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Reconceiving refugees and internally displaced persons as transitional justice actors

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Introduction

This paper constitutes a plea to the academic and practitioner community to conduct research in an emerging area.¹ Current discussions about transitional justice in a post-conflict state tend to ignore the issue of who is included in and excluded from transitional justice decisions, including forcibly displaced persons. There is no existing study of refugees or IDPs and their relation to transitional justice. I argue for research which could lead to both innovative programs in refugee and IDP camps but also improved sustainability of peace-building efforts in the country of origin. Moreover, such research could foreground wider issues of coherence and effectiveness for the current UN system about the prevention of forced displacement.

The 1951 Refugee Convention² deliberately excludes all mention of civil and political rights once a person has attained refugee status, although a person accorded refugee status thereby holds economic, social and cultural rights such as housing, education and access to work.³ Conversely though, the conferral of refugee status is confined to those individuals who suffer breaches of civil and political rights.⁴

Other motivations for forced migration, such as hunger, lack of education prospects or generalised oppression, are not recognised grounds for refugee status. In other words, the international community tends to only concern themselves with the civil and political life of an asylum-seeker when assessing refugee status, and has no regard for their civil and political life after such status has been acquired.

The link between forcible displacement and transitional justice at present is to focus only on accountability for forced displacement where it is categorized as an international violation.⁵ The field of transitional justice has traditionally been heavily focused on institutions within national borders. Truth commissions in Sierra Leone, Guatemala, Peru, and Timor-Leste (as assessed below) have investigated displacement as a human rights violation and its impact on the populations of those countries, but often in an ad hoc or constricted manner, and without a conscious strategy.

¹ A fuller exposition of these issues can be found in Susan Harris-Rimmer, *Reconceiving Refugees and Internally Displaced Persons as Transitional Justice Actors* CIJG Issues Paper No. 8, March 2009, available at <http://cijg.anu.edu.au/cijg/link_documents/IssuesPapers/Rimmer_IssuesPaper8.pdf>. Thank you to the members of the Transitional Justice Network email list for many generous comments on the original proposal.

² Convention relating to the Status of Refugees, adopted on 28 July 1951, as amended by the 1967 Protocol. See Articles 17 to 24.

³ Guglielmo Verdirame and Barbara Harrell-Bond (with Zachary Lomo and Hannah Garry). *Rights in Exile: Janus-Faced Humanitarianism*. New York, Oxford: Berghahn Books, 2005.

⁴ Article 1 of the Convention as amended by the 1967 Protocol provides the definition of a refugee as: a person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

⁵ See further Maria Stavropoulou, "Displacement and Human Rights: Reflections on UN Practice," *Human Rights Quarterly* 20, no 3 (1998): 515-554.

One notable recent exception is the Liberian truth commission, which specifically sought to integrate people in the Diaspora, collecting statements from victims in countries across West Africa (Ghana, Guinea, Nigeria, Sierra Leone) and further afield (UK, US) and conducting public hearings in the US.⁶

There is evidence of emerging and innovative practice in this field. David Backer at the College of William & Mary has been directing a research project to examine victims' responses to the transitional justice processes in Liberia as well as Ghana, Nigeria and Sierra Leone. The surveys conducted by his team ask the respondents whether they have been internally displaced or relocated to other countries as refugees or exiles (grouping these categories together, the shares range from 24 percent in Ghana to 84 percent in Sierra Leone), so they have the ability to assess how those experiences may correlate with other sets of attitudes and behaviours. In addition, to take account of the unique dimensions of the Liberian process, Backer's team has recruited small numbers of respondents from refugee communities in both Ghana (23 individuals) and Sierra Leone (20).⁷

Criminal prosecutions can target perpetrators of violations that lead to displacement, such as the deportation and forcible transfer of population cases at the International Criminal Tribunal for the former Yugoslavia (ICTY).⁸ Reparations programs may distribute benefits to displaced persons for the violations that caused them to flee, for those they suffered while displaced, or for the crime of displacement itself, as has happened in Guatemala.⁹ Restitution programs may restore lost land, homes, and property, such as occurred in post-war Bosnia.

More generally, transitional justice mechanisms are limited in their outreach to displaced populations who remain outside borders. Populations are often surveyed about their attitudes to transitional justice options, such as the recent major surveys of Afghans,¹⁰ Ugandans,¹¹ and Bosnians;¹² but not one survey has ever asked refugee or IDP populations their views, even those in neighbouring countries. This gap highlights the idea that international definitions of democracy typically take a minimalist or 'thin' form in post-conflict societies, simply associating democracy with regular elections. This

⁶ The Advocates for Human Rights, 'A House With Two Rooms', *Final report of the Liberia TRC Diaspora Project*, 2009.

