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INTRODUCTION

The twentieth century closed with massive political changes throughout Latin America, Eastern Europe, Africa and South East Asia. Authoritarian military or tyrannical regimes were overthrown or forced to step aside by gradual changes. In the next phase after ending the ancient regimes, they moved toward similar pathways; they set up a more liberal democratic institution and were officially more accommodative to international human rights standards. However, they headed along different paths when dealing with their past experiences. Most problematically, choices had to be made as to whether or not to unearth the truth, to prosecute or to pardon particular individuals involved in the previous systems. From this perspective, the issue of transitional justice has emerged as one of the major controversies and debates in the human rights' arena. In January 1793, with so many debates and votes, the French National Convention spent many days determining how to deal with Louis XVI before sentencing him to death by guillotine. Yet, up until now the new regimes in many places are still debating how to address past atrocities and to deal with previous oppressors. There is no suitable formula for all problems a society which is recovering from past tragedy. On the contrary, the explanations are dependent on numerous domestic variables that require a unique formula based on individual country's experiences.

Spain, after the Franco's regime, and Uruguay after the military junta, chose to forget the past officially, with the latter using the national referendum as the determining influence.[1] Some people still believe that democratic transition and national reconciliation worked well under civilian regimes in both these countries.[2] In other examples, some countries set up a national, international or hybrid tribunal to try and punish the former regimes and their supporters. The establishment of a permanent International Criminal Court (ICC) has reasserted the international community's commitment to the culmination of the international criminal justice system's evolution. By these means there are many mechanisms to address the legacy of the past. Lustration, a policy to ban or limit the political participation of previous regimes and their followers, are commonly used in the former Socialist countries in Eastern Europe.[3] This policy is sometimes accompanied by confiscating the economic assets or

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[1] Mary Albion, *"Project on Justice in Times of Transition: Report of the Project's Inaugural Meeting",* in *Transitional Justice; How Emerging Democracies Reckon with Former Regimes, Vol. 1; General Consideration*, ed. Neil J. Kritz, Institute of Peace Studies, Washington DC, 1995, p.44.
[2] *Ibid,* at p. 45.
[3] Jon Elster, *Closing the Books; Transitional Justice in Historical Perspective*, Cambridge University Press, Cambridge, 2004, pp. 66-70.

properties of the deposed regimes. Meanwhile, truth commissions are currently the most popular body to address past human rights violations. Up until now these officials, temporary and non-judicial fact-finding bodies have been created in 28 countries around the world, including the bilateral Commission for Truth and Friendship of Indonesia and Timor-Leste.[4] Although this commission can be applied to complement judicial investigations, most of them were set up as an alternative criminal justice system. Amnesty or official pardon is granted to the perpetrators as an incentive and trade-off for their acknowledgment of past abuses, confession or cooperation in the truth seeking process. For the victims or their relatives, this commission usually recommends that the state repair or compensate their loss. In such cases, this mechanism creates controversy and debate among human rights scholars and activists on the question of how to deal with impunity. However, they do agree that something must be done and that effective protection of human rights in the future relies on how a society manages to correct past wrongs.

Many examples from post authoritarian society demonstrate that dealing with transitional political circumstances is a recent area of human rights practice that creates some complex ethical, legal and practical problems.[5] Legalist human rights perspectives and human rights activists advocate for no amnesty and endorse prosecution for the wrongdoers. They believe that prosecution and punishment have a deterrent effect to prevent future repetition of violations. Accordingly, the failure to prosecute will act to undermine an important principle of democratic society, that of rule of law. Therefore, punishing wrongdoers of past atrocities can function not only as a symbolic divergence from the previous system, but also as a confirmation of devotion to new democratic values.[6] Their standpoint is also justified by the recent development of international human rights laws which disallow amnesty for certain human rights violations.

On the other hand, there is a pragmatic political view which promotes a more conciliatory approach based on prudent tactical consideration. This perspective challenges the effectiveness of prosecution and punishment and considers it merely as legal justice. This

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[4] Amnesty International, *Truth, Justice and Reparation; Establishing an Effective Truth Commission*, London, 2007, AI Index: POL 30/009/2007, p. 1.

[5] Jose Zalaquett, "*Confronting Human Rigths Violations Committed by Former Governments: Principles Applicable and Political Constraints",* in *Transitional Justice; How Emerging Democracies Reckon with Former Regimes, Vol. 1; General Consideration*, ed. Neil J. Kritz, Institute of Peace Studies, Washington DC, 1995, p. 3.

[6] Jamal Benomar, "*Justice after Transitions*", in *Transitional Justice; How Emerging Democracies Reckon with Former Regimes, Vol. 1; General Consideration*, ed. Neil J. Kritz, Institute of Peace Studies, Washington DC, 1995, p. 33.

camp argues that most of the recent methods of transitional politics do not produce a new strong democratic system. The new governments are not completely disassociated from their previous authoritarian regimes and in many cases; the perpetrators of human rights abuses contribute significantly in the transitional process. Thus, the degree of success and stability of a fragile democracy in transition relies upon many negotiations and compromises between the former opposition forces, who become the new regime, and moderate factions within the past regimes in order to pursue a political justice. One of the best ways forward in these negotiations is to give amnesty for the perpetrators in order to secure national or international reconciliation.[7]

A tricky dilemma occurs with the question of accountability. This poses the risk of causing the downfall of a new fragile democracy by allowing the perpetrators, mainly from the military forces, to be untouchable to prosecution for their heinous crimes. This seems morally unbearable; yet it also appears unreasonable to insist that an elected civilian government should commit blunders by provoking its armed forces.[8] The Argentinean experience under Alfonsin's administration could be the best example. Alfonsin's decision to prosecute many high ranking military officials, who were involved in past enforced disappearances, led the military to revolt against his government a total of three times. In response, Alfonsin was forced to limit the scope of the prosecutions in order to avoid political turbulence. This move was a serious error and encouraged the military forces to make further demands. Subsequently, the following president Menem issued a general amnesty for the perpetrators, except five former military junta leaders.

This book will examine the problems of transitional justice in the human rights' universe using the example of the Commission of Truth and Friendship (CTF) of Indonesia and Timor-Leste. The CTF is the first truth commission established between two governments; the former is the ex-colonialist regime and serves as the perpetrators, while the latter is the former colony and was subjected to massive human rights abuses for a long period. There are three primary sources used in this book: first, the CTF's Terms of Reference; second, some of the hearing processes of the CTF; and third, the final report of the Commission.

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[7] Tom Hadden, *"Human Rights and Conflict Resolution"*, in *Judges, Transition and Human Rights*, eds. John Morison, Kieran McEvoy and Gordon Anthony, Oxford University Press, Oxford, 2007, p. 167.

[8] Aryeh Neier, *"What Should be Done about the Guilty?"*, in *Transitional Justice; How Emerging Democracies Reckon with Former Regimes, Vol. 1; General Consideration*, ed. Neil J. Kritz, Institute of Peace Studies, Washington DC, 1995, p. 179.

TRANSITIONAL JUSTICE IN INDONESIA AND TIMOR-LESTE AND THE BACKGROUND OF THE ESTABLISHMENT OF

THE COMMISSION FOR TRUTH AND FRIENDSHIP

1. The Dynamic of Transitional Justice in Indonesia Post Soeharto's Regime

The separation line that detaches the authoritarian militaristic system with the relative democratic civilian regime began after the resignation of ex-president Soeharto in May 1998. During 32 years of Soeharto's administration, which is known as the New Order era, gross human rights' violations were committed regularly and systematically as disciplinary measure were used to control and discipline society.[9] All civil society organizations and political parties were co-opted by the state, leaving a limited space for the political opposition.[10] It was also during Soeharto's reign that Indonesian military forces invaded East Timor in late 1975 with the supports from US, Australian and British governments.[11] Although the New Order Regime was supported by the western capitalist governments, the Indonesian economy was state run which resulted in an enormous corrupt, monopolistic practices and high levels of natural resources exploitation. Following the Asian's financial crisis in 1997, Soeharto's regime suddenly became fragile due to his determination to preserve the high cost economic policies which he had put in place. Soeharto's failure to tackle the economic crisis stimulated political radicalization in parts of Indonesian society led by the sporadic student protests and political frictions within his institutional power. Soon, Soeharto's removal from office became inevitable; the demand came from many sides not only from the domestic popular struggle but also from Soeharto's foreign allies. Eventually, Soeharto resigned from his post and handed power over to his vice, Habibie after a series of social riots and massive human rights abuses in several big cities in Indonesia.

However, it is important to note that the political transition in Indonesia, which is known popularly as 'Reformasi' (reform), heavily being contributed by the regional economic crisis and political negotiation and conflict of the fractured elites, such as the military commanders, bureaucracies, members of the ruling party, traditionalist leaders of religious organizations and few new opposition leaders. These political elites soon became the new key players of the following regimes. Furthermore, this elite-led political transition placed political

[9] International Crisis Group (ICG), *Indonesia: Impunity Versus Accountability For Gross Human Rights Violations*, Jakarta/Brussel, 2001, ICG Asia Report No. 12, p. 1.
[10] Philip J. Eldridge, *The Politics of Human Rights in Southeast Asia,* Routledge, London, 2002, p. 118.
[11] Geoffrey Robertson QC, *Crimes Against Humanity; The Struggle for Global Justice*, *Third Edition*, Penguin Books, London, 2006, p. 493. Marc Pilisuk, *Toward a Psychosocial Theory of Military and Economic Violence in the Era of Globalization,* Journal of Social Issues, Vol. 62, No. 1, 2006, p. 53.

constraints and obstacles for the actual protection of human rights. In particular it became difficult to investigate and prosecute past human rights abuses.

Jose Zalaquett drew some illustration of the typology of political constraints faced by the new transitional democracy based on comparative countries' experiences.[12] Firstly, there are no significant political constraints for a new democratic regime. In this situation, the new government has achieved almost a complete victory against the old regime and does not face a significant threat from an armed conflict. The prosecution and punishment for the past wrongdoers can be carried out effectively based on legitimate human rights standards.[13] However, this type also has a negative aspect which can tend to produce the victors' justice ignoring even the principle of due process of law. Many experts have commented on the biased trials in the Nuremberg and Tokyo Tribunal after the end of World War II.[14] Secondly, the political transition are heading to a situation of unresolved armed conflict or deepening social, ethnic, ideology or religious divisions. This type of transition produced a weak government while strengthened and radicalized the political opposition in the form of armed struggle. Human rights abuses are often committed by both conflicting parties. Thus, the investigation and prosecution of past human rights violations would be very difficult and could endanger national reconciliation and pacification in the short term. Human rights abuses are often committed by both conflicting parties.[15] Thirdly, this type of political transition is located between the two types. There are some features describing this type of change; the previous regime has lost their legitimacy but still maintains its control of armed forces and political transition is carried out by a gradual changes.[16] In this situation the defeated forces still have a significant political bargain position and can negotiate with the new actors under their own terms. The human rights' agenda only takes place in the form of normative and institutional reform. However, in this type it is possible that changes actually are the 'postponed transitional justice'.[17] In some experiences such as in Argentina and Chile, the prosecution against the past wrongdoers were reopened after further progressive political changes. The

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[12] Jose Zalaquett, "*Confronting Human Rigths Violations Committed by Former Governments: Principles Applicable and Political Constraints",* in *Transitional Justice; How Emerging Democracies Reckon with Former Regimes, Vol. 1; General Consideration*, ed. Neil J. Kritz, Institute of Peace Studies, Washington DC, 1995, pp. 18-19.
[13] *Ibid,* at p. 18.
[14] David P. Forsythe, *Human Rights in International Relations, Second Edition*, Cambridge University Press, Cambridge, 2006, p. 91.
[15] Jose Zalaquett, supra note 12, at p. 19.
[16] Jose Zalaquett, supra note 12, at p. 18-19.
[17] Jon Elster, *Closing the Books; Transitional Justice in Historical Perspective,* Cambridge University Press, Cambridge, 2004, p. 76.

last type of Zalaquet's model is perhaps the best explanation to illustrate political transition in Indonesia after the collapse of military regime which is known as the New Order.

