JUDICIAL SYSTEM MONITORING PROGRAMME

PROGRAM PEMANTAUAN SISTEM YUDISIAL

The Draft Law on Amnesty and Pardon

A JSMP Report

Dili, East Timor
November 2002

BACKGROUND

In early May 2002 a draft law on amnesty and pardons was prepared by the President of the Republic of East Timor, Kay Rala Xanana Gusmao. The draft law was introduced to the Constituent Assembly (the predecessor to the National Parliament) in the hope that it would be passed promptly on 20 May 2002 and thus form part of general independence celebrations. The Assembly, however, declined to discuss the draft in the limited timeframe allowed and instead referred it for redrafting. After some minor amendments the draft was reintroduced to the National Parliament where it will be the subject of further discussion and debate. Not surprisingly given the context of East Timor's struggle for independence, the draft law, which offers immunity from criminal prosecution for a broad spectrum of past crimes and which reduces prison sentences generally for crimes committed prior to independence, has sparked considerable public comment and debate.

East Timor became an independent nation on 20 May 2002. Independence was preceded by approximately 450 years of Portuguese colonization followed by a quarter-century of brutal Indonesian military occupation. In particular, in 1999, after Indonesia agreed to a UN organised popular consultation, the Indonesian army established and trained pro-Indonesian militias in East Timor and orchestrated a campaign of violence in order to intimidate the population into voting for autonomy within Indonesia. Nonetheless, almost 80% of the East Timorese people implicitly voted for independence by rejecting the Indonesian proposal for autonomy. Following the announcement of the result of the popular consultation on 4 September 1999, the Indonesian army and pro-Jakarta militias escalated their campaign of killings, rapes, torture, looting and the forceful deportation of a large number of the population to Indonesian West Timor. More than 75% of East Timor's infrastructure was razed to the ground in the process.

Security was not restored until the Australian-led military operation (INTERFET) entered East Timor in late September 1999. Following the arrival of civilian UN personnel, a transitional administration, UNTAET[1], was created, and mandated to "exercise all legislative and executive authority, including the administration of justice."[2]

Few, if any, East Timorese escaped unaffected by the violence and trauma of the preceding quarter century. It was apparent, therefore, that in order to move forward there was a pressing need to address, in some way, the events of the past. To that end, two important steps were taken. In order to prosecute so-called Serious Crimes[3] cases that occurred during the Indonesian occupation, Special Panels of the Dili District Court and the Court of Appeal were established. In addition, an independent Commission for Reception, Truth and Reconciliation was established by UNTAET Regulation 2001/10.

[1] United Nations Transitional Administration in East Timor
[2] Security Council Resolution 1272/99, 25 October 1999.
[3] Serious Crimes is defined in UNTAET Regulation 2000/15 sub-articles 2.1, 2.3 and 2.4 as genocide, crimes against humanity, war crimes and torture – whenever and wherever they occurred – as well as murder and sexual offences under the Indonesian Penal Code where the offence was committed between 1 January 1999 and 25 October 1999.

The Commission's mandate is to assist the reconciliation process by inquiring into human rights violations committed in East Timor on all sides between April 1974 and October 1999; to facilitate community reconciliation for those who committed less serious crimes; and to make recommendations identifying issues that need to be addressed in order to prevent future human rights violations and in order to respond to the needs of the victims of past violations.

The draft Law on Amnesty and Pardons purports to be a further step towards coming to terms with East Timor's violent and divisive past. Its stated aim is to allow people to "forget and forgive with compassion and justice"[4]

LAWS ON AMNESTY AND PARDON

The granting of amnesty or pardons for past crimes is not a recent phenomenon. In the past three decades, in particular, amnesty laws have been employed on many occasions in an apparent attempt to facilitate a smoother transition from one regime to another and often, purportedly, to help provide a fresh foundation atop which a new future or peace may be constructed following a period of conflict and division.

Laws on amnesty and pardon may be a product of self-serving political expediency and/or may be introduced under a degree of duress. Alternatively, they may reflect a genuine community consensus that retribution for certain events of the past will only come at the expense of reconciliation and a stable future. Of course, laws on amnesties and pardons may also be the result of political processes which lie between these two extremes.[5]

Ultimately the legitimacy of any law on amnesty or pardons in the eyes of both domestic and international audiences will depend in part on the process by which it is created. Legitimacy, in this sense, rests on factors such as the extent to which any law on amnesty or pardons is consistent with the domestic constitution and other domestic legislation; conformity with principles of international law; consideration of who was consulted and involved in the drafting and adoption of the law; the context in which it was proposed and accepted; and the mechanisms for and complementary to its enforcement. Viewed from this perspective, questions of legitimacy extend beyond issues of formal legality to incorporate wider considerations such as community support for any law and the broader social context within which it is to be implemented. These considerations may in turn involve an inquiry into the rationale behind the law and the manner in which that rationale is pursued.