⁷ See further David Backer, "Victims' Responses to Truth Commissions: Evidence from South Africa." In Muna Ndulo ed., *Security, Reconciliation and Reconstruction: When the Wars End*, London: University College of London Press, 2006; and David Backer, 'Cross-National Comparative Analysis'. in Audrey Chapman, Hugo van der Merwe and Victoria Baxter eds., *Assessing the Impact of Transitional Justice: Challenges for Empirical Research*, Washington, DC: USIP Press, 2006.

⁸ *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, 17 March 2009.

⁹ Claudia Paz y Paz Bailey, 'Guatemala: Gender and Reparations for Human Rights Violations', in *What Happened to the Women? Gender and Reparations for Human Rights Violations*, ed. Ruth Rubio-Marín, New York: Social Science Research Council, 2006.

¹⁰ Afghanistan Independent Human Rights Commission. *A call for Justice: Conclusion of National Consultation on Transitional Justice in Afghanistan*. Kabul: Afghanistan Independent Human Rights Commission, 2005

¹¹ International Center for Transitional Justice and the Human Rights Center, University of California, Berkeley, *Forgotten Voices: A Population-Based Survey On Attitudes About Peace And Justice In Northern Uganda*, July 2005.

¹² Stephan Parmentier, *Restorative Justice: exploring the missing link between transitional justice and peace-building*, RegNet Seminar, ANU, Canberra, 23 September 2008.

forms an inadequate basis for building democracy in post-conflict societies or pursuing transitional justice strategies. A principle of 'democratic inclusion' can usefully guide attempts to develop better processes. To test the boundaries of this idea of democratic inclusion, this paper has conducted an exploration of the difficult case of female refugees located outside transitional justice processes, and what can be done to better address their needs.

What is also missing from emerging practice is a focus on the linkages between forced displacement and transitional justice outside a violations context. For example, I ask the question - do refugees and IDPs have a right to be consulted about peace agreements in their country of origin? One aspect of the inquiry could be processes which prepare and include refugees and IDPs to participate in governance decisions in a broader post-conflict development context. Refugees have a primary interest to be actively involved in processes that improve the conditions in their countries of origin.

The challenge for any such engagement, similar to refugees seeking to participate in elections in the home country, is that the refugee would need to forego their anonymity and expose the fact that they have sought refuge elsewhere. This makes refugees sometimes reluctant to engage as the lack of transitional justice is the very reasons they continue to fear return. For IDPs there is a clear link to human rights obligations to allow participation of citizens in political processes. New research could help overcome some of these challenges.

The significance of this quest lies in foregrounding the ethics of if, how, and when the international community could include refugees and IDPs in transitional justice decisions, including constitution drafting, new parliaments, trials, and truth commissions, but also broader state-building and governance issues such as legislative agendas, security sector reform, justice sector reform, national development plans, budgets and so on. Most refugees will return to their country of origin at some point, but there are still considerable democratic and practical issues to be examined if a general principle of democratic inclusion to this group while they are outside the border. This is particularly important when considering caseloads in protected situations, such as Sri Lanka, or the Thai-Burma border.

The practical benefits of such research might be the better calibration of decisions about assisted voluntary returns, and better methods of monitoring the rights of returnees (at the moment there is a heavy focus on personal security, employment and housing). The strategic benefit of this kind of research is to 'widen the protection space', by which they mean to make sure displacement issues are part of the political discussions, not just relief.

The larger question is whether a deeper understanding of the dynamics of refugee and IDP participation in such processes might lead to greater stability, and identify the root causes of conflict in the country of origin. The demographic profile of many refugee and IDP cohorts show a majority of women, children, elderly and people with disabilities. These groups are traditionally excluded from public decision-making, which adds a further human rights dimension central to the value of this research. In this light, we need to explore some strategic questions emerging from a feminist consideration of the current debates over the Responsibility to Protect (R2P) doctrine, SC 1325 and refugee law,

contextualized by the experience of women in the Asia-Pacific region facing forced displacement.