After Soeharto's resignation, all the following regimes' human rights policies gave emphasis gradually to the legal reforms and the reorganization of state institutions. Many international human rights standards, which were disregarded by Soeharto's regime, were included in the amendment of the constitution. Following that, the parliament also passed two legislations on human rights; the People Assembly Decree (TAP MPR) XVII and Law No. 39/1999. The latter also served as the legal basis for the creation of the new National Human Rights Commission (Komnas HAM). The subsequent governments have also ratified core international human rights instruments.[18] Additionally they revoked many repressive regulations which were used to contain civil and political rights. Journalists began to enjoy the freedom of the press, people could form independent associations or unions and the multi-party system was restored. However the degree of these freedoms varies depending on the region in Indonesia. Outside the main island, Java, the level of freedom and democratic space is lower and state sponsored violence is still taking place regularly, especially in the conflict zones. Furthermore, despite civil liberties being improved, the key actors who hold official positions in the executive, legislative and judiciary are still dominated by conventional actors such as members of the previous ruling party, *Golkar*. The initial challenge to carry out lustration policy upon this party was unsuccessful.

In terms of key institutional reforms, the new regimes also produced some important improvements. In the security sector reform, the government reduced the military's role in politics. The police were detached from the military force and were turned into a civilian body. In 2004, the military had to withdraw their free seats in the parliament. In the same year, the parliaments enacted the law that prohibited the military to engage in business activity and to receive funds outside of the state budget. The military businesses were one of the important factors that generated human rights abuses, especially in the resource rich conflict zones in Aceh and West Papua.[19] The other ongoing reform of the military is to integrate military tribunal under the civilian court jurisdiction for any non-military crimes. These steps are part of a wider agenda to move the military under civilian control. However, the military still hold

[18] Currently Indonesia is a state party to the International Convention on Civil and Political Rigths, International Covenant on Economic, Social and Cultural Rights, International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination against Women, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Rights of the Child.

[19] Human Rights Watch, *Too High a Price; The Human Rights Cost of the Indonesian Military's Economic Activity*, 2006, Vol. 18, No. 5(C), p. 9.

significant power over the civilian actors by maintaining their security role in conflict zones and placing many retired commanders in political parties.

The other important structural reform was regional devolution and equitable allocation of economic resources as a response to the centralized state during the New Order. This regional autonomy policy was also used to prevent regional rebellion. Moreover, in Aceh and Papua, the regions that suffered from long period of human rights abuses and separatist threat, they apply a more autonomic policy compared to the rest Indonesia's provinces. However, this regional devolution policy also caused some negative impacts for the human rights agenda. Some of the regions apply many regulations based on religious norms which endanger the rights of minority people and women as well. This regional autonomy policy also provoked other communal sentiment in the form of ethnic conflict.

After the political change took place in 1998, the incoming regimes soon realized the question of settling past abuses had to be addressed as well. In terms of legislation, the upper house of the parliament (MPR) passed two decrees specifically dealing with the legacy of the New Order. The MPR's degree was the second highest legislation in Indonesia below the constitution. Firstly, in 1999 the first democratically elected parliament, the MPR, enacted TAP MPR IV regarding the national policy guideline for 1999-2004 with a special affirmation to address the problem of past abuses in some conflict areas. In this decree, the MPR stated that past human rights violations in Aceh, West Papua and Maluku would be resolved by judicial investigation and impartial trial. Secondly, to address under past human rights violations under the New Order, the MPR also passed TAP MPR V/2000 regarding the Strengthening of National Unity and Unification which ordered an establishment of "a National Truth and Reconciliation Commission with the task to uphold the truth by disclosing abuses of power and past violations of human rights pursuant to applicable laws and implement reconciliation within the perspective of a common interest as a people." Later on in 2004, the parliament passed a law on the establishment of a Truth and Reconciliation Commission. However, this law was cancelled by the Constitutional Court in 2006. Furthermore, to avoid the establishment of an international tribunal for atrocities which happened in East Timor during the referendum, the Indonesian government and parliament set up a special human rights court mechanism for crimes under the category of gross violation of human rights. However, this special tribunal mechanism has failed to put any perpetrators behind the bars.

Unfortunately, these legislation and institutional reform could not guarantee the actual protection of human rights. The government not only failed to credibly address the gross human rights violations which took place during the New Order, but also failed to prevent the repetition of massive human rights abuses, both from the military operations and grass-root horizontal violence. The failure to deliver justice took place in several circumstances depending on the degree of international or domestic political pressure on the government. Some high profiles human rights abuses in East Timor, West Papua, and Tanjung Priok case -an extrajudicial and summary killing case against a Muslim community in Jakarta in 1984- were carried out by Ad Hoc or Permanent Human Rights Court, but, no one was convicted. For lower profile cases, the judicial process was stopped in the prosecutor's office. Moreover, the worst thing is that until now there has been no judicial investigation at all for the massacre of almost a million alleged communist party members in 1965-1966, although it was considered as one of the worst genocides in modern history.[20] The demand to try Soeharto as the most responsible person for human rights abuses during the New Order regime was also never accepted by any subsequent administrations. In Aceh, years of armed conflict only ended because of the catastrophe caused by the tsunami and the international sponsored peace. In Papua, violence is still endemic and a big number of people became political prisoners because they were exercising their freedom of expression.[21] Religious and ethnic conflicts took place in Maluku, Kalimantan and Central Sulawesi causing thousands of casualties.

An other important change was Indonesian's role in regional and international level, particularly after agreeing to accept the independence of Timor-Leste in 1999. To recover its human rights reputation in the international community, Indonesia submitted for membership to the UN Commission on Human Rights and its successor body, the Human Rights Council. Currently, Indonesia is also a non-permanent member of the UN Security Council. It proved that at the level of the international diplomatic arena, the Indonesian government managed to gather international supports from other countries, particularly from Asian and Islamic countries. Thus, it is very difficult to ask the international diplomatic community or

[20] Robert Cribb, *"The Indonesian Massacres",* in *Century of Genocide; Eyewitness Accounts and Critical View*, eds, Samuel Totten, William S. Parsons and Israel W. Charny, Garland Publishing, New York & London, 1997, pp. 245.
[21] Human Rights Watch, *Out of Sight; Endemic Abuse and Impunity in Papua's Central Highlands*, 2007, Vol. 19, No. 10(C).

mechanism to impose an international tribunal, especially as Indonesia, as the largest Islamic country in the world, and has joined the US led "War on Terror" project .[22]

2. The Transition in the Emerging Timor-Leste

The problems of transitional justice in Timor-Leste have to be understood by several constraints, including both domestic and external factors. The main perpetrators of the past atrocities were almost beyond their government's jurisdiction and part of the powerful political powers in Indonesia, which is a very influential country in the region. This country also has to determine the most important policy to develop the new nationhood out of the massive destruction, from rebuilding the physical infrastructure to maintaining peace and order. The earlier transition in Timor-Leste was also relying on the international involvement in the form of the UN Transitional Administration for East Timor (UNTAET) which was acting as an interim executive and legislative body until May 20, 2002. At the domestic level, the problem of addressing justice must be superseded by the recent violent internal conflict.

In January 1999, the new Indonesian President after the New Order era, B.J. Habibie, made an unexpected controversial decision to reject the interim autonomy proposal for East Timor as the pre-condition for the future independence which was proposed by East Timorese leaders. Instead, the President announced that he would allow the East Timorese to decide between autonomy under Indonesian sovereignty and separation as a new country.[23] This decision would eventually end the illegal Indonesian occupation on East Timor's territory which had lasted for almost 23 years during which allegedly up to a quarter of the 1975 East Timorese population, numbered about 200,000 inhabitants, is thought to have been killed.[24] The United Nations never recognised 'the integration' East Timor into Indonesian territory and declared it as a "non-self-governing territory" under Chapter XI of the UN Charter. The UN Security Council had also repeatedly called for the withdrawal of Indonesian troops from East Timor's territory.[25]

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[22] International Crisis Group (ICG), *Indonesia: Implications on the Timor Trials*, Jakarta/Brussel, 2002, ICG Asia Report No. 16, p. 4.
[23] Philip J. Eldridge, *supra* note 10, at p. 151.
[24] James Dunn, *"Genocide in East Timor"*, in *Century of Genocide; Eyewitness Accounts and Critical View*, eds, Samuel Totten, William S. Parsons and Israel W. Charny, Garland Publishing, New York & London, 1997, pp. 273.
[25] Geoffrey Robinson, *East Timor 1999; Crimes Against Humanity*, Annex to Chega the CAVR Report, Los Angeles, 2003, http://www.cavr-timorleste.org/chegaFiles/finalReportEng/12-Annexe1-East-Timor-1999-GeoffreyRobinson.pdf, p. 18.

On May 1999, under a tripartite agreement signed by Indonesia, Portugal, and the UN, there would be a referendum to determine the people of East Timor's choice under the auspice of the UN. The agreement also stated that the Indonesian security forces, which at that time still consist of the military and police force, would bear the responsibility to maintain law and order before and during the ballot.[26] Despite promising its commitment under the agreement, the Indonesia security forces with the pro-autonomy militias began to intimidate the people and commit violent acts. The referendum outcome in which almost 80 percent of the East Timorese chose independence, soon lead the pro-integration militias backed by the Indonesian security forces, perpetrating more devastating violence, including killing foreign journalists, international humanitarian workers and UN personnel. Furthermore, the militias and Indonesian security forces developed a strategy to remove the people from the territory, which was estimated up be home to about 300,000 people, and provoking the pro-independence guerrilla group to retaliate.[27] It was estimated that the campaign of violence ensued throughout the districts of East Timor had resulted in more than 1,400 arbitrary and summary killings, as well as torture, acts of rape, pillaging, arson and property destruction.[28]

A series of UN mechanisms were established to respond the outbreak of violence in the East Timor. In September 1999, the UN Commission on Human Rights held a rare special session to resolve the East Timor crisis. This lead to the establishment of an international inquiry team. The Commission also sent three special rapporteurs to conduct a country inquiry. Subsequently, these teams reported similar findings in their reports that the acts of violence were systematic and widespread and constituted a pattern of gross violations of human rights and breaches of humanitarian law.[29] They recommended the UN Security Council to establish an international tribunal to bring the perpetrators to justice considering that the Indonesian government was unwilling to punish the perpetrators and did not have a capacity to deal with the most serious crime under the international law.

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[26] Amnesty International, *Indonesia (East Timor): Seize the Moment*, London, 1999, AI Index: 21/49/99, p. 5.
[27] Philip J. Eldridge, supra note 10, at pp. 152-153.
[28] Amnesty International and Judicial Monitoring System Programme (JSMP), *Justice for Timor-Leste: The Way Forward,* London, 2004, AI Index: ASA 21/006/2004, pp. 3-4.
[29] Report on the joint mission to East Timor undertaken by the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on the question of torture and the Special Rapporteur on violence against women, its causes and consequences. Situation of human rights in East Timor. UN Doc. A/54/660, 10 December 1999, para. 71. Report of the International Commission of Inquiry on East Timor to the Secretary-General, January 2000. UN Doc. A/54/726 and S/2000/59, 31 January 2000.

