

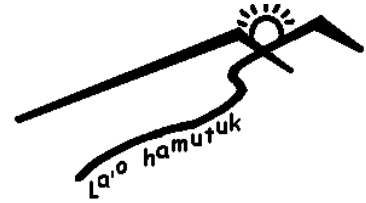
La'o Hamutuk

Timor-Leste Institute for Development Monitoring and Analysis

Rua de Mozambique 1/1a, Farol, Dili, Timor -Leste

Tel: +670-3325013 or +670-7234330

Email: info@laohamutuk.org Website: www.laohamutuk.org



20 October 2009

Members of the United Nations Security Council
New York, New York, USA

Dear Distinguished Members of the United Nations Security Council:

Over the last nine years, La'o Hamutuk has written to you many times about the situation in Timor-Leste, to help improve your discussions and ensure that you have current and comprehensive information. This letter, as well as the enclosed documents, are another effort in this direction. We hope that you find them helpful, and look forward to continuing communication with people throughout the United Nations system regarding our country.

When you meet this week on Timor-Leste, your discussions will include people who have travelled from Timor-Leste to represent the RDTL government and the UNMIT mission. Inevitably, their political and diplomatic presentations are likely to include distortions, omissions and missing context regarding the situation in this country and the views of its citizens. To make wise decisions, you require complete and accurate information, as the UN's deliberations – including reviewing UNMIT's current activities, its mandate extension next year, and appointing the next SRSG – will have significant impacts on the people of our country, as well as for the credibility and effectiveness of the United Nations system.

In particular, recent actions and statements of the Prime Minister and the President of the Republic regarding justice, impunity and the release of Maternus Bere are out of step with the wishes of the large majority of Timorese people, who believe, consistent with Timor-Leste's constitution and international legal principles, that people who commit serious crimes must be brought to trial in a legitimate judicial process. This week, several dozen Timorese citizens have written to you that our leaders' support for impunity does not represent their views and has grave implications for the future.

Like you, we closely read the Secretary-General's recent report on UNMIT (S/2009/504). We are concerned that diplomacy and self-censorship (as well as the pervasive use of passive voice) limit the information in this report, leaving out essential facts, context and responsibilities. We have annexed our attempt to fill some of these gaps and to include some information which became available after the report was written, and hope you find it useful. In addition, our website (<http://www.laohamutuk.org>) includes more on many relevant topics.

The remainder of this letter focuses on justice and impunity, and on the responsibilities of the Security Council, the United Nations, and the international community to complement what the governments of Timor-Leste and Indonesia can not or will not do, rather than once again instructing these two governments, with their bloody past history and problematic current relationship, what they should do.

In late August, La'o Hamutuk published *Justice for Timor-Leste Remains an Unfulfilled International Obligation* (<http://www.laohamutuk.org/reports/09bgnd/JusticeEn.pdf>), a briefing paper on ten years of ineffective justice mechanisms, and Amnesty International published *We Cry for Justice: Impunity Persists 10 Years on in Timor-Leste* (<http://www.amnesty.org/en/news-and-updates/report/no-justice-timor-leste-ten-years-after-independence-vote-20090827>). These reports are a useful reminder that the past decade has seen numerous false starts, unfulfilled promises, and political compromises which followed

24 years of crimes against humanity: the Indonesian invasion and illegal occupation which killed more than 100,000 Timorese people, predominantly civilian noncombatants.

When Timor-Leste politicians tell you that our people don't want justice, do not believe them. In 2008, The Asia Foundation conducted more than a thousand interviews across Timor-Leste for their report *Law and Justice in Timor-Leste: A Survey of Citizen Awareness and Attitudes* (<http://www.laohamutuk.org/Justice/08AsiaFoundationLawJusticeSurveyEn.pdf>). When asked "Suppose some person commits murder. Do you think that there are times when this person should be able to 'avoid punishment' or be free from 'compensating' the victim?" 90% of the respondents said no and only 6% said there might be cases when a murderer should not be punished.

Paragraphs 3 and 53 of the Secretary-General's report discuss the peaceful commemorations of the tenth anniversary of the referendum. However, 1999 in Timor-Leste had 364 days in addition to 30 August, many of which hosted horrendous crimes, terror, displacement and killings. High UN and Government officials generally ignored the tenth anniversaries of these other days, but many of Timor-Leste's citizens cannot forget so easily. We call your attention to two events in April, which commemorated massacres by Indonesian police and military-supported militia. They murdered dozens of peaceful, cowering refugees while negotiations in New York were leading to the 5 May agreement, in which the UN approved Indonesian armed personnel in Timor-Leste for the first time. Our web pages on the commemorations of the massacres at Liquiçá Church (<http://www.laohamutuk.org/Justice/99/09liquicamassacre.htm>) and Manuel Carrascalão's home (<http://www.laohamutuk.org/Justice/99/09CarrascalaoMassacre.htm>) include English translations of the survivors' current demands for justice.