This paper seeks to test the value of the proposition that we should reconceive of displaced persons as transitional justice actors against a recent case study. I evaluate the participation of refugee and displaced women in the Commission for Reception, Truth-seeking, and Reconciliation (Comissão de Acolhimento, Verdade e Reconciliação de Timor Leste or CAVR) in Timor Leste, and the representation of their testimony in the final *Chega! Report*. The CAVR is a unique truth commission process because of the addition of the ‘reception’ function to encourage returns from West Timor, and so provides a useful point of entry to this discussion.

The CAVR and displaced persons: a gendered perspective

The *Chega! Report* has been successful in acknowledging issues facing women in a transitional justice context. The Report is an important historical document which fulfills the truth-telling aim of transitional justice mechanisms.¹³ Restorative justice is designed to be victim-focused, and the CAVR was more successful than any other mechanism in Timor in involving, recognising and telling the truth about women as victims and survivors, mostly because women were better represented in its processes, and women with significant expertise in gender issues were in important leading roles. The CAVR’s Community Reconciliation Process and Urgent Reparations program were both innovative and important for the women it reached.

However, as presented in this paper, the CAVR faced some serious challenges in meeting the needs of displaced women, as well as from political factors outside its control; such as the tardy acceptance of the final report by the Timorese Government, the failure of the concurrent UN serious crimes process to claim jurisdiction over crimes in West Timor, and the refusal of the Jakarta trials to acknowledge gender persecution.

I also conclude that the obligation to punish gender-based crimes was in part ‘traded’ for the political outcome of encouraging militia to return from West Timor. Proper exclusion interviews were never conducted under the 1951 Refugee Convention by the UN refugee agency UNHCR, which if they had been conducted may have prevented those individuals who had committed war crimes from being considered refugees deserving of protection in West Timor at all, and prevented their return to East Timor. This is only barely acknowledged in the *acolhimento* section of the *Chega! Report* (roughly translated as ‘reception’).

The *Chega! Report* succeeds in showing some gender-dimensions of the violence, and what has happened to women in this situation in the independence era. Instead of heroes, the report shows that women are often treated as collaborators with the Indonesians. But the gendered nature of the refugee experience, such a prominent factor in the Timorese conflict in 1999, is left largely untold. Partly because refugee protection and transitional justice goals were not synchronised, and more often working at cross-purposes, the

¹³ Commission for Reception, Truth and Reconciliation (CAVR). *Chega! Final Report of the Commission for Reception, Truth and Reconciliation*. Dili: Commission for Reception, Truth and Reconciliation, 2005.

overall ability to meet the goals of either were compromised, to the detriment of the most vulnerable.

Background to the Commission

East Timor's Commission for Reception, Truth and Reconciliation (CAVR) was established in 2001 as an independent authority with a mandate to investigate violations of international law from 1974 to 1999. The Final Report entitled *Chega!* ('Enough' in Portuguese) was released in 2006.¹⁴ The CAVR had three core programmes: truth-seeking, community reconciliation, and reception and victim support.

A novel aspect of the CAVR mandate compared to most truth commissions was to focus on the reception of up to 85 thousand refugees from West Timor (part of Indonesia), displaced or forcibly deported during the 1999 violence, especially during the month of September. The UN found that most of these refugees were forcibly evacuated by armed militia and Indonesian troops. The approximately 250,000 refugees who fled or were forcibly evacuated to West Timor were accommodated in several large refugee camps, such as Noelbaki, Tuapukan and Naibonat in Kupang, two camps in Kefamenanu as well as about 200 other smaller camps or shelters. They represented about one third of East Timor's population at the time.¹⁵

The reception function of the CAVR and exclusion concerns

The UN refugee agency UNHCR had a presence in Kupang from May 1999 to try to provide emergency relief and protection to the refugees, and coordinate returnees to East Timor.¹⁶ UNHCR's efforts were hampered by Indonesian soldiers and East Timorese militia, who tightly controlled the refugees' movement in and out of these camps, as well as their access to humanitarian aid.¹⁷ Conditions in the camps were very difficult, both in terms of living standards and human rights standards.¹⁸ Refugees returned to East Timor in phases, with 60 000 still remaining when the CAVR began its mandate in 2002. Many had been supporters of integration before the Popular Consultation and some had been active members of the militia in their communities.

¹⁴ Commission for Reception, Truth and Reconciliation (CAVR). *Chega! Final Report of the Commission for Reception, Truth and Reconciliation*. Dili: Commission for Reception, Truth and Reconciliation, 2005.

¹⁵ Chris Dolan, Judith Large and Naoko Obi, *Evaluation of UNHCR's repatriation and reintegration programme in East Timor, 1999-2003*, EPAU/2004/02, February 2004, p. 1 and 88.