However, the suggestion to establish an international tribunal for East Timor similar to the former Yugoslavia and Rwanda was never approved by the UN Security Council. The UN Security Council, instead, accepted the Indonesian proposal to try the perpetrators in their own national judicial mechanism. There were several speculations surrounding the UN Security Council's decision. First, there were some rejections within the UN that an international tribunal, such as the ICTY and ICTR, was very expensive.[30] Second, the assurances from Indonesia were considered reasonable because there were some positive improvement in the Indonesian transition to democracy. In October 1999, the upper house of parliament appointed a new President, Abdurrahman Wahid, who was well known as a champion of democracy and accommodative to human rights discourse. President Wahid himself made an authentic improvement by establishing an Indonesian independent inquiry team led by the National Human Rights Commission. Later on this team produced a credible report, with similar conclusion and finding to the other UN teams' reports. An international trial for the Indonesian military commanders was thought to be unproductive for the young fragile Indonesian democracy.[31] However, after President Wahid was forced to step down from office by the parliament, the course of the human rights agenda in Indonesia drastically change, including the justice agenda for the East Timor's issue. Third, the Indonesian government had begun to lobby some of the UN Security Council's members, especially China, to block any resolution regarding the international tribunal.[32]

The transitional UN administration in Timor-Leste, UNTAET, also established two mechanisms to address past human rights violence. Firstly, in 2000 the UNTAET established Special Panels for Serious Crime (SPSC) to try "serious crime" similar to the category in the Rome Statue of International Criminal Court (ICC), such as genocide, war crimes and crimes against humanity committed between January 1 and October 25, 1999. In addition to this, the Serious Crimes Unit (SPU) was set up to investigate and prosecute the alleged perpetrators. Technically this judicial mechanism was a hybrid tribunal due to the combination of international and national characteristic, including the set of laws and judiciary's officials.[33] Because the most important perpetrators were outside its jurisdiction, the SPSC could only manage to try and punish the 'small fish'. The most fundamental obstacle to this was the Indonesia's failure to cooperate in the process, despite the fact that there was a MOU

[30] Caitlin Reiger, *"Hybrid Attempts at Accountability for Serious Crimes in Timor Leste"*, in *Transitional Justice in the Twenty-First Century; Beyond Truth versus Justice*, eds. Naomi Roht-Arriaza and Javier Mariezcurrena, Cambridge University Press, Cambridge, 2006, p. 146.
[31] Megan Hirst and Howard Varney, *Justice Abandoned?An Assessment of the Serious Crimes Process in East Timor,* ICTJ Occasional Paper Series (June 2005), p. 4.
[32] ICG, supra note 22, at p.4.
[33] Caitlin Reiger, supra note 30, at p. 144.

between Indonesia and UNTAET. For instance, the SCU asked Interpol to issue warrants for 304 people thought to be in Indonesia. Moreover, the SPSC also suffered a lack of support from the Timor-Leste government and the UN Security Council regarding the request to extradite the perpetrators.[34] No one has been extradited to Dili for the prosecution. The government of Timor-Leste always considered the SPSC mechanism as its own domestic judicial system.

Secondly, in 2001 the UNTAET also created the Commission for Reception, Truth, and Reconciliation (in Portuguese, the *Comissão de Acolhimento, Verdade, e Reconciliacao*, or CAVR) for truth seeking, granting amnesty and reconciliation. These two transitional justice mechanisms were working complementarily. The CAVR could not grant amnesty for serious crimes and would refer them to the SCU. In reality, both mechanisms didn't integrate well and they created an "impunity gap".[35] Nonetheless, the scope of the CAVR covered all human rights violations between 1974 and October 1999. It means the CAVR would investigate all abuses as a result of internal conflict, Indonesian's occupation and the surrounding period of the referendum. During its working period, between early 2002 and October 2005, the CAVR managed to collect almost 8,000 statements and to conduct more than 1,000 interviews with many public hearings with an over 2,500 pages final report, *Chega!* (Portuguese for no more, stop or enough). Unfortunately, some of its recommendations were ignored by the government and parliament, including the recommendation to ask the international community to set up an international tribunal should the justice process fail in domestic level and the effort to bring reconciliation to the Timorese political groups. The then President Xanana Gusmao rejected this recommendation with an excuse that it would endanger the democratic consolidation in both Timor-Leste and Indonesia.The Commission also noted that "the deep divisions in the society from 25 years of conflict which entered East Timorese political life in 1975 remain a potential stumbling block to the development of a sustainable culture of democracy and peace in Timor-Leste."[36] Shortly, the fear of repeating the internal conflict in Timor-Leste became real and it turned out to be the biggest political constraint that affects the course of transitional justice in Timor-Leste.

The violent internal conflict was triggered by a dispute within the Timor-Leste military forces and between military and police forces. Between April and June 2006, they were fighting each other in the public space of Dili in which 38 people were killed, more than 100 buildings

[34] Megan Hirst and Howard Varney, supra note 31, at p. 25.
[35] Megan Hirst and Howard Varney, supra note 31, at p. 14.
[36] *Chega!* CAVR Report, Part 11: Recommendation, 2005, http://www.cavr-timorleste.org/chegaFiles/finalReportEng/11-Recommendations.pdf, p. 30.

were destroyed and an estimated 150,000 people fled the city.[37] The crisis had just ceased after the arrival of international peacekeeping force. However, the crisis was generated deeply from the tension among the political elites, including the two most important political people in Timor-Leste; the president and prime minister.[38] The crises caused the state institution to became almost defunct and left the law and order in the hands of international forces again. The crisis still continued as late as February 2008 when the new President Jose Ramos-Horta was shot in a failed assassination attempt.

3. The Relationship between the Two Governments and the Establishment of the Commission of Truth and Friendship

After the independence of the Timor-Leste, there was no enthusiasm from the Timorese government to pursue justice for the 1999 atrocities. Indonesia and Timor-Leste have mostly managed to set up good bilateral relations. The Timor-Leste government was very aware that burying the past was a key to establishing new relations between the two countries and in the region.. The past human rights abuses are always sensitive for the majority of Indonesian people and would provoke anger from many political mainstream groups in Indonesia, including both the nationalist or Islamic groups. Moreover, at the level of international diplomacy, Timor-Leste needed Indonesia's endorsement to joint ASEAN, a southeast regional supra-state body, whereas Indonesia needed to improve their international reputation to be active in many international organizations and to lobby the US government to lift the ban on military cooperation.[39] When facing the past human rights issue of East Timor 1999, both governments took a similar position.

There were several episodes regarding the past human rights violations that were misunderstood by some Indonesian groups, although most of them were not caused by the Timor-Leste government's plot. In February 2003, the SCU issued an indictment on General Wiranto who was regarded as the mastermind of the 1999 atrocities. This move caused a strong reaction from the Indonesian government. It started to cool down after the Timor-Leste government made a statement that the indictment was not from their side, but from the UN

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[37] International Crisis Group (ICG), *Timor-Leste: Security Sector Reform,* Jakarta/Brussel, 2008, ICG Asia Report No. 143, p. 2.
[38] International Crisis Group (ICG), *Resolving Timor-Leste's Crisis,* Jakarta/Brussel, 2006, ICG Asia Report No. 120, p. 13.
[39] Megan Hirst, *Too Much Friendship, Too Little Truth; Monitoring Report on the Commission of Truth and Friendship in Indonesia and Timor-Leste,* 2008, ICTJ Report, p. 12.

office.[40] The UN denied that the warrant came from them.[41] The following year, Timor-Leste President Xanana Gusmao, who was imprisoned for almost 7 years in Jakarta, came to Indonesia and met the then Indonesian President Megawati and General Wiranto to symbolize an act of personal reconciliation and to reassert his will to settle the history through a non-judicial approach. [42] The meeting between the two presidents was the first time that both governments started a plan to set up a bilateral non-judicial reconciliatory mechanism and to send its report to the UN.[43] It was latter known as the Commission of Truth and Friendship (CTF) and the first ever truth and reconciliation commission established by two governments.

The good bilateral relationship continued during the administration of the new Indonesian President Susilo Bambang Yudhoyono who is a retired military general and had served in East Timor in 1976. A short-lived tension came up after President Xanana delivered the CAVR Report, *Chega!*, which was mandated by the UNTAET's resolution to the UN Secretary General in January 2006. Indonesia under the new administration of President Susilo Bambang Yudhoyono which refused to attend the official scheduled meeting with President Xanana in the same month. The new Indonesian government misunderstood the action and intention of President Xanana and thought it was a breach of the previous bilateral agreement. At that time, Indonesia and Timor-Leste just had a political tension with regard to some borders' incidents.[44] However it was ended when they met in February 2006 in Bali, where it became headquarter of the CTF, to clarify the issue and start to establish the CTF.[45] Both governments were determined to propose this mechanism to the UN as the final settlement for the past problems and refused any alternative avenue, particularly the recommendations made by the UN Commission of Expert (COE). Finally, the CTF was established in August 2005 in Bali and consisted of 10 commissioners, 5 from each country.

It is apparent that the main reason of the establishment of CTF was to avoid any possibility to institute an international tribunal for the 1999 East Timor atrocities. To emphasize that indication, in the CTF's terms of reference there was a provision that empowered this

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[40] *E. Timor Denies Indicting RI Generals*, *The Jakarta Post*, February 28, 2003.
[41] *Timor-Leste, Not UN, Indicts Indonesian General for War Crimes,* United Nations News Center, February 26, 2003.
[42] Megan Hirst and Howard Varney, supra note 22, at p. 25.
[43] Megan Hirst, supra note 30, at p. 11.
[44] International Crisis Group (ICG), *Managing Tensions on the Timor-Leste/Indonesia Border*, Jakarta/Brussel, 2006, Asia Briefing No. 50, p. 13.
[45] *SBY Pahami Laporan Xanana ke Sekjen PBB (SBY Understood Xanana's Report to the UN Secretary General) , Media Indonesia*, February 18, 2006. *Dua Sahabat (Two Friends), Koran Tempo*, February 18, 2006.

commission to recommend amnesties and its process would not lead to individual prosecution.

In 2005, under the initiative of Kofi Annan, the then UN Secretary General, a Commission of Experts was established to review the Ad Hoc Human Rights Courts trials in Jakarta and the SPSC in Dili. It consisted of three Asians experts of international human rights law. When the UN Secretary General accepted the Indonesian proposal to try the perpetrators by its own methods, the UN reiterated that it should be in line with the international human rights standards. The COE report would be considered by the UN Security Council to pass a resolution for the issue of justice and accountability for the 1999 atrocities through the Secretary General. The COE mandate was to "recommend measures to ensure accountability, reconciliation and justice for victims and consider ways its analysis could assist the Commission for Truth and Friendship."[46] With regard to last point on the CTF, the COE tried to advise both governments not to recommend any amnesties for the perpetrators. Moreover, the COE report reiterated that the SPSC was unable to "achieved full accountability of those who bear the greatest responsibility" and the Ad Hoc Human Rights Court was unwilling to deliver the justice for the victims and the people of Timor-Leste.[47] Moreover, the COE recommended that the UN to establish an international tribunal if genuine domestic remedies were not implemented within six months.[48]

Shortly, this recommendation was rejected by Timor Leste, both by the president and prime minister. In his letter to the UN Secretary General, the then President Xanana and Prime Minister Mari Alkatiri explained his refusal to accept an international tribunal to pursue justice and proposed their solution through the CTF. They both quoted Zalaquett' proposition that "the emphasis in the duty to prosecute and punish those guilty of human rights abuses stems from a post-World War II model for prosecuting war criminals does not adequately deal with perpetrators who still wield considerable power."[49] They were disappointed that the COE failed to provide a "legally sound and feasible' recommendations for the settlement of past abuses. Moreover, they offered the CTF as the alternative settlement which was a "testament to the democratic and political will" of Indonesia and Timor-Leste for a

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[46] *Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999*, 26 May 2005, UN Doc. S/2005/458, p. 10.
[47] *Ibid*, at pp. 5-6.
[48] *Ibid*, at p. 8.
[49] *Letter dated 22 June 2005 from the President of Timor-Leste to the Secretary-General* and *Letter dated 22 June 2005 from the Prime Minister of Timor-Leste to the Secretary-General*, UN Doc. S/2005/459, pp. 3 and 8.

progressive reform and democratic consolidation.[50] Latter on, while considering the COE report and views from Indonesia and Timor-Leste, the UN Security Council stated that they requested the Secretary General to create “a practically feasible approach”. It seems that the UN Security Council was not interested to establish any international tribunal in the near future, especially after Indonesia became its non-permanent member in 2006.[51]

It is clear that the problem how to settle the 1999 East Timor atrocities represented the dilemma of transitional justice. There are too many complex political constraints that have contributed to the dilemma. The incapacity of the following regimes in East Timor combined with the persistent culture of impunity in Indonesia and the UN’s lack of support.

