were approved — the CTF criteria are vague and permit a wide range of discretion. Gonzalez expressed concern that amnesty could be granted in cases of only minimal cooperation that would fall short of eliciting the truth about various crimes against humanity.<sup>55</sup> There is, thus, the danger that the CTF may fuel recriminations and impede reconciliation if the testimony is deemed inadequate.

President Gusmao counters that Indonesia should be given another chance to come clean. He doubts that amnesty will be granted for serious crimes and emphasizes that the CTF does not prejudice any future judicial initiatives. He takes a long-term view, arguing that progress in seeking justice and accountability for crimes committed by Germany and Japan is an ongoing process and not yet fully resolved. In his view, the time is not yet ripe for formal legal justice, but this could change depending on the international community.<sup>56</sup> In the meantime, it is his duty, he says, to promote reconciliation and devote scarce resources to the more pressing and all-too-evident needs of the Timorese. He has made a political choice that trying perpetrators must be subordinated to improving living conditions, governance, healing, and social justice. As a leader he stresses, "We have to see what we can do, not what we wish to do."

But Father Martinho Gusmao, the director of the Justice and Peace Commission in the Catholic diocese of Bacau told me,

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53. Interview with Father Martinho Gusmao, director of the Justice and Peace Commission of Bacau, 17 December 2005.

54. Gahima (2005) stresses that public support is a key criteria in deciding between options for pursuing accountability, raising serious doubts about prospects for the CTF. East Timor is another example of a country flexibly adjusting mechanisms of justice over time in light of experience as has been the case in Rwanda.

55. Interview with Eduardo Gonzalez, senior associate, ICTJ, 28 December 2005.

56. As Thakur, writing on transitional justice, points out, "a society may choose to begin with one but move to bringing closure with the other, as is starting to

There is no need for reconciliation between Indonesian and Timorese people, we have no problems. The problem is that Indonesian security forces committed crimes here and they need to be held accountable. This is also part of the process of building democracy here. We need to see that nobody is above the law, and the victims in our country need to see that the victimizers — whoever they are — are prosecuted. Amnesty is meaningless and will not promote reconciliation, only resentment. Victims want their day in court.<sup>57</sup>

Responding to criticism leveled by international human rights organizations, Ramos Horta says,

It's great for the human rights activists to be heroic in Geneva and New York where they don't have to live with the consequences of their heroism. They say we don't care about the victims? We care, the president and I have lost relatives, friends and comrades over the years. We know the cost of war, the value of peace and the necessity of reconciliation.

Following our interview he caused a stir by publicly asserting that civil society organizations in East Timor have no moral authority to criticize the president's efforts to promote reconciliation with Indonesia through the CTF.

Father Gusmao naturally disagrees. He condemns the CTF as "just a cosmetic exercise" that won't lead to the truth. He termed it a "Commission of Forgetfulness" that seeks to bypass justice. In his view, "Amnesty without confession and taking responsibility is meaningless. Forgiveness without accountability is illogical." In his opinion, the CTF is a political exercise that is not relevant to the real process of reconciliation that occurs at the grassroots level.

Reverend Agostinho de Vasconcelos, a Presbyterian who served as a commissioner on the CAVR, contends that in dealing with crimes against humanity an international tribunal is needed. He argues that such problems cannot be resolved bilaterally through the CTF, and he points out that the CTF lacks international legal standing to handle such serious crimes.<sup>58</sup> He admits that the CAVR commissioners know that the international community opposes an international tribunal, but says that their guiding principle has been, "No reconciliation without justice." However, he raises the question of what constitutes justice, pointing out that the needs and demands of the victims vary. "We have lots of victim's statements requesting a tribunal but others ask for help with housing, medical care, education, etc. There are many paths to justice."

In 2006 we will learn whether the CTF can deliver the truth. Even so, there appears to be little chance that public demands for justice will fade. Timorese know all too well that memory, justice, and reconciliation can be divisive. The wounds are too fresh and the pain remains poignant for the victims and survivors. There seems to be no enthusiasm for closure and no point in rushing the healing process.

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happen in some Latin American countries with respect to the legacies of their 'dirty wars.'" See Thakur 2004, in Thakur and Malcontent 2004, 289.