¹⁶ United Nations High Commissioner for Human Rights, 'UNHCR News, Timor Emergency Update', 25 November 1999. Of the 110,000 initial returns in late 1999, over 65,000 were reportedly spontaneous, the rest assisted by UNHCR. The mandate of UNHCR is contained in the Statute of the Office of the United Nations High Commissioner for Refugees, Annex to UNGA Res. 428(V), 14 Dec. 1950.

¹⁷ Extracted from Commission for Reception, Truth and Reconciliation (CAVR). *Chega! Final Report of the Commission for Reception, Truth and Reconciliation*. Dili: Commission for Reception, Truth and Reconciliation, 2005, Part 10, p. 6. See also 'Indonesia: UNHCR Asks Government to Control Militias', *Refugees Daily*, 10 November 1999.

¹⁸ Human Rights Watch, *Indonesia/ East Timor: Forced Expulsions to West Timor and the Refugee Crisis* Vol. 11, No. 7 (c), December 1999.

After the referendum violence, then President Xanana Gusmão felt that the first priority should be securing East Timor's stability and literally rebuilding the new nation, which required the majority of the population in the West Timor camps (including the former militia leaders) to return. Gusmão believed the former militias would pose less of a threat back in Timor.¹⁹

While there were debates about this strategy, in the end militia were encouraged to return with the understanding that those responsible for serious crimes would be prosecuted at a later date once the judicial system was up and running. UNTAET's Chief of Staff, in close co-operation with Xanana Gusmão, and with the full endorsement of the Special Representative of the Secretary General, took the lead on pursuing this approach from October 2000 onwards. Some of Gusmão's strategies, notably the 'wining and dining' of militia leaders in expensive Dili restaurants, were controversial within various parts of the UN mission.²⁰

The problem was that some of these militia were almost certainly involved with violence and forced deportations during 1999 and ongoing violations of women and children in West Timor camps. The head of the UNHCR office Bernard Kerblatt informed the world that refugees were in 'a hostage-like situation, with women and children tightly controlled by extremist elements'.²¹

The most well-known example of a person in this situation was Juliana dos Santos, kidnapped as a 'war prize' at age 16 by Igidio Mnanek, the deputy leader of the notorious Laksaur militia after a massacre in the Suai church. Under the 1951 Refugee Convention, persons who fulfil the definition of a refugee under Article 1A can be excluded from that status if there are serious reasons that person could be found 'not deserving of international protection' under Article 1F. These reasons include having committed war crimes or crimes against humanity, serious non-political crimes, or acts contrary to the purposes and principles of the UN.²² Armed combatants are meant to be separated from civilian asylum-seekers.²³

However, one of the reasons the full extent of the treatment of women in the camps is not known, not even by the CAVR process, is due to this political policy of encouraging

¹⁹ Fabrizio Hochschild, 'It is better to leave, we can't protect you': Flight in the first months of the United Nations Transitional Administrations in Kosovo and East Timor. (2004) *Journal of Refugee Studies* 17 (3):286-300.

²⁰ Chris Dolan, Judith Large and Naoko Obi, *Evaluation of UNHCR's repatriation and reintegration programme in East Timor, 1999-2003*, EPAU/2004/02, February 2004, p. 1 and 88.

²¹ Victoria Brittain, 'Traumatized Timorese Women', *The Guardian*, Dili, 30 July 2001.

²² UNHCR Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 September 2003.

²³ According to international standards governing the protection and assistance for refugees, the strictly civilian and humanitarian nature of refugee camps and settlements must be upheld in order to preserve the peaceful character of asylum. These principles are clearly stipulated in various UNHCR Executive Committee (ExCom) Conclusions, including the Conclusion on Safeguarding Asylum, No. 82, (1997), para d (vii), which reiterates 'the responsibility of host States, working, where appropriate, with international organizations, to identify and separate any armed or military elements from refugee populations, and to settle refugees in secure locations at a reasonable distance, to the extent possible, from the frontier of the country of origin, with a view to safeguarding the peaceful nature of asylum.'

returns, even of excludable militia. Even where protection interviews were undertaken, UNHCR focused on a very gendered idea of ‘protection needs’.