[50] *Ibid,* at p. 6

[51] *Letter dated 24 June 2005 from the Secretary-General addressed to the President of the Security Council,* July 15, 2005, UN Doc. S/2005/458.

TRUTH SEEKING PROCESS IN THE COMMISSION OF TRUTH AND FRIENDSHIP

1. Right to the Truth and Truth Commission

Truth seeking in transitional justice is not too controversial, compared to concepts of justice. There is broad agreement that we cannot understand present problems without understanding the past, and that it is not morally acceptable to forget the past. Coming to terms with the past becomes an urgent and imperative subject when regimes change after periods of state terror and repression.[52] In almost every authoritarian experience, the *ancien regime* constructed its own version of 'truth' to justify and legitimise their power. This 'official denial' is established publicly and collectively, and is highly organised through the massive resources of the modern state.[53] We can evaluate the course of transitional justice by the degree of transformation from the predecessor's account of the truth to that of new regime. The truth, therefore, serves as the gate or historical discontinuity between the evil past and the promising future. The truth can act as a judge to distinguish between the perpetrators and the victims, between the evil acts and the good deeds. Consequently, historical truth is itself justice.[54] Historical truth can also become a teacher that illuminates a society, catalysing it to reorganise itself for the future, encouraging subsequent regimes to restructure the society's power structure. Hence, truth may be considered as the primary foundation of accountability. By revealing the truth, people can come to a decision as to how to respond to perpetrators, victims, and their previous social, political or economic order. This philosophy is formally recognised by the Indonesian and Timor-Leste's controversial Commission of Truth and Friendship (CTF). The CTF Commissioners titled their report 'Per Memoriam ad Spem', which in Latin means 'through memory towards hope.'

In recent years, the Office of the High Commissioner for Human Rights has produced several studies on the right to the truth about gross human rights violations and serious violations of

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[52] Stanley Cohen, *States of Denial; Knowing about Atrocities and Suffering,* Polity, Cambridge, 2001, p. 13.
[53] *Ibid, at* p. 10.
[54] Ruti G. Teitel, *Transitional Justice*, Oxford University Press, Oxford, 2000, p. 69.

human rights law.[55] These studies are based on interpretations of international humanitarian and human rights law, legal precedents and best practices of various national systems. For the first time, the right to the truth is explicitly recognized as an autonomous right in the recent International Convention for the Protection of All Persons from Enforced Disappearance, which was adopted by the General Assembly's resolution 61/177 in December 2006, but has not yet come into force. Article 24, paragraph 2 of the convention stipulates that 'each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.'[56] This right is also mentioned in article 32 of the Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts. These legal frameworks suggest a recognized relationship between the right to the truth and the problem of enforced disappearance. Indeed, 'truth commissions' emerged in response to the problem of the disappearances carried out by the military regimes in Latin America during the war against 'communist terrorists' in the 1970s. The criminal justice system would have been insufficient for dealing with this type of human rights abuse because the perpetrators vanished the victims, witnesses and evidence.[57]

However, all of these studies indicate that the right to the truth must be closely linked to the right to justice and the right to reparation. These three rights constitute the right to effective remedy and the failure to implement all of them complementarily would be considered to be impunity.[58] Truth commissions are therefore a prelude to justice and should not be regarded as an alternative to a criminal justice system. However, in practice truth commissions have often been used as a trade-off to justice, as was the case in South Africa, Chile, El Salvador and Guatemala.[59] This is also the case in the CTF created by Indonesia and Timor-Leste. The CTF's terms of reference empowered the commission to recommend amnesty, and barred the process from leading to individual prosecutions. This provision subsequently sparked many criticisms from human rights groups that accused both governments of

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[55] Report of the Office of the High Commissioner for Human Rights, *Right to the Truth; Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council",* 7 June 2007, UN Doc. A/HRC/5/7. Diane Orentlicher, Report of the independent expert to update the Set of principles to combat impunity; Updated Set of principles for the protection and promotion of human rights through action to combat impunity, 8 February 2005, E/CN.4/2005/102/Add.1.

[56] International Convention for the Protection of All Persons from Enforced Disappearance, General Assembly resolution 61/177, 13 December 2006.

[57] Ruti G. Teitel, supra note 54, at p. 78.

[58] A/HRC/5/7 supra note 55, at p. 4. Diane Orentlicher, supra note 55, at p. 7.

[59] Ruti G. Teitel, supra note 54, at p. 89.

sustaining impunity.[60] Because of this amnesty provision, the CTF was also not supported and recognized by the UN. In a press release, the UN Secretary General refused to authorise any UN staff to testify before the CTF, because according to United Nations' policy, the UN 'cannot endorse or condone amnesties for genocide, crimes against humanity, war crimes or gross violations of human rights, nor should it do anything that might foster them.'[61] Surprising many of it's critics, in its final report, the CTF decide not to recommend amnesty because it would not be 'in accordance with its goals of restoring human dignity, creating the foundation for reconciliation between the two countries, and ensuring the non-recurrence of violence within a framework guaranteed by the rule of law.'[62]

There is a consensus among scholars that truth commissions have several distinctive features.[63] First, they focus on the past. Second, the truth commission's role is to investigate a pattern of abuse that has political significance rather than a single isolated event. Usually the type of abuse under investigation is not an ordinary crime, but falls under the category of gross violation of human rights. Third, the commission is a temporary rather than permanent body, with tenure generally lasting less than three years. Fourth, the truth commission is an official body empowered by the state to obtain data, including the authority to summon people to testify. Fifth, usually a truth commission bears a legal mandate to establish an official truth. A truth commission therefore differs in character to a judicial investigation, which limits the truth for the purpose of a specific trial. A truth commission could reveal the underlying causes of or reasons behind human rights abuses, and provide a deeper explanation of the multiple dimensions that contributed to the past injustice such as culture, unequal power relations, or socio-economic stratification.[64]

The CTF is similar in character to the above definition of a truth commission. However, the CTF was criticised for not complying with the international standard of a truth commission. First, the political mandate of the CTF did not come from a proper legislative procedure in both countries. According to the constitutions of both Indonesia and Timor-Leste, any

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[60] International Coalition Urges UN to Be Active for Justice for East Timorese http://www.etan.org/news/2008/056moon.htm.

[61] Secretary-General Says UN Official Will Not Testify At Timor-Leste Commission, As Terms Of Reference Include Possible Amnesty For Human Rights Violations, SG/SM/11101, 26 July 2007, http://www.un.org/News/Press/docs/2007/sgsm11101.doc.htm.

[62] The Commission of Truth and Friendship, *Final Report of the Commission of Truth and Friendship(CTF) Indonesia-Timor-Leste,* July 2008, p. 291.

[63] Priscilla Hayner*, Unspeakable Truths. Confronting State Terror and Atrocity*, Routledge, New York and London, 2001, p. 14. Todd Landman, *Studying Human Rights, Routledge*, London and New York, 2006, p. 108.

[64] Todd Landman, supra note 63, at p. 109.

bilateral agreement should be approved by each country's parliament.[65] Although this did not become a significant problem in Indonesia, it meant that the CTF did not receive sufficient support from either country's civil society, especially from victims groups in Timor-Leste.[66] Second, although the terms of reference stated that the commission has a right to free access to all documents and information, the CTF did not have any power to enforce this right, or to impose penalties on persons who obstructed its work. It has been common internationally that a truth commission is equipped with legal power to access any information. However, in its final report, the CTF stated that the Commission had no access to the Indonesian military (TNI) documents requested.[67] Third, the mandate of the CTF limited the historical scope of its investigations so severely that it was not possible to 'reveal the factual truth of the nature, causes and the extent of reported violations of human rights that occurred in the period leading up to and immediately following the popular consultation in Timor Leste in August 1999.'[68] In its term of reference, the CTF stated that the 1999 human rights violations were 'residual problems of the past' and called for better 'bilateral relations both at the government and people to people levels' in the future.[69] It is true that the reconciliation between both governments and societies has to be built on common understanding about past problems, but the most important 'residual problems of the past' would certainly be the illegal Indonesian occupation between 1975 and 1999. The CTF's failure (and constitutional inability) to explore this period only strengthens the perception that the CTF was established merely to avoid a call for an international tribunal.

2. Maintaining Denial about the Indonesian Occupation

Stanley Cohen elaborates three forms of official denial that governments make in response to atrocities accusation.[70] First, 'literal denial' is the typical denial that occurs in most authoritarian and repressive regimes, which deny all allegations about human rights abuses. This denial occurrs when domestic accountability and external scrutiny are absent due to the governments total control of media and information. Deception and disinformation are the keywords for 'literal denial'. The enforced disappearances in Latin America and massacres in

[65] Megan Hirst, *Too Much Friendship, Too Little Truth; Monitoring Report on the Commission of Truth and Friendship in Indonesia and Timor-Leste,* 2008, ICTJ Report, p. 14-15.
[66] *Ibid*, at p. 13.
[67] The CTF Final Report, supra note 62, at p. 65.
[68] Term of Reference for The Commission of Truth and Friendship Establish by The Republic Indonesia and The Democratic of Timor –Leste, point 14 (a).
[69] *Ibid,* at point 7.
[70] Stanley Cohen, supra note 52, at p. 101-110.

East Timor by the Indonesians are among the exemplars of 'literal denial'.[71] Second, because of the difficulty for repressive regimes to sustain 'literal denial', they often choose another option, 'interpretive denial'. They admit certain facts about abuses, but produce alternative interpretations andeuphemistically rename atrocities. One example of 'interpretive denial' is the US government definition of torture used in the 'War on Terror'. According to them, the "severe pain" in the Convention against Torture definition must be "associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body function."[72] Third, the repressive regimes sometimes do not attempt to deny either the facts or the conventional interpretation of a fact, but justify it by political or utilitarian rationalisation. This 'implicatory denial' is commonly practiced by the governments who use excessive power during a state of emergency.

The dominant discourse in Indonesia holds that it was the East Timorese people's decision to integrate themselves into Indonesia in 1976.[73] In this version, the Indonesian military was there to save the population from a civil war between Fretelin and UDT and to pre-empt the communist threat in the region.[74] The enormous numbers of people killed during the invasion and the occupation, and the massive human rights abuses in East Timor more generally, are not recognised and considered "taboo."[75] The authoritarian military regime severely restricted access to East Timor strictly controlled the media. The Indonesian people were not even aware that the 'integration' of East Timor had never been recognised by the international community, or that between 1975 and 1980 200,000 out of 700,000 Timorese were killed either by war or starvation.[76] This extreme lack of awareness made advocacy for human rights in East Timor very difficult within Indonesia. East Timorese advocacy groups had a good network with international groups, but not with Indonesian groups.[77] Increasing the challenge, any Indonesian advocacy group that raised human rights abuses in East Timor could be considered a promoter of national disintegration.

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[71] *Ibid*, at p. 102

[72] Henry J. Steiner, Philip Alston, Ryan Goodman, *International Human Rights in Context; Law, Politics, Moral, Third Edition,* Oxford University Press, Oxford, 2008, p. 254.

[73] The CTF Final Report, supra note 62, at p. 31.

[74] James Dunn, *"Genocide in East Timor"*, in *Century of Genocide; Eyewitness Accounts and Critical View*, eds. Samuel Totten, William S. Parsons and Israel W. Charny, Garland Publishing, New York & London, 1997, pp. 266-271.

[75] Anja Jetschke, *"Linking the Unlikeable? International Norms and Nationalism in Indonesia and the Philippines,"* in *The Power of Human Rights; International Norms and Domestic Change,* eds. Thomas Risse, Stephen Ropp and Kathryn Sikkink, Cambridge University Press, Cambridge, 1999, p. 144.

[76] Geoffrey Robinson, *East Timor 1999; Crimes Against Humanity*, Annex to Chega the CAVR Report, Los Angeles, 2003, http://www.cavr-timorleste.org/chegaFiles/finalReportEng/12-Annexe1-East-Timor-1999-GeoffreyRobinson.pdf, p. 16. CAVR figure is lower, closer to 120,000 people.

