

The Price Of Peace?

Impunity, Maternus Bere, and the Pursuit of Transitional Justice in East Timor

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I. INTRODUCTION

For states transitioning from authoritarian rule marred by human rights abuse into democracy underpinned by the rule of law, the definition of justice for past transgressions, and how that should be accessed, can be sensitive and controversial. For these states, which have suffered the stifling of justice and democracy, a tension can exist between the pursuits of peace through reconciliation, and justice through prosecutions and reparations. Both peace and justice are ideals founded upon certain values, whose meaning varies epistemologically and according to individual beliefs.¹ What may mean peace and justice in one culture may stoke unrest and injustice in another.² In East Timor, this problem came to the fore of public affairs when in 2009 Prime Minister Xanana Gusmão ordered the release of an apprehended former militia leader, Maternus Bere. This article contextualises and describes this incident, in order to shed light on some of the conflicts and complications inherent in the pursuit of access to justice for transitional societies.

II. INDEPENDENCE

Early in 1998, simmering tensions in the Indonesian province of East Timor began erupting into widespread violence. A referendum was scheduled for August that year, in which the population was to vote either for independence or 'autonomy' within the Indonesian Federation. Having been annexed by Indonesia in 1975,

mere days after being granted independence by Portugal, its colonial leader of over 400 years, the prospect of lasting political independence for the people of East Timor was real at last. Needless to say, many within the Indonesian establishment were loath to see that happen. The 1975 invasion and the intervening 24 years had been marked by widespread violations of international humanitarian and human rights law.³ Throughout the occupation, over 180 000 people – more than a quarter of the country's population – were killed by famine, violence and other direct results of Indonesian military policy and action.⁴ Indonesian sovereignty over its entire archipelago was a point of pride for military leaders, and many feared that East Timorese independence would put wind in the sails of separatists throughout the nation, including in such provinces as Aceh and West Papua. In the hope of intimidating the population into voting to stay with Indonesia, officers based in East Timor began funding, arming and lending operational support to pro-Indonesian militia groups.

When the time for the referendum ultimately came, 78.5 per cent of the population voted in favour of independence.⁵ The militias' response to this outcome was violence characterised by rape, murder, assault and the destruction of property, which led to the deaths of over 1000 independence supporters, and the displacement of 250 000 civilians,⁶ most of whom were forcibly deported to West Timor.⁷ It was only once the United Nations ('UN') intervened that violence ceased.⁸ In its aftermath, the UN Transitional Administration in

East Timor ('UNTAET') was established to temporarily govern East Timor and assist with state-building practices and the establishment of accountability mechanisms to allow the East Timorese people to access some form of justice.⁹

III. TRANSITIONAL JUSTICE IN EAST TIMOR

A Accountability in International Criminal Law

Accountability for violations of international criminal law ('ICL') is broadly understood to be necessary for peace and the maintenance of international stability.¹⁰ In ICL, this is enshrined in the Preamble of the Rome Statute, which calls for an 'end [to] impunity' – the antithesis of accountability – for the perpetrators of the 'most serious crimes of concern to the international community as a whole'.¹¹ Whereas impunity keeps perpetrators from legal accountability through either the granting of amnesties or the failure of states to enforce international norms,¹² legal accountability sees individuals held responsible for their violations of ICL. Under the logic of ICL, criminal accountability is central to achieving justice for victims of serious crimes¹³ and deterring further violations of human dignity.

B Alternative Understandings of Accountability

For transitional states, ICL alone may not always be a 'vehicle for peace'.¹⁴ While accountability may be intrinsic to legal justice, experience demonstrates that its achievement may be compromised by other interests.¹⁵ Whereas amnesties may help to bring warring parties together in the name of reconciliation, or for the purpose of maintaining a viable polity or economy, the emphasis of ICL on accountability complicates this process. Some argue that non-criminal mechanisms alone are insufficient to achieve meaningful justice.¹⁶ On the other hand, ICL's focus on criminal prosecutions in order to achieve accountability may reflect its predominantly Western conception and influence.¹⁷ Indeed, for some non-Western states, prosecution may be a process divorced from local culture, values and dispute resolution mechanisms.¹⁸ Heavy emphasis upon western-centric views of accountability may leave non-Western states little room for flexibility when it comes to achieving a localised form of transitional justice. These considerations account for the rise of truth and reconciliation commissions that often incorporate hybridised approaches to penance and justice that attempt to balance pragmatism, indigenous values, and formal justice.