As the guidelines for the reception of returnees from West Timor indicated, ‘Persons who might face protection problems are: those suspected of past criminal militia activities, those formerly affiliated to militia groups, persons who were active in the pro-autonomy movement, former TNI, former POLRI, former civil servants, persons belong to an ethnic or religious minority group or persons married to such a person’.²⁴ Most of these criteria were assumed to apply principally to men, and there were relatively few female interviewers.²⁵

The UNHCR evaluation report states:

The structure of the assessment forms and the assumptions which framed them, the gender of the interviewers and their lack of training all meant that a number of issues relating to women’s and children’s needs and vulnerabilities – which would have been much more relevant to the majority of returnees - were not picked up in any systematic fashion. This was despite reports that sexual violence was a serious concern in the camps in West Timor. ‘The emphasis on identifying such militia involvement in the assessment process thus seems disproportionate’.²⁶

During the independence anniversary celebrations in 2009, the government released Igidio Manek’s close associate and fellow indictee Martenus Bere.

Impact of displacement on participation in transitional justice process

This had a negative impact on the ability of women in particular to participate in the CAVR process. Chapter 7.7 of the report by the CAVR recorded 853 cases of sexual violence but concluded:

[t]he Commission notes the inevitable conclusion that many victims of sexual violations did not come forward to report them to the Commission. Reasons for under-reporting include death of victims and witnesses (especially for earlier periods of the conflict), victims who may be outside Timor-Leste (especially in West Timor), the painful and very personal nature of the experiences, and the fear of social or family humiliation or rejection if their experiences are known publicly. These strong reasons for under-reporting and the fact that 853 cases of rape and sexual slavery, along with evidence from about another 200 interviews were recorded lead the Commission to the finding that the total number of sexual violations is likely to be several times higher than the number of cases reported. The Commission estimates that the number of women who were subjected to serious sexual violations by

²⁴ Chris Dolan, Judith Large and Naoko Obi, *Evaluation of UNHCR’s repatriation and reintegration programme in East Timor, 1999-2003*, EPAU/2004/02, February 2004, at p. 32.

²⁵ Chris Dolan, Judith Large and Naoko Obi, *ibid*, at p. 1 and p. 88.

²⁶ Chris Dolan, Judith Large and Naoko Obi, *ibid*.

members of the Indonesian security forces numbers in the thousands, rather than hundreds.²⁷

In the camps in West Timor where tens of thousands of women were forcibly deported, a fact-finding team in one study alone found 163 different cases of violence against 119 women, and noted serious impacts of sexual violence on women's health.²⁸ The *Chega! Report* is almost silent on this larger context, but adds that the attitudes of female refugees to voluntary return and reconciliation issues were also not well known. At paragraphs 71-72 of Part 10, the *Chega! Report* states:

Women were especially constrained in their freedom to engage with the NGO Coalition by the power structures that existed within the camps. The positions women took on reconciliation and repatriation were almost entirely determined by their husbands, fathers and uncles who had brought them to West Timor. They were economically and physically dependent on these male figures, who often both intimidated them and acted as their ultimate protection from other men.²⁹

The combination of the political imperative to receive refugees back from West Timor by the Timorese leadership, with the gendered application of protection needs by UNHCR, mean that the violence perpetrated against women in West Timor is still little known. This context is not acknowledged by the Final Report in its summary of the 'reception' function of the CAVR, although some examples of women returning from West Timor are included in the reconciliation hearings.³⁰

However, even here, the experience of displacement is not considered in any three-dimensional way, especially for women. Corey Levine describes the narrow focus of the women's hearing and in Chapter 7.7:

[D]uring the Women and Conflict Public Hearing process not one woman was asked to speak about all the other suffering that the women experienced because of their gender – their culturally assigned roles, responsibilities and their unequal access to economic survival, political participation and the basic necessities of survival. The hearing never heard from women amputees who lost a limb to a landmine while scouring the neighbourhood for fuel and the fallout from that experience. No women shared their stories of the forced displacement they endured while being solely responsible for the survival of their children, their sick relatives and their elderly parents. No woman spoke of the daily beatings she suffered at the hands of her husband because of the heightened tensions and violence that existed in their community and which was then replicated in the home. No woman spoke of how she was denied sanitary products when she was detained in prison and how degrading this

²⁷ Commission for Reception, Truth and Reconciliation (CAVR), *ibid.*

²⁸ Tim Kemanusiaan Timor Barat, 'Violence against IDP/refugee women – Report of TKTB (Tim Kemanusiaan Timor Barat) findings in IDP/Refugee Camps in West Timor', August 2000.

²⁹ Commission for Reception, Truth and Reconciliation (CAVR). *Chega! Final Report of the Commission for Reception, Truth and Reconciliation*. Dili: Commission for Reception, Truth and Reconciliation, 2005, Part 10, p. 17.