Paragraphs 54 and 55 celebrate dialogue. While it is almost always better to talk than not to talk, talking alone cannot replace substantive actions or the rule of law. We urge the UN to deepen its analysis and understanding of the roots of problems here, the dynamics of society, and what is required for effective, durable solutions. In particular, dialogue cannot overcome official actions which ignore or undermine the constitution, rule of law, international human rights conventions and global principles of accountability.

Regarding the recent illegal release of indicted mass murderer Maternus Bere to Indonesian diplomats, paragraphs 33, 34 and 55 omit facts, apparently to hide international responsibility for justice. For example, the "outstanding warrant" against Bere was issued by the UN-initiated Serious Crimes Unit and Special Panels in 2003, and circulated by Interpol. La'ó Hamutuk has posted many documents, analyses and other information on this case at <http://www.laohamutuk.org/Justice/99/bere/09MaternusBere.htm>, and we encourage you to read them.

Although the UN High Commissioner for Human Rights was more active than UNMIT and the SG in responding to this violation of separation of powers and rule of law, her actions have had little concrete result. Like others in the UN system, she puts the entire responsibility for this impunity on Timor-Leste's leaders. Although the President and Prime Minister of this country sprung Bere from jail (in response to Indonesian threats), Indonesia itself provided sanctuary for him for the past six years, and the United Nations has failed to take any steps to assist service of the indictment against him and the 300 other SCU indictees protected by Indonesia. It is hypocritical and self-serving for the Secretary-General to write "It is also my hope that the Governments of both Timor-Leste and Indonesia will ensure that Maternus Bere is brought to justice, taking into account the report of the Commission of Experts appointed in 2005." (paragraph SG-55).

In her private September 2 letter, the HCHR wrote President Ramos-Horta restating “the United Nations’ firm position that there can be no amnesty or impunity for serious crimes such as war crimes, crimes against humanity and genocide.” That sentence needs a subject – and the United Nations must act as well as lecture if it is to retain any credibility. The governments of Indonesia and Timor-Leste have repeatedly shown, including in their conspiracy for Maternus Bere to escape accountability, that they do not have the will or the capacity to end impunity.

In citing the Commission of Experts Report (S/2005/458), the Secretary-General’s report misrepresents its concluding paragraph (emphasis added):

The international community is fully aware of the story of murders, rape, torture and enforced disappearances of East Timorese in 1999 and before. **These are crimes that extend beyond the responsibility of the Governments of Timor Leste and Indonesia. These are crimes that concern humanity.** The Report of the Commission of Experts may provide the last opportunity for the Security Council to ensure that accountability is secured for those responsible for grave human rights violations and human suffering on a massive scale and delivery of justice for the people of Timor-Leste.

The Commission of Experts’ four-year-old recommendation is clear (emphasis added):

525. If for any reason the above recommendations relevant to Timor-Leste and Indonesia are not initiated by the respective Governments within the time frames set out above (six months from 2005), or are not retained by the Security Council, the **Commission recommends that the Security Council adopt a resolution under Chapter VII of the Charter of the United Nations to create an ad hoc international criminal tribunal for Timor-Leste**, to be located in a third State.

Between 1975 and 1998, Indonesian government forces killed more than 100,000 people in Timor-Leste while the UN stood by and passed toothless resolutions without enforceable provisions. Members of the Security Council today may prefer to shirk your responsibility and put the burden on others, but this is neither fair, legal, pragmatic nor honest.

If the UN does not act effectively to bring Maternus Bere to justice, his release overturns the position of the UN, expressed in the formal disclaimer to the Lome Agreement, that impunity cannot apply to serious violations of international humanitarian law. Bere’s release overturns the foundation of the Statute of the International Criminal Court: “the most serious crimes of concern to the international community as a whole must not go unpunished.”

Paragraph SG-34 understates the broad societal debate on the Bere release and consequent legal issues, which includes church, civil society, victims groups, media, human rights groups, and others. On 12 October, Parliament debated the issue for ten hours with the Prime Minister’s participation, rejecting the no confidence motion on party lines. However, many Parliamentarians, including those in the governing coalition, agreed that the motion was correct on the law, although they were forbidden from voting against the Prime Minister. The debate highlighted whether leaders can put their personal interpretation of the “national interest” above the constitution and the law. Although former guerrilla commander Xanana Gusmão claimed this right, members of Parliament observed that similar claims had been made by Suharto, Marcos and Pinochet.