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C East Timor's Approach to Accountability

In transitional states, a range of accountability mechanisms may be adopted in pursuit of a holistic notion of justice that balances pragmatism, international standards, and local demands and mores. In East Timor, the approach taken was determined by a range of economic, policy and geopolitical factors. It struck a balance between criminal and non-criminal approaches to justice by implementing a truth and reconciliation process, the Commission for Reception, Truth and Reconciliation (usually referred to by its Portuguese acronym, 'CAVR'), and engaging in selective criminal prosecutions through the Special Panels for Serious Crimes within the District Court of Dili ('Special Panels').

CAVR was established by UNTAET on 13 July 2001.¹⁹ Its purpose was to promote national reconciliation and healing by examining the patterns of violence that occurred between 1974 and 1999.²⁰ CAVR had a dual function: to establish the truth about human rights violations that were committed under Indonesian rule, and to assist with the reintegration into East Timorese society of individuals accused of committing less serious crimes during the conflict.²¹ To determine whether crimes disclosed during reconciliation were less or more serious, the CAVR exercised a quasi-judicial function.²² To ensure CAVR operated in line with international legal standards, regulations were passed protecting individuals' rights to legal representation,²³ and allowing participants to refuse to incriminate themselves.²⁴ The CAVR's objective of reintegration was enshrined in its Community Reconciliation Process. The Community Reconciliation

Process allowed perpetrators of less serious crimes to gain immunity from civil and criminal prosecution, on the provision that they assumed responsibility for their actions and carried out community service.²⁵ Inherent in this process was the recognition that in order to prevent future conflict and rebuild local populations, a mechanism was needed to encourage the thousands of East Timorese who had committed acts of violence and fled to West Timor in fear of apprehension, to return to East Timor.²⁶

The Special Panels were established by UNTAET *Regulation No. 2000/15* ('2000/15'). Their mandate was to prosecute 'serious criminal offences'²⁷ 'committed... between 1 January 1999 and 25 October 1999'.²⁸ The Panels were a 'hybrid tribunal', presided over by two international judges and one East Timorese judge.²⁹ According to Geoffrey Robertson, former President of the Special Court for Sierra Leone,

*Although the obvious solution was for the Security Council to establish a war crimes tribunal for East Timor, under the Hague umbrella which already covered Yugoslavia and Rwanda, China made clear that in defence of Indonesia's sovereignty it would veto any such proposal – so none was made.*³⁰

Legally, this issue was overcome by 2000/15's adoption of the text of those Tribunals' founding statutes. Logistically, however, the disparity in resources and logistical support between the Hague tribunals and the Panels would chronically undermine the latter's efforts at justice.³¹

2000/15 confers the Panels with 'universal jurisdiction' over genocide, war crimes, crimes against humanity and torture.³² While the validity of universal jurisdiction as a concept remains controversial,³³ delimiting its reach to these four crimes is consistent with its traditional exercise.³⁴ Pursuant to this doctrine, section 2.2 establishes the Panels' jurisdiction over these crimes regardless of the territory on which they were committed, or the nationality of perpetrators or victims. Section 14.3 provides for multiple modes of criminal liability, while section 15 establishes the 'irrelevance of official capacity', explicitly denying impunity even to 'Head[s] of State or Government'. Section 16 applies the doctrine of command responsibility, extending liability for the actions of subordinates to 'commanders and other superiors'. To the extent that it was consistent with principles of human rights and subsequent UN regulations and East Timorese law, the panels were to

apply the law that operated in East Timor prior to 25 October 1999, *mutatis mutandis*³⁵, which raised a host of interpretative complications.³⁶