The scope of this report, however, is confined to exploring the legitimacy of East Timor's draft Law on Amnesty and Pardons by examining the extent to which the draft is

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[4] Preamble to the draft Law of Amnesty and of Pardons (unofficial English translation)

[5] For a study of amnesty laws from a wide variety of communities see William W. Burke-White, Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation, Harvard International Law Journal Summer, 2001 at 467 and Kai Ambos, Impunity and International Criminal Law: A Case Study on Colombia, Peru, Bolivia, Chile and Argentina, 18 Hum. Rts L.J. 1

consistent with the East Timorese Constitution, international instruments to which East Timor will soon become a party and the domestic legislation establishing the Commission for Reception, Truth and Reconciliation. This narrower focus reflects the work and mandate of JSMP which is to encourage informed public debate and promote the rule of law by providing independent legal analysis and commentary on developments in East Timor's judicial system. It is hoped that this report will complement the work of other organisations which are better placed to discuss political issues, community attitudes, cultural and philosophical paradigms and other matters relevant to the wider question of legitimacy as defined above.

The report is not intended to be a comment on whether a law on amnesty or pardons is, in principle, a desirable or necessary step for East Timor.

EAST TIMOR'S DRAFT LAW ON AMNESTY AND PARDON

The draft Law on Amnesty and Pardons currently before the Parliament in East Timor is quite skeletal and contains only eight articles.

- The first article states that all crimes against property committed before 19 May 2002 that do not involve violence or threats are granted amnesty.
- The second article grants amnesty for all non-violent and non-bloody crimes committed on or before 30 September 1999 by East Timorese who were forced to join the militia.
- The third article grants amnesty for all acts committed by the Resistance with the exception of war crimes, genocide or crimes against humanity as defined by Article 160 of the Constitution.
- The fourth article provides for substantial reduction in prison terms for crimes committed prior to 20 May 2002 but not covered by the amnesty provisions. Sentences less than 10 years are reduced by two thirds; sentences between 10 and 20 years are reduced by one half; and sentences of more than 20 years are reduced by one third.
- The fifth article provides that any reduction in sentence granted under article four is conditional on the person not committing a crime punishable by one or more years imprisonment within three years of the amnesty law coming into force, or within three years of release or during the course of their sentence.
- The sixth article states, *inter alia*, that no amnesty is provided against civil actions arising from crimes committed.
- The seventh article states that any doubts or omissions arising from the implementation or application of the law are to be resolved by the Court of Appeal.
- The eighth article states when the law (had it been passed) would have come into operation (i.e. 20 May 2002).

Deficiencies in the drafting of the law, particularly the failure to clearly define key terms and the failure to provide for supplementary adjudicative and enforcement mechanisms necessary to apply the law, have attracted criticism from both local and international

agencies.[6] JSMP's own comments on the draft law which highlight the potential problems and consequences of the draft are available on the JSMP Website.

IS THE LAW CONSTITUTIONAL?

Constitutional Interpretation

The Constitution provides that the "validity of the laws and other actions of the State and local Government depends upon their compliance with the Constitution."[7] East Timor does not yet have its own distinct body of jurisprudence on statutory or constitutional interpretation. Although it can be assumed that a civil law rather than a common law approach will be adopted, that still leaves scope for a wide variety of interpretive approaches. It will require decisions of the Court of Appeal and/or the Supreme Court before debate on matters of "constitutionality" becomes less speculative and more substantive. (It should be noted that the Court of Appeal has not been operational since Independence further stifling the emergence of such jurisprudence.) Nonetheless, it is hoped that the comments below at least serve to draw attention to potential areas of concern.

Amnesty

Under article 95(3) (g) of the Constitution of the Democratic Republic of East Timor, it is incumbent on the National Parliament to grant amnesty. There is no further mention of amnesty in the Constitution and the sub article does not specify whether the Parliament's power to offer amnesty is intended to encompass cases involving individuals, groups or entire classes of people. Likewise, there are no limits specified on the types of crimes for which Parliament may offer amnesty. On its face, therefore, the Constitution affords the Parliament an unfettered power to grant amnesty.