[77] Ibid, at p. 144.

Instead, there was an official discourse that thousands of Indonesian soldiers, who died to defend national sovereignty and the people of East Timor from 1975 to 1999, were dedicated heroes.[78] Indeed, military personnel who served in East Timor were usually promoted within the military structure, because East Timor was one of the few places to gain battlefield experience.

Most Indonesians also believed that the East Timor human rights issue was a plot by the international Western Christian community to divide Indonesia.[79] This scenario was based on the fact that the majority of Timorese are Catholic, and international intention was also focused on human rights abuses in West Papua and Maluku, which were predominantly Christian areas.[80]

As a result of the lack of information and the creation of these alternative narratives, The East Timor human rights issues did not penetrate public awareness during the New Order, although the transnational advocacy network worked intensively. Statistics on human rights abuses were in every annual report of Amnesty International, Human Rights Watch or other rights groups, and UN special rapporteurs requested country visits many times.[81] The Indonesian public attention was even static when two East Timorese activists (Jose Ramos-Horta and Bishop Ximenes Belo) received Nobel Peace Prize in 1996. The prize was a result of the culmination of international outcry on Indonesia after a mass killing in Dili in 1991, in which more than 200 deaths, and the arrest of East Timorese resistance leader Xanana Gusmao in 1992.[82] These conditions applied even after the political transition to a new regime. For instance, soon after the referendum results showed that the pro-independence side won with significant votes, political opposition groups criticised thenPresident Habibie, and the media coverage was also in favour of this nationalist sentiment.Political elites made statements that East Timor could be a dangerous precedent for other regions with separatist groups, such as in Aceh, West Papua and Maluku, often implying a foreign conspicracy.[83]

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[78] International Crisis Group (ICG), *Indonesia: Implication of the Timor Trials,* Jakarta/Brussel, 2002, ICG Asia Report No. 16, p. 19.
[79] International Crisis Group (ICG), *Indonesia: Impunity Versus Accountability For Gross Human Rights Violations*, Jakarta/Brussel, 2001, ICG Asia Report No. 12, p. 19.
[80] *Ibid,* at p. 12. Philip J. Eldridge, *The Politics of Human Rights in Southeast Asia,* Routledge, London, 2002, p. 155.
[81] Anja Jetschke, supra note 75, at pp. 144-145.
[82] Anja Jetschke, supra note 75, at p. 157.
[83] Philip J. Eldridge, supra note 80, at p. 147 and 155.

The CTF report mentioned the 1975-1999 period as a historical background for their report. However, there is no account of human rights abuses during the period. Instead, the report focuses on the system of civil administration and the military command structure.[84] Therefore, the report maintains the 'literal denial' of what happened during the Indonesian invasion and occupation 1975-1999, one of the most important truths for governments and societies to achieve genuine reconciliation and friendship.

3. CTF and Other Truth Seeking Reports

The CTF is not the only commission to carry out fact-finding about the 1999 atrocities in East Timor. The commission was criticised for not discovering anything new and simply mimicking what prior reports have said about the events surrounding the 1999 referendum, although both governments were aware of these findings before they established the CTF. The terms of reference mandated CTF "to review all the existing materials documented by the Indonesian National Commission of inquiry on human rights violations in East Timor in 1999 (KPP-HAM) and the Ad Hoc Human Rights Court on East Timor, as well as the Special Panels for Serious Crimes and the Commission of Reception, Truth and Reconciliation in Timor-Leste (CAVR)."[85] The work of the CTF was considered by many to be redundant, because the prior inquiries were also official reports.

There were at least four official reports from commissions that preceded the CTF. First, was a report by a joint mission of three UN Special Rapporteurs: Asma Jahangir (on extrajudicial, summary or arbitrary executions), Nigel Rodley (on the question of torture) and Radhika Coomaraswamy (on violence against women, its causes and consequences). They conducted a country visit on 4 to 10 November 1999 based on a resolution of the UN Commission on Human Rights in a special session. In its history, the Commission only held four special sessions, two for the former Yugoslavia and one for Rwanda.[86] During the visit, the team met with the victims, witnesses, the pro-independence groups, UN staff, Bishop Belo and some local and international human rights NGOs. Although the joint mission was only to scrutinize the possible human rights violations committed since the announcement of referendum in January 1999, the report mentioned that the crisis in East Timor "should be considered against the background of a long history of serious human rights abuses and

[84] The CTF Final Report, supra note 62, at p. 31-41.
[85] The CTF Term of Reference, supra note 68, point 14 {(a)i}.
[86] The UN Secretary-General, *Situation of Human Rights in East Timor, 10 December 1999,* UN Doc. A/54/660.

political tensions" since Indonesian occupation in 1975.[87] Although the joint mission was relatively short and unable to name names that were responsible individually for the atrocities, the team concluded that a pattern of gross human rights violations such as extrajudicial killings, torture, rape and forced eviction had been committed by both the pro-integration militias and Indonesian security forces.[88] This team also recommended the UN to establish an international commission of inquiry to investigate the full scale and nature of the violence committed in East Timor.

The second report was made by International Commission of Inquiry on East Timor (CIET). This commission was established by then-UN Secretary-General Kofi Annan. The CIET had a mandate to collect and compile thorough information on possible violations of international human rights and humanitarian law committed in East Timor and to provide the Secretary-General with recommendations on future actions.[89] During the visit to East Timor and Jakarta, the CIET managed to meet not only the victims or witnesses, but also some authorities in Jakarta such as the National Human Rights Commission (Komnas HAM), the Attorney General, the Minister of Defence and the Minister of Foreign Affairs. In the meeting with the CIET, the Indonesian representatives implicitly asserted that Indonesia considered the CIET mission unnecessary and would address human rights violations with their own mechanisms, pointing to Komnas HAM's investigation and the plan to establish a human rights tribunal.[90] Like the previous team, the CIET concluded that there were patterns of gross violations of human rights and breaches of humanitarian law which varied over time and took the form of systematic and widespread violence. Patterns were also found relating to the destruction of evidence and the involvement of the Indonesian Army (TNI) and the militias in the violations.[91] The CIET also found that these violations were directly against the provisions of Chapter VII of the Charter and agreements reached by Indonesia with the United Nations on May 1999.[92] Ultimately, the CIET recommended that an international body should be established to prosecute and try the persons responsible for the violations.[93] However, so far the UN Security Council has never approved the recommendation.

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[87] *Ibid,* at para. 16.
[88] *Ibid,* at paras. 59-63.
[89] Report of the International Commission of Inquiry on East Timor to the Secretary-General, UN Doc. A/54/726, S/2000/59 (January 31, 2000), para. 17.
[90] *Ibid,* at para. 108.
[91] *Ibid,* at para. 123.
[92] *Ibid,* at para. 147.
[93] *Ibid,* at paras. 152-153.

The third inquiry was established by the Indonesian National Human Rights Commission (Komnas HAM) which appointed an independent team (KPP HAM) that included reputable national human rights activists. This inquiry team was most likely intended to pre-empt the UN inquiry, as President Wahid tried to avoid criticism from the domestic opposition and argued that the UN team was based on a non-binding resolution.[94] However, the KPP HAM also concluded that gross violations of human rights under the category of crimes against humanity had taken place in East Timor in 1999. Moreover, KPP HAM identified more than a dozen specific cases and 33 alleged perpetrators, including the Commander of the Indonesian military forces (TNI), the governor of East Timor, five district chiefs, fifteen army officers and one non-commissioned officer, one regional police commander and ten civilian militia leaders.[95] Assigning responsibility to individual perpetrators was a very significant step for an Indonesian team to take, one that even the CIET didn't take..

The team also recommended that the Attorney General's Office conduct judicial investigations and prosecute the alleged perpetrators in an Ad Hoc Human Rights Court. The KPP HAM report received positive acknowledgment from the international community due to its compliance with international standard of investigation. For instance, the UN Commission of Experts (COE) later described the report as "a genuine and impartial effort to inquire into serious human rights violations, reflecting the firm commitment of its members to establish the facts. The report provides a firm and credible template for further investigations, particularly in areas where there might have been lack of cooperation or access to information."[96]

Unfortunately, the judicial process that followed was abysmal. The Attorney General's Office reduced the number of the suspects, the element of crimes and geographical range of crimes.[97] These decisions immediately reduced the prospect of proving that crimes against humanity occurred in 1999.[98] The indictment also excluded General Wiranto, former Commander of Armed Forces who was responsible for the security situation in East Timor in 1999 under the agreement made by Indonesia and the UN. Wiranto was ousted from the

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[94] Philip J. Eldridge, supra note 80, at p. 156.
[95] ICG, supra note 78, at pp. 7-8.
[96] *Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999*, 26 May 2005, UN Doc. S/2005/458, p. 40.
[97] David Cohen, *Intended to Fail; The Trials Before the Ad Hoc Human Rights Court in Jakarta,* ICTJ Occasional Paper, 2003, pp. 19-21.
[98] ICG, supra note 78, at p. 4.

cabinet by President Wahid after the announcement of the KPP HAM report, but was never prosecuted.

In the end all the accused before the Ad Hoc Human Rights Court in Jakarta were acquitted either at trial or on appeal at the Supreme Court level. Therefore, according to Indonesian legal system, the state recognised gross human rights violations occurred in East Timor (from the KKP HAM report), but held no individuals responsible for the crimes (from the trial's results). However, the CTF report later acknowledged the conclusion of the KPP HAM report that crimes against humanity did occur in 1999 and there was sufficient evidence to confirm state institutional responsibility.[99]

The three reports mentioned above did not fit the category of truth commission because the inquiries covered a relatively short period and were established as a preliminary process leading to further prosecution and trial. The fourth report, which could be indisputably considered as a truth commission, was the CAVR report, *Chega!* The CAVR was establish based on Regulation 2001/10 of the provisional government UNTAET (United Nations Transitional Administration in East Timor) in 2001 and then reaffirmed by Article 162 of the Constitution of the RDTL (Democratic Republic of Timor-Leste), , following independence. The main difference between *Chega!* and other reports was that its work covered any acts of violence between 25 April 1974 and 25 October 1999, from the declaration of Portuguese government to grant the Timorese people the right to self-determination until the establishment of UNTAET as a transitional administration.[100] CAVR worked for 48 months collecting about 8,000 statements and conducting a research on 1,322 randomly selected household across the territory based on Human Rights Data Analysis Group which was also used in other truth commissions around the world.[101] The CAVR report concluded not only that the Indonesian military forces and the militias committed the gross violations of human rights in 1999,[102] but also that the Indonesian authorities committed systematic violence during the occupation period such as arbitrary killings and detention, torture, enforced

[99] The CTF Final Report, supra note 62, at p. 76.
[100] *Chega!* CAVR Report, Part 2: The Mandate of Commission, 2005, http://www.cavr-timorleste.org/chegaFiles/finalReportEng/02-The-Mandate-of-the-Commission.pdf, p. 3.
[101] *Chega!* CAVR Report, Part 12.2: Data and Statistical Methods - Graphs and Tables, 2005, http://www.cavr-timorleste.org/chegaFiles/finalReportEng/12-Annexe2-Data-and-Statistical-Methods.pdf, pp. 1-2.
[102] *Chega!* CAVR Report, Part 8.1: Responsibility of the Indonesian security forces for the mass violations committed in 1999 - Graphs and Tables, 2005, http://www.cavr-timorleste.org/chegaFiles/finalReportEng/08--Responsibiliy-and-Accountability.pdf, p. 115.

disappearances, sexual violence, enforced displacement and famine.[103] The report also recommended the establishment of an international tribunal if justice deemed to have failed in Timor-Leste and Indonesia.[104]