On 20 May 2002, 'the UN handed over its authority to the new democratic institutions' of East Timor.³⁷ UNTAET regulations continued to apply until repealed or replaced by Timorese law, and the panels continued to operate under the new *Constitution*.³⁸ *Resolution 1543* mandated the panels' conclusion, along with UNMISSET, in 2005. Their caseload transferred to East Timor's ordinary courts.³⁹ The work of the Special Panels has been frequently lamented as a lost opportunity, marked by a failure to prosecute Indonesian commanders and commanders of the pro-Indonesian militias.⁴⁰ The pursuit of accountability was further disabled by legal uncertainties that plagued the courts.⁴¹ Despite being rushed, overworked and underfunded, the Special Panels pursued a policy of fullest possible accountability, which resulted in 55 trials involving 87 accused – 83 of whom were convicted – taking place over a period of four years.⁴²

IV. MATERNUS BERE'S ARREST AND RELEASE

One alleged perpetrator who was charged but never tried was Maternus Bere. Maternus Bere was a *Danki*, or Commander, of the Suai⁴³ sub-group of the Laksaur Militia,⁴⁴ which was formed in April 1999.⁴⁵ In 2003, he was indicted by the Special Panels for alleged participation in numerous attacks against the civilian population of Cova Lima between 27 January 1999 and 4 September 1999.⁴⁶ His long list of crimes is purported to have included torture,⁴⁷ enforced disappearance,⁴⁸ extermination,⁴⁹ deportation⁵⁰ and persecution.⁵¹

The indictment on which he was named accuses 14 individuals with a total of 51 charges.⁵² Such an unwieldy method of charging, impractical for trial purposes, is speculated to have been borne of recognition that a lack of time, political will and resources would limit the prospects of bringing to trial all those who had committed crimes against humanity between January and October 1999.⁵³ The purpose of such indictments may have been to contribute to the conflict's historical record,⁵⁴ and to guide East Timor's ordinary courts in their prosecution of serious crimes after the handover period. Unwieldy as it may have been, the indictment provided the basis for Bere's arrest in 2009.

The indictment is often general in its terms, and it may not meet the standards of evidence seen in international courts and tribunals such as the International Criminal

Court or the International Criminal Tribunal for Rwanda. It is occasionally unclear in its use of language. Nevertheless, it ties, at numerous points, acts he allegedly committed to recognised crimes against humanity listed in 2000/15.

Having settled in West Timor after independence, the CAVR process did not tempt Bere into returning to either clear his name or make peace with his neighbours. But in August 2009, he returned to Cova Lima to attend a religious ceremony.⁵⁵ He was arrested and incarcerated, before being returned to Indonesian custody by order of Xanana Gusmão, the then Prime Minister of Timor Leste.⁵⁶ By October, he had returned to Indonesia, where he resumed his career as a civil servant.⁵⁷

It has been argued by Amnesty International and La'ó Hamutuk, an East Timorese NGO, that Bere's release contravened East Timor's obligations under the Rome Statute.⁵⁸ While the release was contrary to that treaty's normative framework of ending impunity,⁵⁹ the Rome Statute cannot be applied to this situation. States parties are obliged to co-operate 'with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.'⁶⁰ However, the International Criminal Court ('ICC') can exercise jurisdiction only over crimes committed after the Rome Statute's entry into force,⁶¹ which was on 1 July 2002.⁶² Having occurred in 1999, the crimes discussed in the Indictment are not within the ICC's jurisdiction.

Nevertheless, Bere's release was unlawful. Section 160 of East Timor's *Constitution* mandates that 'Acts committed between the 25th of April 1974 and the 31st of December 1999 that can be considered crimes against humanity of genocide or of war shall be liable to criminal proceedings with the national or international courts.' Bere's release without trial directly contravenes this provision. Although the President has the power to issue pardons,⁶³ this was neither purported to have been exercised nor applicable, as a pardon presupposes a conviction. The legislative power of the Prime Minister does not extend to the issue of non-statutory 'orders'.⁶⁴ According to section 118(3), 'Court decisions shall be binding and shall prevail over the decisions of any other authority.' The Panels sat within the District Court of Dili.⁶⁵ As the Court had issued an arrest warrant, this decision should have prevailed over any orders for Bere's release issuing from any other authority. Bere's release was unquestionably unconstitutional.