However, a specific provision of any legal instrument is given meaning and definition by its context. Often, if particular provisions of a legal instrument are viewed in isolation their meaning will be different than if they are viewed as part of the instrument as a whole. Often too, if particular provisions of a legal instrument are viewed in isolation they appear to be in conflict with other provisions of the same instrument. Although, as noted above, each jurisdiction must ultimately arrive at its own approach to statutory interpretation, one would assume that, at the very least, it is safe to assert that each individual article of the Constitution should be read, interpreted and applied, *to whatever extent possible*, in a manner consistent with the spirit of the Constitution as a whole. As a result, there may be implied limits on the Parliament's power to grant amnesty.

A survey of other constitutional provisions suggests that this is the case.

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[6] See for example: East Timor Serious Crime Unit's Comments on Proposed Law of Amnesty and Pardons; Yayasan Hak – Komentar dan Rekomendasi terhadap Rancangan Undang-Undang Amnesty dan Pengampunan; and Human Rights Watch – Letter to Jose Alexandre Gusmao July 16 2002;

[7] Article 2(3)

- **Article 16 and discrimination**

Article 16 of the Constitution provides that:

"1. All citizens are equal before the law, shall exercise the same rights and shall be subject to the same duties.
2. No one shall be discriminated against on grounds of … political or ideological convictions …"

The draft law differentiates between members of the Resistance and other East Timorese. In Article 3 members of the resistance are granted amnesty for past crimes provided those crimes do not constitute war crimes, genocide or crimes against humanity. Such an amnesty might cover crimes such as murder, rape and assault in circumstances where the offence was not committed as part of a widespread and systematic attack aimed directly at the civilian population. The amnesty offered in article two for those "who were forced to integrate into the militia" does not extend to cover crimes which are violent or bloody and therefore is not as broad in its compass. Moreover, no amnesty is offered to those who willingly joined the militia – with the exception of the general amnesty provided in article one for crimes against property. This differentiation between different perpetrators on the basis of their political allegiance rather than on the basis of the nature and context of the crime committed is a violation of article 16. Differentiating between perpetrators on the basis of whether their crimes involved a degree of duress or self defence would not in itself fall foul of article 16.[8] However, underpinning the law appears to be an assumption that some criminal acts were more justified than others, depending on the political ideology of the perpetrator. This assumption is discriminatory and as such the law as it relates to amnesty is unconstitutional.

- **Article 160 and the prosecution of crimes against humanity**

Article 160 of the Constitution provides that "acts committed between the 25th of April 1974 and 31st December 1999 that could be considered crimes against humanity, genocide, or war crimes shall be liable to criminal proceedings with the national or international courts." Article 1 and 2 of the draft law are not framed by reference to this article. That is, rather than limiting any amnesty granted to crimes which do not fall within the ambit of article 160 of the Constitution, the amnesty granted in article 1 is limited to crimes which "do not involve violence or threats" and in article 2 to crimes which are not "violent and bloody crimes". As has been discussed in the commentaries on the draft law referred to above, the imprecision inherent in such phrases means that crimes which do not involve the direct use of violence but which might, nonetheless, be classified as crimes against humanity could potentially qualify for amnesty under article 1 and/or 2 To the extent that articles 1 and 2 of the draft law operate to make crimes against humanity, genocide or war crimes not liable to criminal proceedings, those articles would appear to offend against article 160 of the Constitution.

[8] Although one might argue that self defence or duress are defences to be argued and tested in a Court rather than the basis of a grant of amnesty.

As already noted, there is no direct limit in article 95(3) (g) of the Constitution on the types of crimes for which amnesty may be granted. However given the general nature of 95(3) (g) and the more specific nature of article 160, it appears logically to interpret the amnesty power granted under article 95(3) (g) as circumscribed by article 160. This is a logical interpretation because if the Parliament could use article 95(3) (g) to grant amnesty for the crimes covered by article 160, then it would be possible to leave article 160 without any meaning or utility. On the contrary, limiting article 95(3) (g) by reference to article 160 by no means eclipses the power granted therein. There would still be many crimes and offenders in respect of whom the Parliament could exercise its amnesty power.