³⁰ Commission for Reception, Truth and Reconciliation (CAVR), *ibid.*, Part 10, p. 23.

was to her. No woman spoke of how she was not able to access medical care due to checkpoints, harassment, lack of documentation, lack of money, lack of childcare and so lost the baby she was carrying³¹

In this manner, the truth-telling goals of the CAVR project were compromised by the failure of refugee protection and the limited script offered to returnees.

Limitations on the violations approach to displacement

This failure of the truth-seeking component of transitional justice goals was compounded by the finding by the Special Panels in 2001 that the serious crimes process had no jurisdiction over crimes committed in West Timor. The case of *The Prosecutor v Leonardus Kasa* (the *Kasa case*) was decided by the Special Panel for Serious Crimes in May 2001.³² It shows a blatant disregard for the forcible displacement experienced by the victim. It is also a good example of the manner in which the ‘violations’ approach taken to transitional justice issues by international criminal law can often ignore displacement issues and therefore be detrimental to wider political goals of peace-building and accountability, as well as in this case, gender equality.

The facts of the case are straightforward. Leonardus Kasa was an alleged member of Laksaur militia from Cova Lima district. He was arrested and detained by the Civilian Police (CIVPOL), pursuant to the Indonesian Criminal Procedure Code. The Public Prosecutor, Raimund Sauter indicted him in December 2000 with one charge of rape of a woman in Betun village, West Timor, in September 1999. At the preliminary hearing in February 2001 the defence claimed the Special Panel lacked jurisdiction to hear the case as the alleged rape occurred outside the territory of East Timor, and that as the sex was consensual, it should be classified as adultery, which is not a serious crime.³³

On 9 May 2001 the Special Panel declared that it had no jurisdiction in the case.³⁴ The defendant had already been released from detention in February 2001 but had been prevented from approaching the victim's home. Immediately after the judgment was given, the Special Panel announced that such restrictions on the defendant no longer applied. An appeal was filed by the Prosecution on 11 October 2001 and withdrawn on 5 April 2004.

The judges of the Special Panel were Luca I. Ferrero (Presiding Judge, Italy), Maria Natercia Gusmao Pereira (Judge Rapporteur, East Timor) and Sylver Ntukamazina (Burundi). The judges stated that the same charges might be raised before courts in Indonesia, or in East Timorese courts if jurisdictional issues were clarified by way of amendment to the regulations, which seemed to influence their judgment. The Special Panel also emphasised that it made no finding as to the defendant's innocence or guilt on the charge of rape.

³¹ Corey Levine, *Gender and Transitional Justice: A Case Study of East Timor*, Canadian Consortium on Human Security, Vancouver, 2004 at pp. 29-30.

³² *The General Prosecutor of the United Nations Transitional Administration in East Timor v Leonardus Kasa*. Dili District Court Special Panel for Serious Crimes Case no. 11/CG/2000, 9 May 2001.

³³ Indictment.

³⁴ Judicial System Monitoring Programme, ‘Dili court increases pressure on Indonesia’, 10 May 2001.

Disturbingly, the Special Panel makes no reference to the background of forcible displacement in this case. The alleged victim in this case, Maria da Costa and her two children were displaced on 5 September 1999 from East Timor and brought to a refugee camp located in the warehouse of Betun in West Timor. This was a week after the popular consultation, where militias, organised and supported by the Indonesian military, were forcibly removing up to 250,000 Timorese into camps in West Timor and wreaking widespread and systematic violence on those perceived to be pro-independence supporters and their property in the process.³⁵

The indictment does not refer to this context at all, and the context changes the nature of the offence that should have been charged in the indictment. The mass deportation and rape of women in East Timor is an absent fact in the case. The defendant claimed not to be aware of the chaos around him. The *New York Times* reported in early 2001:

In an interview at the Dili courthouse, Mr. Casa put forward a defence that... he knew his victim. She belonged to him. The sex was consensual. Beyond that, Mr. Casa said, he knew less than just about anybody else in East Timor about the violence occurring around him. 'I never saw any massacre or any destruction,' he said. 'I never even left my house.'³⁶

The consequence of this lack of context is that the Prosecutor charged Kasa with the crime of rape in violation of Section 9 of UNTAET Regulation 2000/15 and Article 285 of the Penal Code of Indonesia. Section 9 'Sexual offences' merely states that the provision of the applicable Penal Code in East Timor shall, as appropriate, apply.