## Justice Betrayed?

For East Timor's leadership, the greatest challenge is to address concerns among those who feel that justice has been both betrayed and abandoned. As Megan Hirst and Howard Varney argue, "The story of the quest for justice in East Timor perhaps can be best summed up as one involving good intentions that were not backed up by the strategic planning and effective support necessary to counter the damaging effect of Indonesian lack of cooperation.... The justice process was trumped by other interests."<sup>59</sup>

There is lingering anger that General Wiranto, the commander of the Indonesian Armed Forces in 1999, and other top-level officers, have not been held accountable. In 2003, General Wiranto was charged with crimes against humanity under the doctrine of command responsibility, but the arrest warrant was disavowed by the UN and subsequently by the government of East Timor. By not backing up the serious crimes process at this critical juncture, the UN effectively pulled the plug on accountability. Eduardo Gonzalez says,

The Serious Crimes Unit indicted Wiranto in 2003 but then the RI [Republic of Indonesia] criticized this indictment and the UN disowned the SCU — a body that they created and partially staffed — saying it was not part of the UN. Backing down in this manner sent a clear message to both RI and East Timor [ET]. This did not have to happen. Initially the SCU was designed to prosecute perpetrators only in ET while RI was supposed to cooperate with the SCU and prosecute those perpetrators in the RI. However, there was no political will to make this happen. Everyone looked the other way. RI lacked compliance, and without UN pressure ET was left with no political cover. When the UN disowned the SCU it sent a message to ET not to rely on the international community. It must work out a diplomatic solution with Indonesia.<sup>60</sup>

Gonzalez added,

Within ET there was a range of perspectives on the pursuit of justice and managing the bilateral relationship with Indonesia. From Foreign Minister Ramos Horta favoring reconciliation to Prime Minister Alkatiri favoring prosecution and justice. But when the UN showed that it was not willing to go the distance, a more conciliatory line favored by Ramos Horta emerged. East Timor was left on its own to deal with Indonesia from a position of weakness and isolation.<sup>61</sup>

Gonzalez sympathizes with the problems created by insufficient international support, but is puzzled by the ardently pro-reconciliation stance of East Timor's leaders:

This does not explain the aggressive appeasement pursued through the creation of the CTF. Why are East Timor's leaders taking such a favorable stance to Indonesia? After the SCU indictment in 2003 Gusmao met

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57. Interview with Father Martinho Gusmao, 17 December 2005.

58. Interview with Reverend Agostinho de Vasconcelos, 17 December 2005.

59. Hirst and Varney 2005, 1.

Wiranto — an indicted war criminal — to promote reconciliation. The postponed release [of the CAVR Report] is consistent with the government's conciliatory stance toward Indonesia — it is aggressively outspoken in favor of reconciliation with Indonesia.

Father Gusmao agrees and insists, "It is worth trying for an international tribunal. We can't forget what happened. Whether it takes one year or ten years doesn't matter. We struggled twenty-four years. Look at Japan and China still coming to terms with what happened sixty years ago. We need to be patient. We are aware it is difficult in Indonesia but we can't be so soft and have such an easy-going mentality and just close this chapter of history."<sup>62</sup>

He adds, "We must honor our history and identity and Indonesians must be aware that this is part of our relationship. There are no quick solutions and we cannot betray our identity, culture and struggle." Clearly, the experience of resistance and the fight for justice against all odds has become a foundation of East Timorese national identity.

### Judicial Romanticism?

Ramesh Thakur, regarding East Timor, refers to the concept of "judicial romanticism." This involves the problem of overestimating the capacity of courts to resolve issues of justice and accountability and taking a purely judicial approach to transitional justice. He argues that the insistence on formal legal justice by civil society activists and the international community risks preempting the prerogatives of elected political leaders, a sensitive issue in East Timor where the government's attempts to balance justice and reconciliation have drawn heated criticism. Judicial romanticism, Thakur explains, is

[t]he idea of always looking to courts for a solution to every problem. In the commitment to justice at any price, the romanticists discount political and diplomatic alternatives. Not everyone in South Africa was happy with the amnesty granted to some apartheid-era criminals by the Truth and Reconciliation Commission. Some in Britain would like to see IRA terrorists brought to book even at the cost of imperiling the peace accords. And we see it within East Timor in calls for no compromise with the murderers of 1999.

Romanticism turns into judicial colonialism with demands that the political and diplomatic decisions made by democratically elected governments of other countries be subordinated to "international" judicial processes that reflect the values of the most dominant countries of the day. It is based in moral imperialism: Our values are so manifestly superior to theirs that we have the right to impose it on them.<sup>63</sup>

This concept of judicial romanticism is implicit in President Gusmao's use of "grandiose idealism" in describing the CAVR report. He says that the time is not ripe for seeking what he calls "formal justice," arguing that the people are better

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60. Interview, 28 December 2005.