- **Article 6(b) and the Rule of Law**

Article 6(b) of the Constitution states that it is a fundamental objective of the State to "guarantee and promote fundamental rights and freedoms of citizens and respect for the principles of the democratic State based on the rule of law." It is not difficult to construct an argument that a broad ranging general amnesty, of the type proposed under the draft law, serves to undermine the rule of law. However, this does not automatically lead to the conclusion that the draft law offends against article 6(b). All amnesty laws can be characterised as undermining the rule of law – the purpose of an amnesty is to pervert the ordinary course of the law by allowing a person to escape the criminal consequences of their actions. Nonetheless, it was clearly envisaged in the Constitution that the Parliament would have this power. The question arises, therefore, is the power to grant amnesty intended to be constrained by article 6(b) and if so, how?

Amnesty may be expressed and granted with varying degrees of specificity or generality. The draft law grants broad amnesties and then denotes (with a lack of clarity) exceptions to the amnesty granted. The law could have been expressed in the alternative – by stating specifically what crimes would be subject to amnesty with the implication that all other crimes would not be covered. Framing the law in this way would have eliminated the uncertainty of the current draft and minimised the possibility that crimes not intended to be covered by articles 1, 2 and 3 would nonetheless be subject to amnesty.

Likewise the timeframes referred to in articles 1, 2 and 3 of the draft law are expressed broadly. In article one the amnesty operates on crimes committed "until the 20 May 2002"; in article 2 the amnesty operates on crimes committed "until the 30 September 1999"; and in article 3 the amnesty operates on crimes committed "in the past". These timeframes are indefinite. In the case of the first two, it is not stated when the period of amnesty begins. In the case of article 3, it is not clear either when it begins or ends. There is no apparent rationale for the use of different timetables in each of the three articles. Moreover, there is no apparent rationale for any of the timeframes used. In particular it is not clear why any amnesty offered would extend to cover the entire period of UNTAET administration when that period post dated Indonesian occupation and the violence, destruction and chaos which followed the popular consultation. The UNTAET administration was charged, inter alia, with restoration of law and order in East Timor. It

would undermine the work done by that administration to grant amnesty for all crimes against property committed over the period of UNTAET administration.

Further, there is no attempt to restrict the operation of the amnesty to crimes which were motivated by and/or arose out of the struggle for and against East Timorese independence. No rationale is provided for why ordinary criminals, whose actions were not committed in order to advance any political position, ought to be granted amnesty. The implicit message is that rule of law is a fluid concept with negotiable application.

It may be that the article 95(3) (g) is interpreted as intended to operate as an exception to the State's more general obligation to promote respect for the principles of the democratic State based on the rule of law. However, the preferable view is that the two articles can and should be read together. The effect of this would be that, in exercising its power to grant amnesties, the Parliament would be required to state with a careful degree of specificity what crimes, perpetrators and timeframes would be covered by the amnesty. In that way, any amnesty law would be marked as a limited and clearly defined departure from the rule of law for an apparent purpose and as such, its operation would not be antithetical to the promotion of the rule of law. However, blanket amnesties, or amnesties framed in the most general of terms, by their very nature operate to undermine the principle that the law at any particular point in time is and ought to be known, certain and predicable. Of course, it is not necessarily possible to designate at exactly what point an amnesty law becomes too general or broad reaching to be reconcilable with article 6(b). However, the current draft with its inherent ambiguities, unexplained timeframes and coverage of ordinary crimes unconnected with the struggle for and against independence falls at a point on the spectrum which must be regarded as inconsistent with the spirit of the rule of law.

Pardons

Article 85(i) of the Constitution provides that the President of the Republic has exclusive power to grant pardons and commute sentences after consultation with the Government. Given that the President has exclusive power in this regard, article 4 of the draft law is unconstitutional. If the Parliament passed the law in its current form it would be attempting to legislate to reduce prison sentences, to varying degrees, for all crimes committed before 20 May 2002. Even though the law was proposed by the President and would have to be promulgated by him, the law is an act of parliamentary power and not presidential power. Clearly the Parliament does not have that power. Neither does the Parliament have the power to direct the President to exercise his or her discretion in a particular way because that would constitute a violation of the separation of powers, a doctrine enshrined in article 69 of the Constitution.

In addition to this lack of power, article 4 of the draft law should be regarded as unconstitutional for two further reasons.