V. IMPUNITY – AN AID OR HINDRANCE TO TRANSITIONAL JUSTICE?

Maternus Bere was not held accountable through either of the transitional justice mechanisms operating in East Timor. Besides, perhaps, the sympathetic eyes of posterity, his victims have been denied access to justice on any individually experienced level.

Bere's release was reportedly ordered under diplomatic pressure from the Indonesian government.⁶⁶ Despite political independence, much of East Timor's fledgling economy depends upon imports from or through Indonesia. It therefore epitomises a broader dilemma facing the nation since independence: the moral, legal and political question of whether and how to weigh access to justice against development. Arguably, the exigencies of international relations and Timor's economic reliance upon Indonesia demand a more conciliatory approach to its powerful neighbour than would satisfy many notions of justice.⁶⁷ Accordingly, Indonesia has not extradited any of its citizens indicted by the Panels; nor has this been demanded by East Timorese politicians.⁶⁸ Of the 373 defendants called before the Panels, 279 remain at large in Indonesia.⁶⁹ United Nation Development Programme ('UNDP') reports from the early years of independence indicated slow progress on key indicators of health and poverty.⁷⁰ In light of this, the East Timorese Government may be justified in focussing on its political, diplomatic and economic resources rather than transitional justice.⁷¹ It should also be noted that 2009, the year of Bere's return and release, was the first of five-and-a-half consecutive years without widespread bloodshed or political crisis, despite parliamentary and presidential elections having taken place in 2012. Moreover, it is possible that criminal convictions would not serve the interests of East Timorese society more broadly. According to Scheeringa, East Timorese respondents to field research have frequently expressed the importance of 'leav[ing] the past behind and mov[ing] on.'⁷² Indigenous notions of justice are further blurred by the widespread opinion that militia members were 'forced or bribed to commit crimes', leading to public preference for amnesty for such offenders.⁷³ Indeed, while according to some reports, Bere was attacked upon his return to Suai,⁷⁴ according to others, he was welcomed.⁷⁵

Victims' justice, however, is not always concerned with the immediate priorities of the population at large. It provides individuals with the opportunity for healing



and closure. As Scheeringa points out, ‘As long as perpetrators of serious crimes remain unpunished, the victims will continue to feel bitter and... put the past before them, and not behind them.’⁷⁶ Indeed, prosecuting such perpetrators may be essential to the principle of accountability key to building citizens’ faith in democratic institutions. In contravening the Constitution, Xanana Gusmão disregarded the rule of law and undermined the nation’s democratic credibility. Moreover, if impunity is normalised, stable peace may be unattainable.⁷⁷ On a regional level, as Geoffrey Robertson points out, ‘One consequence of Indonesia’s failure’ to address impunity ‘is that its army commanders continue persecution in West Papua’.⁷⁸ Providing access to justice for Maternus Bere’s victims would therefore have served more than their interests alone. The unsatisfactory outcome of this predicament is encapsulated in the words of M Cherif Bassiouni.

Justice is all too frequently bartered away for political settlements. Whether in international or purely internal conflicts, the practice of impunity has become the political price paid to secure an end to the ongoing violence and repression. In these bartered settlements, accountability to the victims and the world community becomes the object of political trade-offs, and justice itself becomes the victim of realpolitik.⁷⁹

VI. CONCLUSION

Accountability is inextricably linked to peace and reconciliation. For East Timor to develop into a safe and democratic society that gives access to justice for the victims of crimes against humanity, commitment to the rule of law is essential. While the fledgling nation has achieved peace and is on its way to reconciliation, the failure to hold those most

responsible to account has left behind wounds. In the absence of meaningful accountability, they will not heal, and may be inflicted afresh.

