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Exclusion of Individual Responsibility by Indonesia – Timor Leste Commission for Truth and Friendship

Judhariksawan¹

In international criminal law, there is a general principle applied that no one may be held accountable for an act that he has not performed. In the history of international humanitarian trials, there is an additional principle that nobody may be held accountable for criminal offences perpetrated by another person. But, with mandate and conclusion of Commission for Truth and Friendship between Indonesia and Timor Leste, there is no individual responsibility for gross violation of human rights.

Keywords: Human Rights, Humanitarian Trials, International Criminal Law

I. Introduction

Based on shared experience and prompted by a strong desire to move forward in order to strengthen peace and friendship, the governments of Indonesia and Timor-Leste hailed the creation of a unique bilateral Commission for Truth and Friendship (CTF or Commission) in December 2004. Composed of commissioners² from the two countries, the Commission was to review the documents of the four most-significant previous “transitional justice” institutions, reveal the truth regarding reported human rights violations in East Timor in 1999, and produce a final report of its findings and recommendations. The Commission began its work in August 2005 and was to operate for one year. Following two extensions of its mandate, CTF submitted its report at the end of March 2008, entitled “Per Memoriam Ad Spem” or “Through Memory to Hope”.

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The Terms of Reference (TOR) purport to create the CTF and provide its mandate. The Commission's objective was "to establish the conclusive truth in regard to the events prior to and immediately after the popular consultation in 1999, with a view to further promoting reconciliation and friendship, and ensuring the non-recurrence of similar events." Its mandate is to:

- Reveal the nature, causes, and extent of reported human rights violations in Timor-Leste in 1999;
- Review the documents of the four preexisting institutions, namely those produced by the KPP-HAM investigations, the Ad Hoc Human Rights Court, the Special Panels for Serious Crimes and the *Commissao de Acolhimento, Verdade e Reconciliacao* (CAVR);
- Establish the truth concerning reported human rights violations documented by the Indonesian institutions and the Special Panels for Serious Crimes;
- Publish a report on these matters; and
- Recommend measures to "heal the wounds of the past, to rehabilitate and restore human dignity."

The final report of the Commission "Per Memoriam Ad Spem" noted some conclusions. Among those conclusions are those headed "Gross Violations of Human Rights" and "Institutional Responsibility". The Commission concluded that gross violations of human rights in the form of crimes against humanity did occur in East Timor in 1999 and that these violations included murder, rape and other forms of sexual violence, torture, illegal detention, and forcible transfer and deportation carried out against the civilian population.³

How did the commission arrive at this conclusion? From the Report, we can find out that the Commission received a very large volume of documentary evidence, analysis, and live interview testimonial evidence. After careful analysis of all the evidence, it concluded that the evidence over-

² The Commissioners are: Achmad Ali, Benjamin Mangkoedilaga, Agus Widjojo, Wisber Loeis, Mgr. Petrus Turang (Indonesia), Dionisio da Costa babo-Soares, Cirilo Jose Jacob Valadares Cristovao, Aniceto Longuinhos Guterres Lopes, Felicidade de Sousa Guterres, dan Jacinto das Neves Raimundo Alves (Timor Leste). Additional commissioners are: Sjamsiah Achmad, Antonius Sujata (Indonesia), Maria Olandina Isabel Caerio Alves, Isabel Ferreira, and Rui Pereira dos Santos (Timor Leste).

³ See Per Memoriam Ad Spem p. xvii.

whelmingly supported that gross violations of human rights occurred in East Timor 1999. The next step was to identify the perpetrators of these crimes against humanity and to determine how they carried them out. On the basis of its review of all of the evidence, the Commission identified specific cases of gross violations and determined that there were in fact persistent patterns of organized and systematic violations by members or elements of pro-autonomy groups and Indonesian governmental institutions. The Commission also identified a significant number of illegal detentions “that appear highly likely to have been systematically perpetrated by pro-independence groups”.⁴

On the basis of its analysis, the Commission concludes that gross violation of human rights was perpetrated by “both sides” directly or indirectly, including members of pro-autonomy militia, TNI (Indonesia’s Army Force), Indonesian Police and Indonesian civilian government, as well as members of pro-independence groups. By Commission, although there is no statistical basis for quantitative assessment, the evidence analyzed indicates that the great majority of reported violations were perpetrated against pro-independence supporters.