- **Article 118(1), Article 69 and the Separation of Powers**

Article 4 operates to reduce sentences in respect of all crimes committed prior to 20 May 2002 which are not covered by the amnesties granted in the first three articles. In that way, it purports to operate on criminal cases which have not yet been instituted, heard or finalised. Therefore, it could be argued that the law pre-empts and interferes with the exercise of judicial power. Article 118(1) of the Constitution states that the Courts are the organ of sovereignty charged with administering justice in the name of the people. An important part of that mandate is issuing sentences in criminal cases. There is a multiplicity of considerations which judges must weigh against each other in exercising their sentencing discretion. By legislating to reduce sentences across the board before they are even determined, the Parliament would be interfering in this important judicial function. For this further reason article 4 would fall foul of article 69 of the Constitution

- **Article 6(b) and the Rule of Law**

As with the power to grant amnesty, article 6(b) of the Constitution would also impact on the power to grant pardons and commute sentences. An indiscriminate, across the board sentence reduction for all people convicted of crimes committed before 20 May 2002, is a violation of the rule of law with no obvious rationale. To be consistent with article 6(b), the power to grant pardons and commute sentences should be exercised on a case by case basis after careful consideration of the circumstances of the offender and the offence. Article 85(i) itself foreshadows such a process of consideration when it provides that the President must consult with the Government before issuing a pardon. It is not possible that the President could effectively consult with the Government in respect of a whole class of offenders, some of whom have not yet been identified, charged and tried.

These factors indicate that the power to grant pardons cannot be exercised in an indiscriminate and pre-emptive manner. More importantly, as noted, it is not a power that may be exercised by the Parliament.

IS THE LAW CONSISTENT WITH PRINCIPLES OF INTERNATIONAL LAW?

Article 9 of the Constitution provides that:
"1. The legal system of East Timor shall adopt the general or customary principles of international law.
2. Rules provided for in international conventions, treaties and agreements shall apply in the internal legal system of East Timor following their approval, ratification or accession by the respective competent organs and after publication in the official gazette.
3. All rules that are contrary to the provisions of international conventions, treaties and agreements applied in the internal legal system of East Timor shall be invalid."

There are several principles and provisions of international law which appear to be breached by the draft Law on Amnesty and Pardons. However, given that East Timor only became a member of the United Nations on 30 September 2002 and has not yet

taken the opportunity to sign and ratify several key human rights instruments, it is necessary to consider the draft law's conformity with international law in two parts – the first dealing with principles of international law by which East Timor is already bound and the second dealing with the principles of international law by which East Timor may become bound if, as anticipated, the Parliament ratifies several core human rights conventions.[9]

Existing International Law Obligations

Although it is not without controversy, it now widely argued that all states, independent of treaty obligations, have a duty to investigate and prosecute or extradite suspected perpetrators of crimes against humanity who are within their territory.[10] This obligation is said to arise because the prohibition of crimes against humanity forms part of *jus cogens* (that is, it is an international legal norm that can not be changed or revoked by treaty) and states have an obligation *erga omnes* to prohibit crimes against humanity (that is, they have an obligation to prohibit crimes against humanity irrespective of what treaties they are or are not signatory to because the obligation arises from a more fundamental duty owed by every state to the international community to uphold justice). The principle that states have a duty to prosecute crimes against humanity is supported by the preamble to the Rome Statute, to which East Timor is a signatory, and numerous resolutions of the UN General Assembly.[11]

As discussed above the draft law potentially grants amnesty to perpetrators of some crimes against humanity.

The first two articles of the draft law are not specifically framed so as to exclude crimes against humanity from the amnesty granted. The first covers all property crimes, except crimes involving violence or threats. This does not necessary exclude from the amnesty all crimes against humanity because violence or the threat of violence is not a necessary element of a crime against humanity. For example, the burning of a large number of homes, killing of livestock and destruction of crops may, particularly if performed in connection with other acts, constitute a crime against humanity in that it may represent

[9] This report was written in October 2002. On 10 December 2002, the East Timorese Parliament ratified the following 7 international treaties: International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Covenant on the Elimination of All Forms of Racial Discrimination; Covenant Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment; Convention on the Elimination of All Forms of Discrimination Against Women; Convention on the Rights of the Child; Convention on the Protection of All Migrant Workers and Members of Their Families. The following Optional Protocols were also ratified: Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women; Optional Protocol to the Convention on the Rights of the Child dealing with Involvement in Armed Conflict; Optional Protocol to the Convention on the Rights of the Child dealing with Sale of Children, Child Prostitution and Child Pornography; and the Second Optional Protocol to the International Covenant on Civil and Political Rights. Although these instruments have now been ratified by Parliament, according to article 9(2) of the Constitution they will not apply in the internal legal system of East Timor until they are published in the official gazette. As of 27 January 2003, this has not yet occurred.