61. Ibid.



Youth on bicycle in Los Palos. President Gusmao is “well aware of public yearning for justice, but argues that it is not the most pressing concern for people living in impoverished villages without electricity, clean water, decent housing, and medical care.”

served by the government concentrating its meager resources on achieving economic and social justice and consolidating peace. Cultivating a working relationship with Indonesia is a priority for East Timor both in terms of its security and economic interests. Seeking justice now without any international backing and political cover could imperil bilateral relations. The president is well aware of public yearning for justice, but argues that it is not the most pressing concern for people living in impoverished villages without electricity, clean water, decent housing, and medical care. He also is concerned that the pursuit of justice will lead to a

destabilizing settling of scores among Timorese while Indonesian perpetrators remain beyond the reach of prosecutors.

Gusmao’s dilemma is being caught between high public expectations for justice and accountability and insufficient international support to make this happen. Indeed, the UN has grown increasingly ambivalent about promoting international justice and more circumspect in its ambitions to pursue accountability. As the failures and costs mount, the UN advocates shifting responsibility and implementation to national authorities.<sup>64</sup> This is especially problematic in war-ravaged societies where the capacity to administer justice is clearly inadequate and the “need” for convictions overshadows impartiality and due process.

Gusmao’s pro-reconciliation views have drawn criticism from various domestic and international civil society organizations that fear he is betraying justice. Is justice postponed justice betrayed? Do ongoing reconciliation efforts preclude future initiatives? Gusmao pointedly draws attention to traumatized nations such as South Africa and Mozambique that have gained a measure of social stability by treading softly on the question of justice. He also cites the examples of Pinochet in Chile, ongoing Nazi hunting, and Sino-Japanese disputes to

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62. Interview, 17 December 2005.

suggest that postponing justice need not preclude justice. It is clear that at the moment, he does not see the pursuit of justice as a viable option because international support is lacking. He is acting in what he believes to be the national interest now, but this does not mean his successors won't have other options. Clearly, he does not oppose pursuing such options at some later date.

Thakur sees "hope for a permanent reduction in the phenomenon of impunity. In 1990, a tyrant would have been reasonably confident of escaping international accountability for any atrocities. Today, there is no guarantee of prosecution and accountability, but not a single brutish ruler can be confident of escaping international justice. The certainty of impunity is gone. Fifteen years is a very short time in the broad sweep of history for such a dramatic transformation of the international criminal landscape."<sup>65</sup>

Perhaps, but there are those who argue that such dramatic gains have been achieved precisely because principle has trumped pragmatism. Professor Yozo Yokota, one of the UN experts who prepared the 2005 human rights report to the UN secretary-general, understands the concept of judicial romanticism as a critique of human rights activists who assert their agenda with disregard for prevailing political realities.<sup>66</sup> Such critics, he explains, complain that the activists feel a self-congratulatory satisfaction by insisting on justice and invoking international laws and principles whether or not pursuing these is pragmatic or a viable course of action. These critics advocate a judicial pragmatism that is rooted in political reality and national self-interest. Rigorously applying such constraints, he argues, would necessarily limit reform, accountability, and further improvements in international criminal justice.

The problem with judicial pragmatism is that powerful perpetrators will understand that they need not be worried about accountability. This approach thus condones a continued cocoon of impunity for those from influential countries and reserves justice for those who are not. In Yokota's opinion, greater accountability has come about because of idealistic challenges to prevailing political realities and the pervasive disregard for human rights. He also dismisses the issues of judicial or moral colonialism, arguing that in calling for accountability the Commission of Experts voiced the justified and explicit demands of the Timorese.<sup>67</sup>

According to Joseph Nevins, the cost of realpolitik for the international community in East Timor is the high-profile renegeing on promises, fleeing from commitments, and betrayal of principles — in short, the acceptance of a double standard that ensures scant accountability for those who victimize the relatively weak.<sup>68</sup> In the space of five years the international community has swung from outraged condemnation of Indonesia and demands for justice to averting its

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63. Thakur 2005. Also see Thakur and Malcontent 2004, 284–89.

64. See *Report of the Secretary-General* 2004.

65. Thakur 2005.

66. Interview, 25 January 2006.

eyes for the “common good”; participating in the Bush administration’s war on terror evidently exonerates sins past.