As noted above, the Special Panels exercise exclusive jurisdiction with respect to genocide, war crimes, crimes against humanity, murder, sexual offences and torture, but not universal jurisdiction with regard to 'ordinary' murder or sexual offences between 1 January 1999–30 October 1999, which must be prosecuted under the Indonesian Penal Code.³⁷ The sexual offences in the Penal Code are contained in the section 'Crimes against Decency'. Adultery is a criminal offence under Article 284(1), and the definition of rape is 'any person who...forces a woman to have sexual intercourse with him out of marriage' (Article 285).³⁸ This dissonance between the context of the offence and what was charged created jurisdictional problems for the Special Panel to resolve.

As the charge brought was rape under domestic law rather than rape in the context of a crime against humanity, the Special Panel found it had no jurisdiction. The Special Panel deemed the applicable criminal law to be Section 9 of UNTAET Regulation 2000/15 and Article 285 of the Indonesian Penal Code, and therefore held that only Indonesia has the jurisdiction on the case. This meant that the East Timorese courts and the Special Panel

³⁵ Commission for Reception, Truth and Reconciliation (CAVR). *Chega! Final Report*. Dili, East Timor, 2005.

³⁶ Seth Mydans, 'Sexual Violence as Tool of War: Pattern Emerging in East Timor', *New York Times*, 1 March 2001.

³⁷ Establishment of panels with exclusive jurisdiction over serious criminal offences. UNTAET/REG/2000/15, 6 June 2000

³⁸ Note Suzannah Linton, 'Experiments in International Justice' (2001) *Criminal Law Forum* 12:210-211. The ICTR defined rape in the *Akayesu* case as 'a physical invasion of a sexual nature committed on a person under circumstances which are coercive' at paras 6.4 and 7.7.

of Dili District Court itself did not have jurisdiction over a crime of rape committed in West Timor before 25 October 1999. '[N]o East Timorese Court, according to the laws in force at the present time, could try this case.'³⁹

In my view, the Special Panel erred in its failure to consider principle of active personality (or nationality) of the perpetrator as a basis of jurisdiction. Universal jurisdiction is generally only relied upon where the crime is a gross human rights violation; and there is no link with the territory where the crime took place, the offender or the victim.⁴⁰

There was no impediment to assessing the other grounds of jurisdiction under customary international law, especially the nationality principle, even if universal jurisdiction in this case was found not to exist due to the judicial interpretation of Regulation 2000/11. The Special Panel is able to apply 'recognised principles and norms of international law'⁴¹ and it is unquestionable that the extra-territorial application of criminal jurisdiction in certain circumstances, for example, on the ground of the nationality principle is one of these norms.

It was also open to the court to ask the Prosecution to justify why this act of rape was an 'ordinary' crime, opportunistic only, or else reframe the charge.⁴² Had the Prosecutor charged the case as an international crime, the jurisdictional arguments could have been handled quite differently. Both the Prosecutor and the Special Panel seemed to completely fail to entertain the idea that a single rape by a militia leader could have been characterized as a crime against humanity if part of a 'widespread and systematic attack' as envisioned by Section 5.1(g); a war crime under Section 6.1(b)(xxii) in an international armed conflict or Section 6.1(e)(vi) in a non-international armed conflict; or an act of torture under Section 7.1.

The Special Panel is directed to apply 'established principles of international law of armed conflict',⁴³ but fails to mention that the *Furundzija* case in the International Criminal Tribunal for the Former Yugoslavia (ICTY) decided that the rape of a single victim is a crime serious enough to warrant prosecution by an international war crimes tribunal. The defendant in that case was charged and convicted with rape and torture as war crimes.⁴⁴ This oversight can only be explained by speculating that either the Panel or Prosecutor or both lacked sufficient knowledge of recent precedent in international

³⁹ Kasa Judgment, 2001, at p. 6.

⁴⁰ See further International Law Association Committee on Human Rights Law and Practice, 'Final report on the exercise of universal jurisdiction in respect of gross human rights violations', *Report of the Sixty-Ninth Conference*, London 2000, at pp. 403-431.

⁴¹ Section 5, UNTAET Regulation 2000/11.

⁴² Judge Pillay asked the Prosecution to amend the indictment and undertake further investigation in the *Akayesu* case before the ICTR, leading to the first judgment of rape as a crime against humanity: Bill Berkely, 'Judgment Day', *Washington Post Magazine*, 11 October 1998, at p. W10.

⁴³ Section 5, UNTAET Regulation 2000/11.