[10] UNIVERSAL JURISDICTION: The Duty of states to enact and enforce legislation – Chapter 5; Amnesty International September 2001; AI Index IOR 53/017/2001

[11] ibid., Chapter 5 p10-12

"persecution against an identifiable group or on political, racial, national, ethnic, cultural, religious, gender or other ground …"[12]

The second article grants amnesty for crimes committed by people forced into the militia provided the crime is not violent and bloody. This amnesty could encompass forced deportation, illegal imprisonment, and persecution provided those acts were performed with the direct or implicit threat of violence rather than violence itself. Such acts might also potentially constitute crimes against humanity depending on the context in which they are committed.[13] Other crimes against humanity, such as rape and torture, might also be caught by the amnesty if it is interpreted so as to exclude only crimes which are both violent *and* bloody.

It may be that the drafting of the first two articles was intended to encompass all acts that might be characterised as crimes against humanity. It is possible that the person drafting the law assumed that crimes against humanity would necessarily involve violence and thus be ineligible for amnesty. Nonetheless that is not the case and as such the draft, in its current form, creates the possibility that East Timor might be in violation of the general customary law duty of states to investigate, prosecute and punish perpetrators of crimes against humanity.

Further Obligations under United Nations Conventions to which East Timor may become a party

East Timor is currently in the process of determining which United Nations Treaties it will become party to. Two of the core human rights treaties which it is anticipated East Timor will ratify are the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Both conventions contain provisions which are relevant to the draft law.

Article 2(3) of the International Covenant on Civil and Political Rights provides that:
"Each State Party to the present Covenant undertakes:
(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted."

This article imposes a duty on signatory states to prevent conduct contravening the rights set out in the covenant and, where violations have occurred, whether perpetrated by the state or not, to investigate, prosecute and punish those responsible. It also involves an

[12] UNTAET Regulation 2000/15 article 5 in which "crimes against humanity" is defined for the purposes of the Special Panels. Persecution is defined in article 5.2(f) as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."
[13] UNTAET Regulation 2000/15 article 5

obligation to provide fair and adequate reparation to the victims and their families and the obligation to establish the truth of the facts.[14]

Some of the types of rights expressly protected by the International Covenant on Civil and Political Rights are the right to life; the right to freedom from torture and cruel, inhuman or degrading treatment or punishment; the right to freedom from slavery and servitude; the right to liberty and security of person; the right to freedom of movement; and the right to freedom of thought, conscience and religion. Needless to say, all of these rights were often violated over the period of Indonesian occupation and particularly during the violence in the lead up to, and fall out from, the popular consultation.

Some violations of rights enshrined in the covenant would be immune from criminal prosecution under the draft law. Although victims and their families would still be able to pursue civil remedies, nonetheless, the state would be in violation of its duty under article 2 to investigate, prosecute and punish.

Article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that states must make all acts of torture an offence punishable by an appropriate sentence which takes into account the grave nature of such acts. Article 7 provides that if a state does not extradite a person who is within their territory and who is reasonably suspected of having committed an act of torture then the state must prosecute that person. The draft law would potentially allow acts of torture to go unprosecuted. This is particularly a risk with article 3 which grants amnesty for crimes committed by members of the Resistance except in the case of crimes against humanity and war crimes, which are crimes that require a particular contextual element that will not be satisfied in every torture case. For example an act of torture committed in a domestic setting would not qualify as a crime against humanity. Further, the sentence reductions provided for in article 4 in relation to all offenders, are such that the length of the reduced sentence might be regarded as no longer an "appropriate sentence which takes into account the grave nature of the [act of torture]".

Even if East Timor does become a signatory to either instrument, the State would not necessarily have any obligation to investigate and prosecute in respect of rights violations which occurred prior to ratification, particular given that many of those violations will not constitute crimes against humanity. However, increasingly the prevailing view is that many of the rights protected by both instruments also have *jus cogens* status. Therefore states' obligations in respect of those rights or violations of those rights would exist independent of treaty obligations and may precede accession to the two treaties.[15]

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[14] Legal brief on the Incompatibility of the Chilean Decree Law No 2191 of 1978 with International Law (a document published jointly by Amnesty International and the International Commission of Jurists) Jan 2001; AI Index – AMR 22/002/01

[15] UN Committee against Torture, decision of 23 November 1989, Communication Nos. 1/1988, 2/1988 and 3/1988, Argentina, decisions of November 1989, para. 7.2. Although these decisions relate to the Convention against Torture only– the reasoning underlying those decisions is equally applicable to the ICCPR.

