



## JUSTICE UPDATE

*Period: 9 – 18 March 2005*

*Issue 8/2005*

### THE CONSTITUTIONALITY OF THE COMMISSION OF TRUTH & FRIENDSHIP

The model for the proposed **Commission of Truth & Friendship (“CTF”)** between Indonesia and Timor Leste was finalised on 9 March 2005 when the respective governments signed its Terms of Reference. These Terms of Reference raise a number of important questions as to the nature of the CTF, its ability to exercise its mandate independently and impartially and, perhaps most importantly, its role in terminating all further investigation and prosecution of crimes committed in Timor Leste prior to and during 1999<sup>1</sup>. Aside from these broader policy issues, however, there are also serious questions as to the constitutional validity of the CTF, as required by **section 2.3** of the **Constitution** of Timor Leste.

#### 1. CONSTITUTIONAL POWER TO ESTABLISH THE CTF

**Section 95** of the Constitution prescribes the competencies of Timor Leste National Parliament. According to section 95.3(g) the Parliament has competency to grant amnesty<sup>2</sup>. Furthermore, under section 95.3(f) Parliament is empowered “to approve and denounce agreements and ratify international treaties and conventions”. Section 115 in turn prescribes the competencies of government. According to section 115.1(f) the government is competent to negotiate and enter into international treaties and agreements *on matters which do not fall within the competence of parliament*. It follows, then, that any international agreement pertaining to the grant of amnesties falls within the competence of, and must be authorised by, parliament. It appears that the Government has not yet obtained this approval.

Under **section 85(i)** of the Constitution, the President has exclusive competency “to grant pardons and commute sentences after consultation with government”. A pardon is the use of the executive power to cancel punishment. This measure is only applicable after a judicial process has established responsibilities and has assigned penalties. Pardons do not erase the crime from the record of the convicted perpetrator.<sup>3</sup> Section 85(i) does not therefore, give competency to the President to recommend amnesty. According to the Constitution, only the Parliament has the

<sup>1</sup> See *JSMP Press Release*, “Commission of Truth and Friendship” Seeks to End the Search for Justice whilst “Commission of Experts” Keeps it Alive’, 14 March 2005.

<sup>2</sup> “Amnesty is the governmental act or erasing the institutional memory of an offence. Its legal result is that punishment or certain crimes is cancelled, but also that no record of the crimes is kept; so that persons convicted for the commission of a crime are exonerated of responsibility and the crime itself is erased from their record.” ICTJ memo 26 April 2004.

<sup>3</sup> ICTJ memo 26 April 2004

competency to recommend amnesty. The National Parliament has not authorised the government or the President to agree to a body which could interfere with the Parliament's competency to grant amnesty.

Although the President and the Prime Minister gave a presentation on the CTF to the Parliament on 3 March, at no stage has the Parliament's authorisation been sought. As distinct from a failure to uphold constitutional obligations, the execution of an agreement on a subject matter beyond the government's competence would arguably render the agreement to establish the CTF void *ab initio* i.e. from the beginning.

## 2. CONSTITUTIONAL OBLIGATION TO PROSECUTE SERIOUS CRIMES

According to **section 160** of the Constitution “[a]cts committed between the 25th of April 1974 and the 31st of December 1999 that can be considered crimes against humanity of genocide or of war shall be liable to criminal proceedings with the national or international courts”. Amongst other things, the CTF is purportedly empowered to grant amnesties in respect of these crimes thereby preventing prosecution in accordance with section 160. In parliamentary debate on this issue the Prime Minister stated that the imminent conclusion of the Special Panels for Serious Crimes (“SPSC”) in May signified an end to investigation of the crimes to which section 160 refers and, therefore, the mandate of the CTF to grant amnesties in respect of these crimes did not conflict with proceedings controlled by the SPSC. In other words, in the Prime Minister's view, “the national or international courts” referred to in section 160 have the substituted meaning of the SPSC.

It is a fundamental principle of constitutional interpretation that words should be given their natural and ordinary meaning in preference to a less direct and more ambiguous interpretation. The phrase “national or international courts” clearly contemplates the possibility that crimes committed during and immediately after Indonesian occupation could be tried by courts other than the SPSC, which were established at the time of the drafting of the Constitution in 2001 or in the future.<sup>4</sup> If the drafters of the Constitution had intended the SPSC to conclusively determine liability for these crimes, to the exclusion of all other possible courts, they would have expressed this intention clearly in the document. In JSMP's view there is consequently a strong argument to be made that any attempt to ‘oust’ or exclude from the jurisdiction of national or international courts the crimes mentioned in section 160 would contravene the Constitution. Granting an amnesty for these crimes would constitute such exclusion.

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<sup>4</sup> This is also strongly suggested by s 10.4 of UNTAET Reg 2000/11 which states that ‘The establishment of panels with exclusive jurisdiction over serious criminal offences shall not preclude the jurisdiction of an international tribunal for East Timor over these offences, once such a tribunal is established.’

**Section 9**<sup>5</sup> also indicates an obligation to prosecute acts which amount to crimes under international law. The CTF purports to limit prosecution and therefore violates this obligation. As a party to the *Rome Statute of the International Criminal Court*, international law requires Timor Leste to comply with its obligations under the Rome Statute. Accordingly if the CTF has the effect of preventing further prosecutions for international crimes the CTF will be contrary to the Rome Statute, and will therefore be invalid pursuant to s 9.3 of the Constitution. Moreover, under s 9.1 “the legal system of East Timor shall adopt the general or customary principles of international law”. It is a customary principle of international law that crimes against humanity, genocide, and war crimes, are crimes under international law for which universal jurisdiction lies – that is, they are crimes which are of such a serious nature that all states within the international community are obliged to prosecute irrespective of the place in which or the person against whom the crime was committed.<sup>6</sup> The government of Timor Leste is therefore obliged by s 9 of the Constitution, and the principles of customary international law which it incorporates, to prosecute the crimes of universal jurisdiction which were committed in its territory prior to and during 1999. JSMP believes that, the CTF’s power to possibly grant amnesties will effectively prohibit prosecution of these crimes and consequently this power, being unconstitutional, cannot be exercised.

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<sup>5</sup> 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 component 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.”

<sup>6</sup> Given that the Rome Statute has been ratified by over 60 states, it can now be said that the crimes described therein constitute customary international law.