During the debate, the PM took full responsibility for Bere’s release, although he sometimes called it a “transfer” as if the Indonesian embassy were a prison, or tried to invent a back-dated medical rationale. The ensuing controversy has highlighted many fundamental issues here, including the constitutional separation of powers, unlawfully freeing a legally-imprisoned individual (punishable by 2-6 years in prison, according to Chief Judge Claudio Ximenes), and whether anyone supported by high Timor-Leste officials will ever be able to be brought to justice. The issue has grave implications not only for the future of the Serious Crimes process for

past crimes, but for current and future rule of law, public confidence in governmental institutions, and public security in Timor-Leste.

Discussion of the four-year-old CAVR recommendations (SG-31 and SG-55) in Parliament and elsewhere could be useful, and implementing those recommendations would be even better. But selective attention to the easy ones – and ignoring those which require political courage and/or international involvement – is hypocritical and ineffective. In addition to recommendations for Timor-Leste and Indonesia, the CAVR report recommends many actions by the UN and international community (including numbers 1.5, 1.6, 1.7, 1.8, 1.9, 1.10, 5.15, 7.1.1-7.1.12, 7.2.1 and 12.10). We wish to call your attention to one particular recommendation:

7.2.1. The United Nations and its relevant organs, in particular the Security Council, remains seized of the matter of justice for crimes against humanity in Timor-Leste for as long as necessary, and be prepared to institute an International Tribunal pursuant to Chapter VII of the UN Charter should other measures be deemed to have failed to deliver a sufficient measure of justice and Indonesia persists in the obstruction of justice.

The UN should be ashamed of the information given in SG-32, regarding the Serious Crimes Investigations Team. After more than three years, only 89 of 396 cases from 1999 have been investigated, and only 21 more are in process. When will the other 286 be done, or the tens of thousands of cases from before 1999? The UN has been here for more than ten years – how can it still be surprised by weather and road conditions?

Furthermore, the extremely limited mandate of SCIT results from an unacceptable series of compromises that has eroded justice to mere symbolism. There is no mechanism for indictments, extradition from Indonesia, arrests, or trials. Timor-Leste authorities have repeatedly demonstrated that they are too afraid of their larger neighbor to support any processes for justice. In fact, only one of the 84 Timorese militia convicted by the Serious Crimes Process remains in prison. President Ramos-Horta has even asked the SCIT to close (although apparently this was based on misinformation which has since been clarified). The issue is not capacity – but legality, courage and responsibility. If RDTL cannot meet its national and international legal obligations to end impunity, the UN must.

Paragraph SG-50 gives an unduly optimistic impression of progress in improving the functioning of the judiciary, accountability for criminal activity, and repairing the justice sector. In truth, there is a long way to go, and the examples of impunity and false “reconciliation” set by government leaders make it difficult for such systems to be perceived as fair. There is a widespread public perception that justice and accountability are only for “small people,” and that big people and their friends will enjoy impunity. This leads both to crime and to vigilante vengeance, undermining current and future stability and security. Although the government often gives lip-service to respect for the rule of law, their actions belie their promises, and the UN must not be afraid to look beneath the surface.

Paragraph SG-50 states that “the Government has sought at various levels to ensure strict ethical standards and to enhance respect for the rule of law” without mentioning the many times the ethics of members of the government have been questioned with regard to corruption and other issues, or that the principal leaders have undermined respect for the rule of law. As the Prime Minister told Parliament (and the national radio and television audience) on the Bere release, “we needed to consider the problem from a political viewpoint, rather than from a legalistic one, but as the legal path was barred ...”

We encourage you to read *The Justice System of Timor-Leste: An Independent Comprehensive Needs Assessment* issued by UNMIT on 13 October. Two excerpts from the Executive Summary are especially relevant:

8. Protecting Judicial Independence and Respecting the Separation of Powers

Judicial independence is a prerequisite to the rule of law. It is enshrined not only in international law, but also in the Constitution of Timor-Leste. Judicial independence must be observed in two ways. Not only must individual judges perform their judicial functions independent of outside influence or interference, but also the judicial branch as a whole must operate independently of the other, separate branches of government. Both the decisional independence of judges and the institutional independence of the judicial branch must thus be respected.

Judicial independence is not an end unto itself, but is a means to an end, ensuring that judicial decisions are made solely on the basis of the law applied to the facts of a particular case and not on the basis of outside influence or interference. Judicial independence is also grounded in the separation of powers, allowing judges to make decisions even when they run contrary to the preferences of another branch of government.