At the very least, a moral and good faith obligation would arise. If the new independent state of East Timor were to sign either instrument it should be as part of a concerted effort to break with the past and embrace a new and different future. One would have to question the new regime's genuine commitment to human rights standards and the rule of law, if one of their early actions was to provide immunity for past human rights violations.

COMMISSION FOR RECEPTION, TRUTH AND RECONCILIATION

The poetic preamble to the draft law alludes to notions of reconciliation but the draft law itself does not include any measures positively aimed at fostering reconciliation. If indeed reconciliation is the purpose underlying the draft law, then it proceeds on the questionable assumption that amnesty alone can deliver that end. There is no evidence to support that proposition.

"Reconciliation" is best described as a process. It can be facilitated by legislation but certainly not mandated by it. It is not a deal which can be brokered between leaders. The position adopted by East Timor's own Commission for Reception, Truth and Reconciliation reflects the view that comprehensive truth seeking and personal accountability are preconditions to reconciliation. It is not difficult to envisage how amnesty might be employed as a tool in such a process. As in the South African model, the promise of amnesty can be used to encourage frank disclosure which brings to light truths which would otherwise have remained uncovered.[16] Full disclosure of this kind can in turn encourage acceptance and acknowledgment of personal responsibility on the part of perpetrators. However unconditional amnesty offers no incentives of this sort. On the contrary, amnesty of the type proposed by the draft law would appear to undermine the work of the Commission for Reception, Truth and Reconciliation before it has even begun in earnest. [17]

One of the functions of the Commission is to facilitate community reconciliation, whereby an individual who has committed a less serious offence may approach the Commission, make a written statement, participate in a hearing and undertake an act of community reconciliation.

An offender who wishes to participate in the Community Reconciliation Process must provide a written statement to the Commission which contains, *inter alia*, the following: a full description of the relevant offence; acknowledgement of responsibility; an explanation of the association of the offence with East Timor's political conflict; an identification of which community the offender wishes to reconcile with; and a

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[16] Kirsty Sangster, Truth Commissions: The Usefulness of Truth Telling, (1999) 5 Australian Journal of Human Rights 136

[17] The Commission has only recently commenced Community Reconciliation Process hearings on 24 August 2002 and six further meetings have been conducted since then.

renunciation of violence to achieve political objectives.[18] Statements from deponents must then be reviewed by the Commission in order to determine whether the acts disclosed therein are appropriate to be dealt with in the context of the Community Reconciliation Process. The kind of offences that are more likely to be regarded as less serious and therefore suitable to be dealt with under this process are said to be crimes such as theft, minor assault, arson (other than resulting in death or injury), the killing of livestock or destruction of crops, particularly if carried out in pursuance of orders rather than at the deponent's own initiative.[19]

If the offence is considered suitable to be dealt with through the Community Reconciliation Process, the matter is referred to a relevant Regional Commissioner who convenes a panel for the purposes of conducting a public hearing. Following the hearing, the panel must deliberate and decide upon an appropriate act of reconciliation to be performed by the deponent and inform him or her of their decision. Acts of reconciliation may include community service, reparation or a public apology.[20] The deponent my choose whether to undertake the act of reconciliation or have his or her case referred back to the Office of the General Prosecutor.[21] Once accepted, failure to comply with a community reconciliation agreement may result in a fine of up to $3000 or one year's imprisonment or both.[22] On the contrary, compliance with the agreement means that the individual concerned can not be prosecuted or subject to civil liability in respect of the disclosed acts which gave rise to the agreement.[23] It is hoped that "by participating in the process, individuals will be able to demonstrate to their own communities that they are sorry for what they have done and that they wish to live together in peace."[24]

Clearly, there is a significant overlap between the types of offences it is envisaged will be dealt with by the Commission under the banner of community reconciliation and cases which will be given amnesty under the draft legislation. The procedures set out in the UNTAET Regulation above both presuppose and depend on the Community Reconciliation Process occurring against the backdrop of a functioning judicial system whereby a major incentive for participating in the process at every stage is the opportunity to avoid criminal prosecution. Without that incentive, there may well be offenders who nonetheless choose to participate in the process in order to facilitate a smoother reintegration into their community. However, it is incontrovertible that many others who may have been encouraged or induced to participate will avoid the difficult process of disclosure, public hearing, admission of guilt and act of contrition, if they are granted unconditional amnesty through another channel.