As for judicial colonialism, the evident desire of East Timorese for accountability indicates that this is a homegrown yearning and not a question of standards and practices imposed from without. According to Augustus Vasconcelos, a CAVR commissioner and Presbyterian minister, the eight thousand witnesses who testified expressed a strong desire for justice.<sup>69</sup> He sees this as a normal human desire rather than the agenda of civil society organizations or a reflection of judicial colonialism. In his view, suggestions to the contrary are condescending to the Timorese and the appeal made in *Cbeqa!* Retributive justice is not the answer for all victims and other avenues beyond judicial processes are necessary, he says, but it remains important for many victims still coming to terms with their agonizing experiences.

Professor Yokota expresses disappointment that the UN secretary-general and the Security Council have effectively buried the report he and his colleagues submitted in mid-2005 largely due to realpolitik. He still thinks it is possible and advisable to revive the hybrid tribunals and hopes that the dictates of justice will ultimately prevail, and soon. Speaking for many in the activist community, he asserts that justice postponed is justice lost.<sup>70</sup>

Yokota, along with Gonzalez of the ICTJ, both assert that the United States has lobbied on Indonesia’s behalf to dissuade the Security Council from acting on the Commission’s recommendations. Aside from losing Indonesian assistance in the war on terror, there is an additional geostrategic concern that pressing accountability for human rights violations might push Indonesia toward China as has happened with Myanmar.

## Conclusion

“We have to see what we can do, not what we wish to do. Now we need reconciliation and we have to think of socioeconomic rather than formal justice. That is our priority.” — Xanana Gusmao, 16 December 2005

“No violation of human rights, no invasion of human dignity and no infliction of pain and suffering on fellow human beings should be allowed to go unpunished.” — UN Commission of Experts on East Timor, 26 May 2005

“[O]ur mission was to establish accountability in order to deepen and strengthen the prospects for peace, democracy, the rule of law and human rights in our new nation. Central to this was the recognition that victims not only had a right to justice and the truth but that justice, truth and mutual understanding are essential for the healing and reconciliation of individuals and the nation. — *Cbeqa!* (CAVR Report), December 2005

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67. Everyone I met in East Timor in December 2005, with the exception of government leaders, strongly supported an international tribunal, expressing frustration that the UN had abandoned the process.

68. Nevins 2005, 202.

These statements frame the ongoing debate in East Timor. Justice or reconciliation? Principles or pragmatism? Accountability or impunity? These are the major questions facing the international community and the people of East Timor as they cope with the trauma of Indonesia's brutal occupation and departure. In realizing justice, reconciliation, and democracy the UN reminds us that there is a virtue in a sensible sequencing of these processes and finding a middle ground.<sup>71</sup>

The verdict on justice in East Timor is not encouraging. There is a consensus that initial efforts to pursue accountability have largely failed. This failure is partly attributed to the judicial vacuum created by Indonesia's scorched-earth policy and the ground zero legacy it bequeathed to East Timor. In addition, the UN failed to pressure Indonesia to keep its promises on prosecuting perpetrators and also did not provide sufficient funding or political backing for judicial mechanisms to realize justice. As a result, "High-level perpetrators from the Indonesian military and government have been shielded by the Indonesian authorities and [have] remained outside the reach of the serious crimes process."<sup>72</sup>

In light of these findings, it is not surprising that the East Timor leadership is skeptical about securing the international support deemed necessary to achieve justice. As Nevins argues, it is not fair to criticize these leaders for making the best of a difficult situation by emphasizing reconciliation.<sup>73</sup> The failure to secure justice in East Timor is a reflection of the failure of the international community to match its rhetoric with effective actions. Nevins also points out that aside from undermining "sociopolitical reconstruction" this failure "has serious material implications by lessening the likelihood that East Timor will receive reparations for its suffering, thus perpetuating the territory's impoverishment."<sup>74</sup>

In the absence of either retributive or restorative justice, the prospects for reconciliation seem dim. Legitimacy and democracy may also hang in the balance. The ICTJ urges the East Timorese leadership "not to assist Indonesian efforts to obscure the truth and entrench impunity for reasons of political expediency. Continued impunity for perpetrators will only erode democratic legitimacy in Timor-Leste and strengthen authoritarian elements within the Indonesian government and military."<sup>75</sup>

Clearly, the flawed and fitful pursuit of justice under UN auspices has disappointed East Timorese expectations and undermined their respect for the rule of law. So far, only the most vulnerable perpetrators have been held accountable while their powerful commanders evade justice. Given international ambivalence about reviving an international tribunal, are national judicial avenues worth exploring? There is a risk that the judicial process will serve as a cover for

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69. Interview, 17 December 2005.