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10. Bassiouni, above n 1, 384.
11. Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) (‘Rome Statute’) Preamble.
12. Bassiouni, above n 1, 398.
13. Rome Statute, above n 11, Preamble.
14. Jeremy Rabkin, ‘No Substitute for Sovereignty’ in Edel Hughes, William A Schabas and Ramesh Thakur (eds), *Atrocities and International Accountability: Beyond Transitional Justice* (United Nations University Press, 2007) 98, 116.
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17. Ibid.
18. Ibid.
19. SC Res 1272, UN SCOR Regulation 2001/10 pursuant to SC Res 1272 UN SCOR, 4057th mtg, UN Doc S/RES/1272 (25 October 1999).
20. UNTAET/REG/2001/10 (13 July 2001).
21. Stahn, above n 3, 952.
22. Section 25.3 of UNTAET/REG/2001/10 (13 July 2001) provides that

- 'the power of the Office of the General Prosecutor to institute criminal proceedings is stayed in relation to acts which are the subject of a Community Reconciliation Process,' once the commission has delegated the community reconciliation to a regional commissioner.
23. UNTAET/REG/2001/10 (13 July 2001) ss 18.1, 18.3.
 24. See UNTAET/REG/2001/10 (13 July 2001) s 17.1.
 25. Stahn, above n 3, 964.
 26. Ibid 967.
 27. 2000/15 s 1.1.
 28. 2000/15 s 2.3.
 29. Geoffrey Robertson, *Crimes Against Humanity* (Penguin Books, 4th ed, 2012) 591.
 30. Ibid.
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 35. UNTAET/REG/1999/1, ss 2–3; 2000/15 s 2.4.
 36. See Butler, above n 33; *The Prosecutor v Armando dos Santos (Decision)* (District Court of Dili Special Panels for Serious Crimes, Case No 16/2001, 15 July 2003); Sylvia de Bertadano, 'Current Developments in Internationalized Courts: East Timor – Justice Denied' (2004) 2 *Journal of International Criminal Justice* 910, 917.
 37. Cryer et al, above n 9, 192.
 38. Ibid.
 39. Cohen, above n 31, 91–4.
 40. Robinson, above n 5, 214.
 41. For instance, in order to be consistent with international law, subsequent UN regulations and East Timorese law, the panels were to apply the law that operated in East Timor prior to October 25, 1999, mutatis mutandis. While this was initially believed to be Indonesian law, in July 2003 the Court of Appeal's decision in *dos Santos* held that, due to the fact the Indonesian occupation was unlawful, Portuguese law was to be applied instead. Statutory intervention was required to correct the confusion that ensued, and the legal intrigue that followed impaired the credibility of the Special Panels in the eyes of many. The Special Panels achievement of 'justice' was arguably correlative to the resources invested in it, which was very little.
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 44. *The Deputy General Prosecutor For Serious Crimes v Egidio Manek (Indictment)* (District Court of Dili Special Panels for Serious Crimes, Case No 09/CG/TDD/2003, 28 February 2003) ('*Indictment*') [16].
 45. Ibid [12].
 46. Ibid.
 47. Ibid Count 8, 22.
 48. Ibid Count 12.
 49. Ibid Count 27.
 50. Ibid Count 50.
 51. Ibid Count 51.
 52. *Indictment*.
 53. de Bertadano, above n 36, 911.
 54. Ibid 912.
 55. Lindsay Murdoch, 'How an Alleged War Criminal in East Timor Escaped Justice', *Brisbane Times* (online), 5 November 2009 <<http://www.brisbanetimes.com.au/opinion/politics/how-an-alleged-war-criminal-in-east-timor-escaped-justice-20091105-hyn1.html>>.
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 64. Ibid ss 95, 96.
 65. 2000/15 s 1.1.
 66. Murdoch, above n 55.
 67. Sandra Scheeringa, 'Enhancing the Local Legitimacy of Transnational Justice Institutions: Local Embeddedness And Customary Law in CAVR' in Damien Kingsbury and Michael Leach (eds), *East Timor: Beyond Independence* (Monash University Press, 2007) 132, 132.
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 71. UN Commission on Human Rights, *Situation of Human Rights in East Timor*, UN GAOR, 53rd sess, 16th mtg, E/CN4/RES/1997/63 (16 April 1997) 13.
 72. Scheeringa, above n 67, 135.
 73. Ibid.
 74. Murdoch, above n 55.
 75. Peak, above n 57.
 76. Scheeringa, above n 67, 138.
 77. Ibid.
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