The CAVR report, which was submitted by then-President Xanana to the UN Secretary-General in December 2005, immediately sparked anger from Indonesian politicians. They claimed that Xanana had betrayed the bilateral agreement to settle past accounts through the CTF. Unfortunately, the submission of the report was also in the moment when political tension between two governments was high due to border incidents. The Indonesian Defense Minister, for instance, denied any systematic violence during the occupation period and said that the report was "unreal" and "impractical".[105] Meanwhile, in the same manner, Vice-President Jusuf Kalla said that the report was "exaggerated" and even "absolutely not true".[106] The CTF, because of its mandate to examine only the 1999 violence, did not even try to address the CAVR's findings on the systematic violence committed during the occupation period. The CTF only stated that the CAVR report was "a valuable source for understanding the events of 1999 because it combines quantitative and qualitative methods, and legal and historical perspectives in reaching its conclusions."[107]

4. CTF's 'Conclusive Truth': Friendship over Truth

In some cases, a truth commission may be better than an effort to determine judicial truth through a trial. It can provide victims an opportunity to tell their broader truth, which can elevate their position in the public and restore their dignity.[108] A criminal trial limits the victims' testimony in a court room and reduces it to mere evidence to confirm or challenge an indictment. At a truth commission, victims' testimony, through verification and cross-examination, can raise awareness of human rights violations enabling the public to share the burden of the victims and generating sympathetic listeners.[109] The truth telling in the South African TRC showed how the victims' testimonies can be powerfully contribute to social

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[103] *Chega!* CAVR Report, Part 6: Profile of Human Rights Violations - Graphs and Tables, 2005, http://www.cavr-timorleste.org/chegaFiles/finalReportEng/06-Profile-of-Violations.pdf.
[104] *Chega!* CAVR Report, Part 11: Recommendations, 2005, http://www.cavr-timorleste.org/chegaFiles/finalReportEng/11-Recommendations.pdf, p. 26.
[105] *RI dismisses report on Timor atrocities during occupation*, The Jakarta Post, January 20, 2006.
[106] *Kalla denies Indonesia committed widespread rights abuses*, http://www.etan.org/et2006/january/21/24kalla.htm, January 24, 2006.
[107] The CTF Final Report, supra note 11, at p. 104.
[108] Martha Minow, *"Hope for Healing",* in *Truth v. Justice,* eds. Robert I. Rotberg & Dennis Thompson, Princeton University Press, Princeton and Oxford, 2000, p. 238.
[109] *Ibid,* at p. 248.

healing for the public in general. The truth telling in a truth commission can have psychological benefits for the victims by offering public testimony to confirm their experience of injustice.[110] Indeed, the right to the truth has two dimensions. First, it contains the individual right of victims to be recognised officially, so they subsequently have a right to justice and compensation. Second, it also has a collective and societal dimension.[111] All Indonesians and Timorese have the right to know what really happened, so they can question state's accountability and transparency on that matter.

However, these positive features were not present in the CTF's truthseeking process. The Commission heard mainly from alleged perpetrators and high-level officials, rather than victims.[112] The CTF only summoned 12 victims, out of total 60 people who gave testimony in Jakarta, Bali and Dili.[113] Each person was given 30 minutes to speak freely, although the CTF enforced this limit the inconsistently. Most of the military commanders were given more timeand the CTF hearing provided another forum for the alleged perpetrators to sustain the denial and to defend themselves without being challenged by alternative claims.[114] For instance, General Wiranto, the highest military commander during the referendum, stated that the accusations were "senseless and crazy" and emerged from the UN's hidden agenda. General Wiranto also denied any relationship between his men and the pro-integration militias.[115] Similar statements were made by other military officers during the hearing. The other problem was that the CTF held several closed hearings, particularly for high-level Timor-Leste officials. The closed hearings were thought to be designed to prevent diplomatic problems and to maintain friendship over truth, undermining the principle of transparency and accountability.[116]

Although the CTF hearing process was flawed, the final report showed that the Commission did not rely only on this aspect of truth seeking. The final report confirmed the allegation that the violence in East Timor in 1999 was systematic and widespread.[117] Thus, it could be defined as crimes against humanity. CTF pointed out that the main perpetrators were the pro-integration militias supported by and working together with the Indonesian security forces

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[110] Amy Gutmann and Denis Thompson, *"The Moral Foundations of Truth Commission", ",* in *Truth v. Justice,* eds. Robert I. Rotberg & Dennis Thompson, Princeton University Press, Princeton and Oxford, 2000, p. 29.
[111] *Right to the Truth*, supra note 55, at p. 16.
[112] Megan Hirst, supra note 65, at p. 24.
[113] *Ibid*, at pp. 39-42.
[114] *Ibid*, at p. 24.
[115] KontraS' Monitoring of CTF hearing in Jakarta, May 5, 2007.
[116] Ibid, at p. 34.
[117] The CTF Final Report, supra note 62, at p. 273.

(the military and police) and local civilian government. The Commission found that the Indonesian authorities, particularly the Indonesian security forces and local civilian government at the time, supported the pro-integration militias “through assistance in forming armed groups, providing these groups with financial, equipment, weapon and logistical support”.[118] Even finding responsibility for crimes against humanity at an institutional level was a big step forward for Indoneisa, but does not meet international human rights law principles of individual responsibility.

However, CTF concluded that the pro-independence groups also participated in the gross human rights violations.[119] This conclusion is quite controversial since none of other reports on the 1999 atrocities came to this conclusion it and could undermine the essence of crimes against humanity which implies only one dominant oppressor party in the violence. This conclusion appeared to be an attempt to prove to the public that both parties were involved in atrocities but were now ready to end the hostility by promoting reconciliation without prosecution.

[118] The CTF Final Report, supra note 62, at pp. 262-263
[119] The CTF Final Report, supra note 62, at p. 265.

COMMISSION OF TRUTH AND FRIENDSHIP AND THE QUESTION OF JUSTICE IN TRANSITIONAL JUSTICE DISCOURSE

1. Theoritical Consideration of Justice in Transitional Justice Discourse

It is a problematic task to elaborate the meaning of "justice" in transitional justice. Prior to the widespread political change in the last two decades of the twentieth century, the conception of justice was dominated by the idealist and legalist approach which framed 'transitional justice' as a normative proposition and implied a universal or ideal explanation.[120] This approach considers that full retributive or corrective justice is necessary for democratisation and liberal change, and places punishment as a main theme of transitional justice. Only prosecution and punishment of the prior regimes can create a demarcation line between past and present, not only to deter repetition of horrible acts in the future, but also to actualise the rule of law, a core principle of democratic society. Under the retributive justice approach, through a failure to punish those responsible for past injustice, society bears enduring collective responsibility.[121] The failure of the new government to punish the crimes of previous regimes can be considered as an extension of the previous regime's attempt to avoid accountability for its crimes.[122] In legal human rights term this is called the continuity of state obligation regardless of any relation between the old and new regime. Moreover, retributive justice focusses on individual perpetrators. However, the criminal justice system is inadequate to address the systematic violence present in the former authoritarian society. In many cases, state-sponsored violence is the product of a systematic ideology and is even sometimes embedded in the social structure. The idealist and legalist arguments are often favored by lawyers and human rights activists.

In contrast to the idealist approach, the realist approach situates the law as a mere product of political processes.[123] The realist camp does not deny that horrible acts are committed under authoritarian regimes. They argue that because these crimes are committed ina a

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[120] Ruti G. Teitel, *Transitional Justice*, Oxford University Press, Oxford, 2000, pp. 3-4.
[121] *Ibid,* at p. 56.
[122] Ruti G. Teitel, *"How Are the New Democracies of the Southern Cone Dealing with the Legacy of Past Human Rights Abuses?",* in *The Handbook Of Reparations, ed. Pablo de Greiff,* Oxford University Press, Oxford, 2006, p. 146.
[123] *Ibid,* at p. 4.

systematic and widespread way by an organised political structure, it is impractical to prosecute individuals.[124] The realist also holds that moral considerations, such as demanding justice, are politically irrelevant and impractical, because it is unrealistic to enforce them. Truth commissions, which offer an alternative to the criminal justice system (trading amnesty for truth), are considered reasonable, inventive and practical, a product of political negotiation between the old fading forces and new emerging forces. The realist explanation is commonly accepted by politicians or political scholars.

Ruti G. Teitel offers an alternative to both approaches. She accepts the realist proposition that law is shaped by political forces but, contrary to the realist, rejects the view that law is a mere product of politics. Instead, law itself can construct and facilitate the transitional courses. Additionally, the rule of law is historically and politically contingent, and the concept of justice is partial and contextual, situated between the legal and political order.[125] Thus, the outcome of transitional justice will be different from one society to another, producing a series of complicated legislative, administrative and legal decisions. In this context, the idea of pursuing full retributive justice will confront other goals, such as national unity, transitional peace or economic recovery.[126]

2. "Legalist" Perspective on Justice

The legalist perspective on justice is the most dominant approach in human rights discourse. It was formalised in many treaties and is used by the human rights bodies or quasi judicial human rights judicial bodies, at both the international and regional level. Scholars of human rights law have codified a concept of justice systematically. For instance, in a UN study on amnesty, justice and impunity, the UN independent expert has defined impunity:

> the impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not

[124] Amy Gutman and Dennis Thompson, "The Moral Foundations of Truth Commissions", in *Truth v. Justice,* eds. Robert I. Rotberg & Dennis Thompson, Princeton University Press, Princeton and Oxford, 2000, p. 26.
[125] *Ibid,* at pp. 7 and 9.
[126] Jon Elster, *Closing the Books; Transitional Justice in Historical Perspective,* Cambridge University Press, Cambridge, 2004, p. 188.

> subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.[127]

This description clearly states that justice must be defined by the state duty to prosecute and punish the perpetrators through the judicial system. This position is the reason why the UN did not support the work of CTF and ordered staff not to participate in the process.

The evolution of international human rights law has also progressively obliged states to criminalize the perpetrators of certain human rights violations, particularly crimes under international law such as genocide, slavery, crimes against humanity and torture.[128] This development is strengthened by international and regional human rights treaty proliferations and the practice of the establishing international tribunals since World War II, from the Nuremberg Trials to the ICTR (International Criminal Tribunal for Rwanda).[129] International norms also finds amnesty for the perpetrators of these crimes unacceptable, despite the fact that amnesties are still applied *de jure* or *de facto* in many countries.

The first treaty that explicitly obliges states to prosecute specific human rights violation was the Convention on the Prevention and Punishment of the Crime of Genocide (1948),the oldest human rights treaty.[130] Article IV of the Genocide Convention states that the state parties should punish the perpetrators of genocide. However, this convention does not have an enforcement body. Consequently, the prosecution and punishment rely on domestic enforcement.[131]

The second international human rights treaty that obliges its state parties to prosecute is the International Covenant on Civil and Political Rights (ICCPR), though not in explicit terms. Article 2 (paragraph 3) of ICCPR only mentions that the state parties should ensure the victims of human rights violation receive an effective remedy (through judicial, administrative or legislative body). However, subsequent developments made this obligation clearer. The Human Rights Committee has frequently held that this provision does not empower

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[127] Diane Orentlicher, Report of the independent expert to update the Set of principles to combat impunity; Updated Set of principles for the protection and promotion of human rights through action to combat impunity, 8 February 2005, E/CN.4/2005/102/Add.1, p. 6.
[128] Raquel Aldana-Pindell, *An Emerging Universality of Justiciable Victim's Rights in the Criminal Process to Curtail Impunity for Stated-Sponsor Crimes*, Human Rights Quarterly 26 (2004), p. 607.
[129] Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, The Yale Law Journal (Vol. 100), 1991, pp. 2554-2555.
[130] It is adopted by General Assembly resolution 260 A (III) of 9 December 1948 and entered into force in 12 January 1951.
[131] *Ibid*, at p. 2563.

individuals to force a state to prosecute, but it imposes an obligation of state to investigate an alleged human rights violations and subsequently to prosecute the identified suspects.[132] Later on, the definition of an effective remedy was clarified by the Human Rights Committee's General Comment No. 31, entitled The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004). In this General Comment, the Human Rights Committee describes that an effective remedy consists of the obligation to investigate allegations of violations (para. 15), to provide reparations for the victims (para. 16) and to bring the perpetrators to justice (para. 18). The Human Rights Committee also stressed that this obligation is recognized by both international and domestic law for certain human rights violations, such as torture and other forms of ill-treatment, enforced disappearance and summary or arbitrary killing. In addition, the failure of state to enforce this obligation also generates a new separate violation of ICCPR. In another General Comment, the HR Committee also has similar stance regarding impunity related to the prohibition of torture and other forms of ill-treatment. In its General Comment No. 20 on article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), the HR Committee declares that granting amnesty for the perpetrators of this violation is incompatible with the state parties' duty under the Covenant (para. 15). In considering Chile's regular report under article 40 of the ICCPR, the HR Committee criticized the state party for failure to prosecute and punish the perpetrators of human rights violations during military dictatorship, although the government has provided the victims with financial compensation.[133]

More progressive development of the obligation to prosecute and punish the perpetrators in a treaty instrument was demonstrated by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Like the Genocide Convention, CAT explicitly requires the state parties to carry out criminal proceeding against the suspects. However, unlike the Genocide Convention, CAT is equipped by a monitoring body, the Committee against Torture, creating a stronger enforcement system. The most important progress in CAT is that this convention introduced a kind of universal jurisdiction to guarantee prosecution and penalty should a state party fail to establish the criminal proceeding.[134] The universal jurisdiction principle states that a state is empowered by international law to prosecute and to punish the perpetrators irrespective of the place of a

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[132] Geoffrey Robertson QC, *Crimes Against Humanity; The Struggle for Global Justice*, *Third Edition*, Penguin Books, London, 2006, p. 289.