70. See for example, Judicial System Monitoring Programme 2005a; Judicial System Monitoring Programme 2005b; Hirst and Varney 2005.

71. See *Report of the Secretary-General* 2004.

72. Hirst and Varney 2005, 16.

settling political scores between domestic parties. There is also a consensus that East Timor currently lacks the capacity to conduct trials that meet minimum standards of due process and impartiality. In consequence, by shifting this onerous responsibility on a nation unprepared to fulfill such a mandate, the UN's battered reputation could suffer further reproach. In the absence of a binding commitment by Indonesia to justice for those most responsible for orchestrating the atrocities — and this currently seems unlikely — there seems little point in pursuing half-hearted, poorly funded palliatives to add to the checkered record of justice in East Timor. In this sense, better justice postponed than botched and betrayed yet again.

What is the proper balance between justice and reconciliation? Analyzing the tensions between peace and justice, Thakur writes: "If society is privileged over the individual, then restoring social harmony is more important than punishing individual wrongdoers... [and] justice has many more, and perhaps more fundamental, roles to play beyond simply bringing wrongdoers to account."<sup>76</sup>

In the end, President Gusmao, a man who participated in a twenty-four-year-long struggle for justice and won more than 80 percent of the vote, has made a calculated gamble. He seeks to draw a line under the past and postpone a reckoning in favor of reconciliation and recovery in his war-ravaged nation. He hopes the people will follow him. For him, the potential of independence cannot be realized by trying perpetrators in a courtroom, especially when there are so many more pressing problems that demand the government's attention and resources.

The complex political calculus of his choice involves, *inter alia*, weighing the costs and benefits of pursuing justice at a time when East Timor is poorly prepared to do so and Indonesia remains recalcitrant, unrepentant, and unencumbered by international pressures. Given the power of the security forces and the nascent democratic process of consolidating civilian control in Indonesia, the prospects of prosecuting high-ranking Indonesian perpetrators are remote. Moreover, the judicial infrastructure in East Timor remains insufficient and the need for capacity building, involving all government institutions, is acute. Simply, without a credible and sustained commitment by the international community, and the political protection this confers, East Timor cannot achieve accountability. The costs of demanding justice and reparations now are high in terms of souring relations with Indonesia. In addition, President Gusmao does not believe that the international "accomplices" of Indonesia, including leading donors such as the United States, Japan, Australia, and the United Kingdom, much less the arms dealers, will pay reparations or allow extradition to prosecute their nationals for complicity in Indonesia's invasion and reign of terror. Thus, eager to cultivate the goodwill of powerful nations as a form of insurance, the president has decided against acting on the demands of the CAVR for justice and reparations.<sup>77</sup> In his view, national interests and justice in terms of security, harmony, and social welfare are best served by not antagonizing powerful na-

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73. Nevins 2005, chap. 8, "Accounting for the past: Truth without justice," 159–78.

tions and potentially dangerous neighbors in quixotic gestures that are bound to fail and likely to boomerang.

In Professor Yokota's opinion, Gusmao has also chosen to make reconciliation a priority because he did not want to turn down President Susilo Bambang Yudhoyono's appeal to work with him on the CTF. In addition, Japan, the leading bilateral donor, strongly backs the CTF process. The CTF process may indeed be a dead-end, but at least East Timor can say it gave the Indonesians a second chance to make up for the sham trials. If Indonesia fails to deliver yet again, they can only blame themselves, while East Timor can gain credit for acting in good faith with patience.

President Gusmao is risking his substantial political capital in defying public opinion on justice and accountability. He is demonstrating leadership and prodding the people to embrace reconciliation. Few doubt that this revered and charismatic national hero can sway public opinion. He emphasizes that reconciliation also means reintegrating Timorese who committed crimes while serving Indonesian interests. This tricky process has gone better than anyone expected and owes a great deal to his emphasis on healing. This remains a difficult process in many local communities and does not involve those guilty of serious crimes, but it does mark a step forward out of the nightmare.

Like Nelson Mandela, Gusmao wants to shape public expectations and steer them away from retribution and toward peaceful and democratic development. However, it is also certain that the Church and civil society organizations will continue to give a voice to the victims and lobby for justice.