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[18] Article 23.2 UNTAET Regulation No. 2001/10

[19] Schedule I to UNTAET Regulation No. 2001/10. NB - Although the schedule originally provided that "in no circumstances shall a serious criminal offence be dealt with in a Community Reconciliation Process" it has since been amended by UNTAET Directive on Serious Crimes N0. 2002/9 to read "in principle, serious criminal offences, in particular, murder, torture and sexual offences shall not be dealt with".

[20] Article 27.7 UNTAET Regulation No. 2001/10

[21] Article 27.9 UNTAET Regulation No. 2001/10

[22] Article 30.2 UNTAET Regulation No. 2001/10

[23] Article 32 UNTAET Regulation No. 2001/10 – NB the article states that no immunity shall extend to a serious criminal offence.

[24] Summary of the Commission Regulation issued by the Commission for Reception, Truth and Reconciliation in East Timor in April 2002 – www.easttimor-reconciliation.org/Reg_Summary-E.htm

In that way, the draft amnesty law would operate as an obstacle to reconciliation by jeopardising one of the fundamental elements of the Commission's work. If the two paths to "effective" amnesty offered by the draft law and the Commission's Community Reconciliation Process respectively are compared, it is obvious that the latter provides the only achievable prospect of genuine reconciliation.

It is interesting to consider the potential utility of the draft law in the context of a divided "unreconciled" community. JSMP recently attended a community reconciliation convened by a local NGO in Alas. The meeting was precipitated by rising tensions in the community directed towards returned refugees from West Timor alleged to have been involved in militia violence in 1999. It was feared that without some immediate intervention, violence motivated by a desire for revenge and retribution might erupt. Would the draft law, had it been enacted, have served to alleviate tensions and hostility within the Alas community?

JSMP's observations indicate, quite simply, that there is no reason to suppose that the draft law would have any effect on reconciling the community, except perhaps to further anger locals frustrated at a perceived lack of justice for past offences. What emerged from the meeting in Alas was that the community wanted individuals alleged to have been involved in past offences to admit and disclose their full involvement in past offences. Further, they wanted those individuals to be held accountable, in some way, for their alleged actions. Those who had an opportunity to speak demanded, with great animation and forcefulness, that alleged perpetrators must confess. There was also a distinct push for reparations to be made. Victims and their families suggested that alleged perpetrators should have to build them a house, provide free assistance on their lands and a variety of other forms of compensation.

The draft law, had it been in operation, would not have helped to bring the truth to light; it would not have encouraged individuals to admit their involvement in past offences and seek forgiveness, it would not have provided any form of redress, compensation, sense of finality or justice to victims or families of victims. On the contrary, it might have had the effect of discouraging alleged perpetrators, with no fear of accountability within the formal justice sector, from participating in the community meeting. Perhaps more troublesome, it may have encouraged the general community in Alas to provide their own incentives for participation - that is, it may have encouraged the locals to wield the threat of unsanctioned, community imposed retribution.

In short, if we consider the potential operation of the draft law against the backdrop of anger and frustration which exits in communities like Alas, it is apparent that unconditional amnesty has no part to play in averting tension and division amongst communities. Unconditional amnesty can not deliver, in any way, the very things which people demand as preconditions for "moving on", that is, truth and accountability. On the contrary, the draft law would potentially disable alternative procedures specifically and carefully designed to deliver those ends.

The draft law in it current form is incompatible with the existing mandate of the Commission and would serve to undermine a crucial aspect of its work. In addition, it would not in itself serve to advance the cause of reconciliation via some alternative route.

CONCLUSION

Even adopting a narrow approach to "legitimacy", largely confined to exploring the conformity of the draft law with relevant national and international legal instruments, it is apparent that the formal legal status of the law is questionable. It appears that the draft has been prepared without due consideration of East Timor's constitutional framework, international obligations and existing state sponsored endeavours directed towards meaningful reconciliation.

JSMP does not have a position on whether a law on amnesty and pardons is desirable or necessary in East Timor. Rather, JSMP seeks to offer independent legal commentary on the draft law in its current form with a view to promoting the rule of law. In that vein, JSMP recommends that any final law on amnesty and pardons should be framed in clear and limited terms carefully calculated to exclude serious crimes and to safeguard respect for the rule of law. Likewise, JSMP recommends that any final law should be complimentary to and compatible with other efforts to address the events of the past rather than in conflict with such efforts.