[133] Human Rights Committee, *Consideration of reports submitted by States Parties under article 40 of the Covenant, Concluding observations of the Human Rights Committee: Chile*, UN Doc. CCPR/C/CHL/CO/5,
17 April 2007, par. 9.

[134] Diane Orentlicher, supra note 129, at p. 2567.

violation committed and irrespective of the nationality of the victims and the offenders. The universal jurisdiction principle calls for a state either to prosecute or to extradite the alleged perpetrators to other authorities who are able to institute criminal proceeding.[135] The Committee against Torture also recommended the South African government to consider bringing to justice the perpetrators of torture acts under apartheid regime, although the committee appreciated the notable work of its Truth and Reconciliation Commission.[136] In a similar argument, the Committee was concerned that "the Commission on Truth and Friendship between Indonesia and Timor-Leste has a mandate to recommend amnesties, including for those involved in gross human rights violations (arts. 5, 6, 7, 8 and 9 of CAT) and The State party should not establish nor engage in any reconciliation mechanism that promotes amnesties for perpetrators of acts of torture, war crimes or crimes against humanity."[137]

These achievements were followed by the new International Convention for the Protection of All Persons from Enforced Disappearance (20 December 2006) which has not come into force. In this convention, state parties should make enforced disappearance a punishable crime and to hold the perpetrators criminally responsible under article 3 and 4.

At the regional level, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the American Convention on Human Rights (ACHR) do not explicitly require the state parties to prosecute and to punish alleged perpetrators of the rights set forth in the conventions.[138] However, this obligation was recognized later in case law before these regional courts. Only the Inter-American Convention to Prevent and Punish Torture clearly contains a provision addressing torture victims' right to a criminal proceeding.[139] Article 8 of the Inter-American Torture Convention declares that states parties should ensure "that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case" and "that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process."[140]

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[135] Geoffrey Robertson QC, supra note 132, at p. 273.
[136] Committee against Torture, *Consideration of reports submitted by States Parties under article 19 of the Convention, Conclusions and recommendations of the Committee against Torture: South Africa*, UN Doc. CAT/C/ZAF/CO/1, 7 December 2006, par. 18.
[137] Committee against Torture, *Concluding Observation of the Committee against Torture, Indonesia*, 2 July 2008, UN Doc. CAT/C/IDN/CO/2, p. 11.
[138] Diane Orentlicher, *supra* note 129, at p. 2568. Geoffrey Robertson QC, *supra* note 132, at p. 290.
[139] Raquel Aldana-Pindell, supra note 128, at p. 651.
[140] Inter-American Torture Convention entered into force on February 28, 1987 with 17 state parties. http://www.oas.org/juridico/english/Treaties/a-51.html.

Although not all treaties mentioned above explicitly or literally oblige state parties to ensure prosecution and punishment for the perpetrators of certain human rights violations, the development of case law precedents before some treaty bodies or regional courts does reinforce this obligation.

The strongest position by enforcement bodies on the obligation to prosecute and to punish has emerged in the two principal organs of the inter-American human rights system, the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights. One of the dramatic advancement of victims' right to justice was decided by the Inter-American Court in the *Velasquez Rodriguez Case v. Honduras* in 1988. In its decision, the Inter-American Court confirmed the state duty to investigate a human rights violation, to identify the alleged perpetrators, to impose proper penalty and to provide adequate compensation to the victims.[141] This case law then became a precedenton the state's duty to redress past atrocities and frequently referred by other human rights bodies.[142] This development is especially interesting because this region had many experiences in establishing truth commissions as an alternative to criminal tribunals. The Inter-American Court also has case law, in *Barrios Altos v. Peru,* responding to amnesty laws, which were applied not only in Peru but also in many countries in the region. The Inter-American Court decided that amnesty provisions were unacceptable because the intention was to prevent the investigation and prosecution of the perpetrators of serious human rights violations. Moreover, the Court found the amnesty provisions to violate international human rights law.[143] Following the Inter-American Court decisions, the Inter-American Commission reaffirmed the state's duty to prosecute and declared that the application of amnesty laws in many Latin American countries is incompatible with the ACHR.[144]

The other regional mechanism, the European Court on Human Rights has similarly interpreted the state duty to prosecute on Article 13 of the ECHR for certain human rights violation, such as right to life and humane treatment. The European Court in the case of *McCann and others v. The United Kingdom*, *Kaya v. Turkey* and *Assenov and others v.*

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[141] *Velasquez Rodriguez v. Honduras*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), para. 174.
[142] Arturo J. Carrillo, "*Justice in Context: The Relevance of Inter-American Human Rights Law And Practice to Repairing The Past,"* in *The Handbook Of Reparations, ed. Pablo de Greiff,* Oxford University Press, Oxford, 2006, p. 506.
[143] *Barrios Altos v. Peru*, Judgment of May 14, 2001, Inter-Am Ct. H.R. (Ser. C) No. 75 (2001), para. 41.
[144] Arturo J. Carrillo, *supra* note 142, at p. 506.

Bulgaria, defined the right to an effective remedy as the state's duties to conduct "an effective official investigation" that "should be capable of leading to the identification and punishment of those responsible."[145]

The Human Rights Committee also has landmark case law, *Bautista v. Colombia* in 1995. It was a case of disappearance, torture and murder of a political activist by military forces. Colombian government had established an administrative tribunal, which resulted in dismissal of two military officers and awarded monetary compensation to the family.[146] However, in its decision, the HR Committee urged the Colombian government to "expedite the criminal proceedings leading to the prompt prosecution and conviction" of the persons responsible for the crime.[147] The decision showed that the HR Committee emphasized the priority of judicial remedies.[148]

The establishment of the ICTY, ICTR, hybrid court or permanent international tribunal, International Criminal Court has also strengthened the inspiration that there will be no "safe haven" for those responsible for the most serious human rights crimes.

There are several non-binding instruments produced by United Nations' system related to a state's duty to prosecute and to punish. In 2005, the UN General Assembly adopted a document titled Basic Principles and Guidelines on the Right to a Remedy and Reparation of Victims of Violations of International Human Rights and Humanitarian Law. This soft law reminds the state's obligation to "investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law."[149]

An independent expert under the UN Commission on Human Rights, Diane Orentlicher, has produced the Updated Set of Principles for the Protection and Promotion of Human Rights through Rction to Combat Impunity. However, after the commission changed into a new

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[145] *Assenov and others v. Bulgaria* App. No. 24760/94, Decision of 28 October 1998, para. 102. Dinah Shelton, *Remedies In International Human Rights Law, Second Edition*, Oxford University Press, Oxford, 2006, p. 128.

[146] Bautista de Arellana v. Colombia, Communication No. 563/1993, U.N. Doc. CCPR/C/55/D/563/1993 (1995).

[147] *Ibid*, para. 10.

[148] Manfred Nowak, U.N. Covenant on Civil and Political Rights; CCPR Commentary, 2nd revised edition, N.P. Engel, Publisher, Kehl, 2005, at p. 65.

[149] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, para. 3(b).

body, the Human Rights Council, this study was never adopted as a UN resolution or declaration. In another indication of the inconsistency of international organ to enforce these standards, in 1993, after the El Salvadorian Government passed an amnesty law that ignored the recommendations of a UN-appointed truth commission, the then-UN Secretary General, Boutros-Gali responded by saying that it was only "an internal matter."[150]

However, there is a variant of legalist approach. One of the leading advocates of the legalist approach, Aryeh Neier, has offered a moderate way to deal with the perpetrators of past injustice. He admits that itis a problem to uphold pure legal justice by punishing all those responsible for horrible atrocities in a situation in which violations were committed by almost the entire apparatus of a prior regime. He recognises that it would be suicidal and irrational to insist on total prosecution, which could provoke the armed forces to turn against the new fragile civilian governments.[151] An example of this scenario was in Argentina under President Alfonsin's administration. After the military junta was overthrown in 1984, Alfonsin started to prosecute all military officials who were involved in enforced disappearances in the prior regime. However, the prosecution also targeted middle-level officers who had supported the democratic transition, in opposition to their superior officers, after the military lost the war over the Malvinas to the British. Due to their contribution to the political transition, the middle-rank officers refused to be responsible for crimes they committed during the "Dirty War". They launched three military uprisings against President Alfonsin, who later passed laws to halt the wholesale prosecutions and to appease the rebel officersThe new government was able to prosecute a limited number of former high-ranking generals.

Aryeh Neier offers the solution of selective prosecutions based on this Argentinian experience. According to him, in transitional situations, "prosecutions should at least remain a possibility" and "accountability should not be understood or judged as a political tactic."[152] At this point, he reaffirms that successor regimes have to recognise their moral duties to deal with the past even the political situation gives little to enforce those responsibility. However, critics of this solution argue that selective prosecution violates the principle of non-discrimination and adherence to the rule of law. Moreover, most serious crimes perpetrated

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[150] Jo M. Pasqualucci 1994, *The Whole Truth And Nothing But The Truth: Truth Commission, Impunity And The Inter-American Human Rights System*, Boston University International Law Journal (Vol. 12:321), p. 345.
[151] Aryeh Neier,*"What Should be Done about the Guilty?"*, in *Transitional Justice; How Emerging Democracies Reckon with Former Regimes, Vol. 1; General Consideration*, ed. Neil J. Kritz, Institute of Peace Studies, Washington DC, 1995, p. 179.
[152] *Ibid*, at pp. 181-182.

in the authoritarian regime can not be attributed only to the prior regime's leadership.[153] Based on the principle of combatting impunity, the UN independent expert states, "The fact that the perpetrator of violations acted on the orders of his or her Government or of a superior does not exempt him or her from responsibility".[154]

3. "Realist" Approach to Justice

The realist approach does not deny that the idea of pursuing justice through prosecution is morally good. However, this approach argues that the existing international justice system is unreliable and unable to bring the perpetrators to justice with certainty. The international criminal justice sytem has been very reluctant to establish criminal tribunal because the members states still consider their own interests and respect national sovereignty. The establishment of international criminal tribunals were only possible because of political consideration rather than adhering any moral principles.[155] Without the approval of powerful states, especially the five permanent members of UN Security Council, it was impossible to try the perpetrators. It is very hard to establish an international criminal tribunal if the atrocities are perpetrated by those five permanent members or any country that has good relation with them. Acts of genocide or crimes against humanity did happen in World War II by the German Nazi and Japanese Fascist regimes, in former Yugoslavia by the Serbians (and Croatians) and in Rwanda by the Hutu. However, similar gross human rights violations also occurred in Cambodia under the Khmer Rouge regime, in Vietnam during the civil war involving US troops, in the Soviet Union under the communist regime, and in East Timor under Indonesian occupation. The international system failed to take action similar to the Nuremberg Tribunal, ICTY or ICTR because the important international decision makers never came to a unanimous decision. The evolution of international instruments is not followed by consistent enforcement. In the case of East Timor under Indonesian occupation, the UN Security Council has never seriously showed any intention to establish an international tribunal, presumably because member countries consider the important role of Indonesia at the regional and international level. Moreover, for more than two decades, the UN also failed to force the Indonesian occupation force from East Timor and to realize the right to self-determination of the Timorese. This policy clearly contradicts the repeated suggestion by the Special Rapporteurs or even the UN Secretary-General to establish an

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[153] Ruti G. Teitel, supra note 120, p. 43.
[154] Diane Orentlicher, supra note 127, p. 15.
[155] David Forsythe, *Human Rights in International Relations, Second Edition*, Cambridge University Press, Cambridge, 2006, pp. 89-90.

international tribunal to redeem the failure of the international community to secure the right to self-determination of the Timorese people.