The current situation in Timor-Leste as it relates to judicial independence is problematic. Although the country's judges have consistently asserted their independence in the cases that have come before them, the institutional independence of the judiciary is still not fully recognized by other state actors.

This fact has been made evident most recently in the case of Maternus Bere, who is under indictment for crimes against humanity and other serious offenses allegedly committed in Suai in 1999. Bere appeared before a Timorese judge and ordered held in Becora Prison as a pre-trial detainee. Despite the fact that no further judicial proceeding was held and no additional judicial order issued, Bere was released at the direction of a high official in the Timorese government. This disregard for a judicial order and direct interference with the judicial system was a grave violation of judicial independence and the separation of powers.

It is the responsibility of all those who serve in the four organs of sovereignty, including those at the highest levels, to respect judicial independence and the separation of powers. It is imperative that a commitment be made to promote a culture of respect for the rule of law and to avoid those actions that would jeopardize it.

14. Confronting Impunity and Requiring Accountability

The judicial system of Timor-Leste, as currently constituted, is not actively engaged in the process of addressing the crimes of the past or holding accountable those who committed them. There is no question, however, that Article 160 of the Constitution contemplates prosecution for offenses occurring between 1974 and 1999 in either the national court system or before an international court. Similarly, Article 163.1 provides for a hybrid special panel of national and international judges with jurisdiction over serious crimes committed between 1 January and 25 October 1999. The preamble of the Decree- Law promulgating the Code of Criminal Procedure also acknowledges the existence of such panels and Article 3 of the Decree-Law confirms that the legal framework for the operation of the Special Panels remains in place, although they are not currently functioning.

Regardless of whether an international tribunal were to come into being as recommended by the Commission of Experts, there are still numerous domestic indictments and arrest warrants pending against hundreds of defendants charged with crimes against humanity and other serious offenses committed during 1999. To the extent that the leadership of Timor-Leste chooses not to support a domestic judicial process to ensure that those responsible for past serious crimes are held accountable, it should nonetheless be made clear by both the UN and other donors that, if requested, they are prepared to provide the necessary resources to support such a process.

In any event, in light of the possible return to Timor-Leste of defendants who are already under indictment, such as Maternus Bere, national judges, prosecutors and defence lawyers should be provided appropriate training through the Legal Training Centre to handle such cases.

The Serious Crimes Investigation Team should continue to function and be appropriately supported and resourced until it has concluded all investigations and has provided to the Office of the Prosecutor General all materials and documentation necessary to permit those cases to be prosecuted in the future. Moreover, proper facilities should be arranged so that forensic and other evidence required by the SCIT can not only be stored, but also properly conserved, considering the challenges presented by the local climate. Finally, the SCIT should also be supported to help develop the domestic capacity to prosecute those serious crimes investigated by the unit, whether they amount to violations of domestic or international law.

Civil society's presentation to the April Development Partners Meeting (SG-40) (at www.laohamutuk.org/econ/09TLDPM/NGOPaperTLDPM09.pdf), includes the following:

First and foremost, particularly as we approach the tenth anniversary of the human rights violations of 1999, we continue to call for an end to the ongoing cycle of impunity which dates back to 1975. There is a strong perception that people who commit political crimes go free even if they were recommended for prosecution by independent commissions. Most cases from 2006 still remain unresolved. The granting of parole, including to those convicted of crimes against humanity, undermines efforts at seeking justice for serious crimes. Furthermore, despite several national and international commissions since 1999, the most important of which was to create an international tribunal to try crimes against humanity committed during the Indonesian occupation, very few of their recommendations have been implemented. We therefore **call upon the government to hold a full and proper parliamentary debate of the CAVR report and take action on its recommendations. The international community must now implement the UN's repeated promises by allocating the necessary political, financial and legal resources to end impunity for these crimes against humanity.**

As always, La'o Hamutuk is happy to respond to your questions or requests for additional information.

Thank you for your attention and concern, and we hope that you can put some action behind the eloquent words that are often spoken in the Security Council's chambers.

Sincerely,

The image shows four handwritten signatures in black ink. From left to right: the first signature is 'amsf' followed by a stylized signature; the second is a signature that appears to be 'Mariano'; the third is a signature that appears to be 'Juvinal'; and the fourth is a signature that appears to be 'Charles Scheiner'.

Ines Martins, Mariano Ferreira, Juvinal Dias, Charles Scheiner
La'o Hamutuk Justice Team

Cc: SRSG Atul Khare and others at UNMIT, media, RDTL officials, others.

Enc: La'o Hamutuk Supplement to Secretary-General's Report on UNMIT January-September 2009