⁴⁴ *Prosecutor v. Anto Furundzija*, ICTY-95-17/1-T, Judgment 10 December 1998. See further Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester; Manchester UP, 2000 at pp. 322-3.

criminal law.⁴⁵

The *Kasa* judgment could also be read as the participants having insufficient insight into the crime of rape during armed conflict. There has been a long struggle by feminist legalists to have rape considered as a weapon of war, not a private, unavoidable circumstance unconnected to the conflict. The legal errors above could be illustrative of a type of gender-blindness.⁴⁶ It is also a parable for the fact that two separate arms of the United Nations simultaneously undermined the protection and inclusion of women in the transitional justice processes in a UN Transitional Administration. There is a clear need for better coherence across the UN system in the pursuit of shared UN goals.

In summary then, the *Kasa* case can be seen as combination of problems with the indictment, the verdict and jurisdictional confusion, which culminate in a judgment representing a step backwards for the women of East Timor, and for international gender jurisprudence. But it is also symptomatic of the lack of cohesion between international criminal law and refugee law in a politically delicate context. Outside the region, refugees fared no better. There were significant numbers of Timorese granted refuge in third countries since 1975, who have never been consulted in any capacity as to their views.⁴⁷

The situation of refugees in West Timor represented almost a complete failure of international protection, but also had consequences for the integrity of the transitional justice process. The UN itself became a victim in West Timor when several UNHCR staff were murdered in Atambua in September 2000, leading to the complete withdrawal of humanitarian actors.⁴⁸

Conclusion

Where there has been significant displacement of the population, in theory, states should tailor their transitional justice processes to reflect the needs of that population, but this has rarely occurred and did not occur in Timor.⁴⁹ UNHCR does take an interest in rule of law and transitional justice issues but they are not part of its core mandate of refugee protection.⁵⁰ UNHCR also attempts to focus on protecting female refugees from gender-

⁴⁵ Judicial System Monitoring Programme has raised concerns over the training and experience of both local and international public defenders in the Los Palos case. *A JSMP Trial Report The General Prosecutor v John Marques and 9 Others (The Los Palos Case)*, Dili, 2002, at pp 23-4.

⁴⁶ Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester; Manchester UP, 2000 at p. 19.

⁴⁷ The Australian government blocked all efforts of volunteer lawyers from the International Commission of Jurists (Australia branch), including the author, to take evidence from Timorese refugees evacuated to Australia under 'Safe Haven' visas in 1999.

⁴⁸ ABC TV, 'UN aid workers killed in West Timor', *Lateline*, 6 September 2000.

⁴⁹ See in contrast the Afghanistan Independent Human Rights Commission. *A call for Justice: Conclusion of National Consultation on Transitional Justice in Afghanistan*. Kabul: Afghanistan Independent Human Rights Commission, 2005

⁵⁰ Steven Wolfson, 'Refugees and Transitional Justice.' (2005) *Refugee Survey Quarterly* 24(4): 55-59. Senior UNHCR official Erika Feller stated in 2006 that UNHCR has shifted to a 'responsibility to protect' framework, replacing the idea of right of humanitarian intervention in the 1990s: '[r]esponsibility should lie on need, not mandates or artificial legal categorizations'.

based violence.⁵¹ In concert with a UN Transitional Administration, one would expect that this part of the UNHCR mandate would have been easier to fulfil. For a series of complex operational and political reasons, it was not possible.

The case study of the CAVR highlights that reconceiving refugees and IDPs as transitional justice actors will be a complex and difficult research task. The serious crimes process run by the UN within Timor Leste decided in an early case that it held no jurisdiction over crimes committed in West Timor. There were some serious difficulties reconciling the desire to bring refugees from West Timor home, with the legal demands for exclusion screening of militia from the camps. There was a heavily gendered impact in that exercise that went largely unnoticed.

There were also significant numbers of Timorese granted refuge in third countries since 1975, who have never been consulted in any capacity as to their views. I argue that transitional justice processes where there has been significant displacement of the population must tailor their operation to reflect the needs of that population. This seems straight-forward but in fact has been extremely difficult in the Timorese context. It is clear that more research and thinking has to be done in this area.

⁵¹ See further Alice Edwards, 'Overview of International Standards and Policy on Gender Violence and Refugees: Progress, Gaps and Continuing Challenges for NGO Advocacy and Campaigning'. Paper delivered at the Canadian Refugee Council International Refugee Rights Conference, Toronto, Canada, 17-19 June 2006. Amnesty International, AI Index: POL/33/004/2006.