East Timor's demonstration of reasonableness is a significant confidence-building measure and an important step toward influencing hostile Indonesian attitudes toward its tiny neighbor. Especially in light of Jakarta's recent success in negotiating a deal with separatist rebels in Aceh that preserves Indonesian territorial integrity, there are widespread regrets, and recriminations, about East Timor's independence. While the threat of revanchism may well be exaggerated, fence mending with Indonesia and mollifying the Indonesian military could pay dividends. There is no shortage of potential bilateral rifts. For example, Mario Carrascalao points out that East Timor's oil wealth is likely to widen disparities with neighboring West Timor in coming years, carrying the potential for instability. One need not raise the specter of irredentism to appreciate that building trust and communication now may help in handling such problems down the road.

Whether or not justice postponed is justice lost remains to be seen. In this context, civil society organizations and the international community can play a key role in keeping the issue of accountability alive and preserving an option important to many traumatized victims. Pressures generated by civil society organizations helpfully keep the pursuit of justice on the national agenda. As Eduardo Gonzalez points out, efforts to bring Pinochet to justice depended on quiet

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74. *Ibid.*, 178.

75. ICTJ 2006.

but sustained political backing for the activists seeking accountability.<sup>78</sup> Thus justice in the future depends on maintaining such political pressures. While national leaders follow the dictates of *realpolitik*, and embrace alternative forms of justice, other actors usefully promote what they cannot. In this sense, there is a symbiotic relationship between the state and civil society/international organizations. Leaders can consolidate peace and build trust while such organizations maintain pressure for retributive and restorative justice.<sup>79</sup>

These parallel efforts contribute to what could be a gradual, incremental, and often sputtering process of accountability and reconciliation. Understandably, victims will be disappointed by what portends to be a frustratingly slow and fitful process, but, as Gahima reminds us, total satisfaction for them is impossible. Modest satisfaction entails recognition of their suffering, acceptance of responsibility by Indonesia, clear signs of contrition and atonement, and cultivating a common historical memory of what happened in East Timor in the final quarter of the twentieth century.

Reconciliation is difficult because the aggressor nation must humble itself by acknowledging wrongdoing and demonstrating sincere contrition in ways that confront national pride and identity.<sup>80</sup> Germany demonstrates that this is possible and beneficial, Japan that it is difficult, but decidedly problematic if neglected. The onus is on Indonesia; reconciliation will depend on its political choices and actions. However, the East Timorese must also be ready to accept meaningful, symbolic gestures of responsibility and atonement that will fall short of a full reckoning.<sup>81</sup> Reconciliation thus also requires the wronged nation to act with restraint such that the victimizing nation can atone while retaining its dignity. Thus can the apparently contradictory logic of peace and justice be reconciled.

The geostrategic situation may be bleak for East Timor, and prospects for improvement remote given the reinvigorated U.S. partnership requiring the active participation of Indonesian security forces, but it is important to recognize that Indonesia's participation in the war on terror and radical Islam is in its own national interest. Whether or not the world lets it slide on East Timor, the Indonesian government is now in a war against religious extremism it cannot afford to lose. It is unlikely, therefore, that pressing it to facilitate justice for those who bear the greatest responsibility in East Timor will undermine its commitment to the war on terror or bolster its ties with Beijing.<sup>82</sup> Such excuses do not, thus, justify or mitigate Indonesia's attempts to evade its responsibilities in East Timor.

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76. Thakur and Malcontent 2004, 287–88.

77. For a summary of these demands, see “Supplementary Resources,” on the BCAS website: [www.bcasnet.org](http://www.bcasnet.org).

78. Interview, 28 December 2005.

79. On the role of civil society organizations in the reconciliation process, see Feldman 2005.

80. For further discussion of reconciliation issues, see Yamazaki 2005; Saaler 2005; and Horvat 2004, 137–48.

Ultimately, the failure of justice in East Timor serves as an indictment of the international community and bestows a responsibility to facilitate both reconciliation and justice. Breaching the moat of impunity over the past fifteen years provides a measure of solace, but the siege continues and the outcome remains in doubt. Those who bear the greatest responsibility for human rights violations are the least likely to face accountability. This is not an encouraging basis for reconciliation and unlikely to address even the most modest needs of victims. It is important to recognize that it is not too late — the evidence has been gathered and is available — and that the window of opportunity remains open. Perhaps these initial efforts at reconciliation will be a confidence-building measure, demonstrating East Timor's reasonableness and enabling reciprocal gestures. As both nations consolidate democracy and the rule of law, the basis for a reckoning may improve. This trend merits sustained and generous international support.

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81. In this context, to facilitate reconciliation there is a “need” for high-profile convictions of Indonesian perpetrators. The UN suggests a targeting of prosecutions focusing on those most responsible for the most serious crimes. See *Report of the Secretary-General 2004*.

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