The realist approach also argues that the outputs of the existing international criminal justice system have failed to guarantee the principles of fair trial or rule of law. Ideally, criminal trials can promote the truth, the adherence of rule of law, punishment as deterence effect, but in reality they are rarely at their best.[156] It is also important to note that in the international system, the enforcement of human rights norms is very weak although the promotion of the norm is abundant in many treaties.[157] The Nuremberg and Tokyo Tribunals only prosecuted and punished the perpetrators of gross violations of human rights or war crimes from the losing sides, Germany and Japan despite the fact that the Allied forces also perpetrated similar crimes against civilians.[158] This victor's justice identified perpetrators only on the losing side and the victims on the winning side. Meanwhile, the ICTY and ICTR also failed to contribute much beyond the punishment and development of legal precedents. Those tribunals hardly affected the regional reconciliations and stability.[159] The ICTY is accused ogf being anti-Serbian, while ICTR is considered anti-Hutu.[160] The problem was that the tribunals were detached from the public at large and were not able to explain the structurals cause of the abuses.

Another court dealing with serious human rights crimes that suffered from a lack of credibility is the US-assisted Iraqi Special Tribunal. Although many people would agree that Saddam Hussein was worthy of prosecution as a criminal, the lack of impartiality and independency sparked opposition not only from the human rights organization but also from the anti-occupation resistance groups. Thus, the Iraqi Special Tribunal created a negative impact on peace in the country.

Hybrid courts established in Sierra Leone, Kosovo, Cambodia and East Timor also have problems.[161] In Sierra Leone, the Special Court did not work complementarily with the truth commission. The Special Court also asked the international community to prosecute former President Charles Taylor,abroad because it could not guarantee the safety of the witnesses.

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[156] Erin Daly & Jeremy Sarkin, *Reconciliation in Divided Societies; Finding Common Ground,* University of Pennsylvania Press, Philadelphia, 2007, p. 174.
[157] Jack Donnelly, *Universal Human Rights in Theory & Practice, Second Edition*, Ithaca and London, Cornell University Press, 2003, p. 138.
[158] David Forsythe, supra note 155, at p. 91.
[159] Erin Daly & Jeremy Sarkin, supra note 156 p. 177.
[160] David Forsythe, supra note 155, at pp. 102-103.
[161] *Ibid*, at p. 103.

In Cambodia, the government and United Nations had a big disagreement on many terms, particularly the composition of the panel of judges. In East Timor, the Special Panels for Serious Crimes was unable to prosecute the alleged perpetrators who resided in Indonesia.

The intention to solely pursue justice has not made the criminal tribunals effective, and has even . produced counter-productive consequences. This approach is labeled by Forsythe as "judicial romanticism."[162] Another important weakness of the criminal tribunal system is that it is difficult to address past atrocities that have insufficient material evidence and witnesses due to the technical requirements of a fair trial in a court of law.[163] Moreover, it is almost impossible to hold a trial for crimes that happened too long ago; many atrocities have no living perpetrators, such as slavery under the age of colonialism.

The challenge of building national unity, maintaining peace, and strengthening the democratic process combined with the demand for justice becomes problematic for the new regimes. The realist approach considers that criminal justice is not the only important goal and sometimes it can be contested by other important goals which in the case of Indonesia and Timor-Leste is the stable bilateral relationship, between the largest Muslim country in the world and a small Catholic country that could easily be accused of being a western puppet.[164] It is not realistic to focus only on accountability during peace talks or a cessation of armed conflict. The agenda of combating impunity could endanger a peace initiative, especially if the perpetrators still have access to armed groups.

The realist approach tries to find another form of justice beyond the judicial punishment. Unde this approach, justice can not be reduced to judicial punishment. The dissemination of official truth can also generate social punishment for the perpetrators. Naming names in truth commissions has a function to acknowledge an official record of persons who committed past injustices. Subsequently, the record can form the basis for informal social sanctions of public disapproval which could create embarrasment or shame for the perpetrators.[165] At the very least, disclosing and disseminating the truth to the public about the actions of perpetrators exposes them to shame, humiliation or stigmatisation. This is what some

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[162] *Ibid*, at p. 90.
[163] Ruti G. Teitel, supra note 120, at pp. 62-63.
[164] Letter dated 24 June 2005 from the Secretary-General addressed to the President of the Security Council, July 15, 2005, UN Doc. S/2005/458, p. 3.
[165] Kent Greenawalt, *"Amnesty's Justice"*, in *Truth v. Justice,* eds. Robert I. Rotberg & Dennis Thompson, Princeton University Press, Princeton and Oxford, 2000, p. 190.

scholars call a 'truth trial'.[166] Even Aryeh Neier who advocates judicial punishment also recognises the power of this truth trial, stating that "to reveal the truth is to identify those responsible and to show what they did, is to mark them with a public stigma that is punishment in itself."[167] Sometimes a truth trial is important to reduce the political options of perpetrators who want to regain their power in public positions. However, it is important to note that a truth trial has a limited effectiveness if the perpetrators can avoid the shame by isolating themselves in their own ethnoracial enclave.[168] This is what happened in the case of Indonesia and Timor-Leste. Most of the victims of 1999 atrocities were the Timorese while most of the important perpetrators were Indonesian high-rank military or police commanders, who live in Indonesia and are treated like national heroes.

The other important realist argument is that transitional states need to build a more stable democratic constitutional system, which requires a "loyal opposition".[169] In the early years of a democratic constitutional system, the new government requires mechanisms that allow an opposition willing to accept the rule of law to benefit from power-sharing. The exclusion of this opposition could turn them into "disloyal opposition" which could lead to a crisis for the new regime. The effect would be worse if the these opposition leaders had contributed to the democratic transition. In the case of Argentina in 1984, the mid-rank military officers turned their support from their supperior officers to the civilian opposition in the early part of the transition. The prosecutions launched by the Alfonsin government against them were followed by three military coups.

There is also a moderate perspective within the realist camp, which can also be accepted under a legalist approach. This approach believes that pursuing justice could still be a long-term target, after achieving several realistic short-term targets. A truth commission could be a good investment towards a long term goal of prosecution, after the new regime is closer to genuine democracy. There are some cases of reopened prosecutions more than a decade after the initial transition. This situation is called "postponed transitional justice."[170] In Spain, the Defence Minister recently proposed to declassify secret documents held in military archives about abuses during the civil war and 40 years of Franco'sdictatorship. .[171] Prior to

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[166] Jon Elster, supra note 126, at p. 63.
[167] Aryeh Neier, supra note 151, at p. 180.
[168] Erin Daly and Jeremy Sarkin, supra note 156 pp. 143-144.
[169] Juan J. Linz, *"The Breakdown of Democratic Regimes: Crisis, Breakdown, &Reequilibration",* in *Transitional Justice; How Emerging Democracies Reckon with Former Regimes, Vol. 1; General Consideration*, ed. Neil J. Kritz, Institute of Peace Studies, Washington DC, 1995, p. 123.
[170] Jon Elster, supra note 126, at p. 76.
[171] *Minister fights Spanish military secrecy, the Independent,* August 11, 2008.

this, Spain was considered the best example that the politics of forgetting could work compatibly with democratic transition. In Chile, the immunity enjoyed by former dictactor Pinochet was stripped off by a new reform-minded Supreme Court in 2005 after years of stable democratic transition. When he died, Pinochet was facing prosecution as a suspect in many human rights abuses committed during his administration.[172] In Argentina, the Supreme Court annulled two laws in 2005 that halted the prosecution of perpetrators of torture, enforced disappearance and extrajudicial killing during the Dirty War era (1976-1983).[173]

Postponed transitional justice is also compatible with one international human rights instrument, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (adopted on 26 November 1968 and entered into force on 11 November 1970). According to Article 1, "no statutory limitation shall apply to the gravest crimes in international law which are war crimes, crimes against humanity and crimes of genocide irrespective of the date of their commission."

Postponed transitional justice was also hinted in the letters sent by then- President Xanana and Prime Minister Alkatiri of Timor-Leste. In a letter to the UN Secretary-General, they wrote:

> The Commission for Truth and Friendship is not a final phase of justice. Over time, as both nations mature democratically, people's need for justice will be met. There is, after all, no statute of limitations for such crimes. As nations become more politically mature, past grievances and past wrongs can often be righted. Examples of this abound across the world and they enlighten and inspire us. For now, both nations strive to move forward in a spirit of friendship and it is with courage and humility that we will attempt to revisit the events of the past, respecting our own peoples' right to know the truth.[174]

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[172] Human Rights Watch, *Chile: Pinochet Held on Torture Charges*, Human Rights News, October 31, 2006, http://hrw.org/english/docs/2006/10/31/chile14491.htm.
[173] Human Rights Watch, *Argentina: 'Disappearances' Trial Breaks Years of Impunity,* Human Rights News, June 19, 2006, http://hrw.org/english/docs/2006/06/19/argent13580.htm.
[174] Letter dated 24 June 2005 from the Secretary-General addressed to the President of the Security Council, July 15, 2005, UN Doc. S/2005/458, p. 6.

CONCLUSION

Although initially a truth commission was not necessarily an alternative to prosecution, as in the case of CONADEP in Argentina, it is now often a substitution for trial. Therefore, there is a belief that establishing a truth commission requires a trade-off between truth and justice. The establishment of the Commission of Truth and Friendship (CTF) by Indonesia and Timor-Leste adds fuel to this debate. In its term of reference, the CTF was clearly not established with a view towards prosecution, but rather had a mandate to "recommend amnesty for those involved in human rights violations who cooperate fully in revealing the truth."[175] The intention of Indonesian and Timor-Leste governments to establish CTF was clearly to avoid any accountability in the form of an international trial. However, the motive of each countries wass different. Timor-Leste more complex political constraints from its failure to manage internal conflict and the need to establish stable relations with its gigantic neighbor, Indonesia. Meanwhile the motive of Indonesia, considered as the perpetrators side, derives more from its persistent culture of impunity rather than from a threat of national instability.

In a negotiated transition, decisions have to be made based on existing constraints. There is no formula that fits all problems faced by new transitional regimes. The experience of one country can not be mechanically applied in other countries. Complicated political calculations produce different formulas for new democratic regimes to institute appropriate justice mechanisms, although international human rights instrument havecreated standards for justice and accountability. International human rights law has increasingly emphasized the importance of the state's duty to prosecute and punish perpetrators of gross violations of human rights. H owever this obligation has never been enforced cosistently. Those international standards should be understood as guidelines and not as a predetermined and fixed canon. Internal power struggles, relationships with countries in the region, the support of the international system, and the political interplay of relevant interest groups will significantly determine the course of transitional justice.

[175] Term of Reference for The Commission of Truth and Friendship Establish by The Republic Indonesia and The Democratic of Timor –Leste, point 13 (c) and point 14 [c(1)].

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