For “Institutional Responsibility”, the Commission concluded that the violence in East Timor in 1999 was not composed of random, isolated, individual acts, but demonstrated organization, planning, and coordination. These coordinated and organized attacks targeted individuals because of their perceived political affiliation. These factors are the basis of the Commission’s conclusion that gross violations of human rights were perpetrated in a large-scale and systematic manner, and these factors also provide towards a finding of institutional responsibility.

II. International Political Justice

Although the Commission arrived at the conclusion that gross violation of human rights occurred in East Timor 1999, the Commission could not clearly identify who was responsible, as its mandate did not give them the obligation. According to TOR Article 13(c) states, “Based on the spirit of a forward looking and reconciliatory approach, the CTF process will not lead to prosecution and will emphasize institutional responsibilities.” The impli-

⁴ See Executive Summary Per Memoriam Ad Spem.

cation was that pursuing individual accountability was detrimental to reconciliation.

As a result, the CTF may not recommend the establishment of any other judicial body. This makes it clear that CTF is not a legal procedure or any kind of extrajudicial process and we have to regard the commission as political activity rather than the law. As a political body, all of its conclusions and recommendations only appear in the political field and are not legally binding. The problem is that the East-Timor Case 1999 constituted a gross violation of human rights. The Commission expressively states this in the final report. Dealing with legal violations or criminal offences in a political way not only means weakening the supremacy of law but indeed is itself a violation of the law. Crimes against humanity as international crimes have *jus cogens*⁵ (peremptory norm of international law) status creating an obligation for all nation-states (*obligatio erga omnes*) to prosecute perpetrators or extradite them to the *prima facie* jurisdiction based on the *aut dedere aut punere* principle. More than that crimes against humanity are *hostis humani generis* or enemy of humanity.

However, the Indonesian and Timor-Leste governments claimed that the commission was a new and unique approach rather than a prosecutorial process. They thought that the prosecutorial system of justice can certainly achieve one objective, which is to punish the perpetrators, but it might not necessarily lead to the truth and promote reconciliation. Is this the case? Does the criminal justice system not necessarily elicit the truth? Of course, asking within the political arena will find answers with political views. So, we could not discuss the problem with political aspects, but later questions arise: can political decisions negate legal procedure? If a political decision was taken, should a criminal case be finished with no possibility to re-prosecute?

In legal thought, the Critical Legal Studies group formed the view that law is a political decision. Historically, we could find some precedents that show how politics intervene in legal affairs especially in international hu-

⁵ See Bassiouni, M. Cherif. 1999. Crimes Against Humanity In International Criminal Law. Article 53 Vienna Convention on The Law of Treaties states that *jus cogens* is a norm accepted and recognised by the community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

man rights fields. The decision to refuse a trial for Emperor Hirohito for war crimes and crimes against humanity in East Asian by the Potsdam Declaration is political justice. Also, amnesties without prosecution from Nelson Mandela for perpetrators of gross violation of human rights in South Africa are political justice. Although this thinking receives a lot of criticism, both examples can be viewed as a product of history and a new jurisdictional paradigm, particularly in *Transitional Justice*⁶ context. Acceptance of the outcome of the Commission's works, not only shows again the acceptability of political decision over legal, but also is making a new principle in the international criminal law. *Institutional responsibility* will become a new paradigm in distinction to *individual responsibility* principle and impunity doctrine.

Although it seems like political justice, actually "institutionalism of personal act" could find a place in international law. Regarding the International Law Commission's draft articles on Responsibility of States for Internationally Wrongful Acts⁷, the conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions (Article 7). Added in Article 9 states:

"The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority".

⁶ Transitional Justice is name given by United States Institute of Peace (USIP) for study of government transition from repressive or militaristic regime to democratic regime. In the beginning, this study only learning about how new democratic regime manage the legacy of gross violation of human rights by predecessor regime and then accepted as "new doctrine" that in Transitional Justice context, State or democratic government could created a new measure, normal or abnormal way, to solve the problem. Comprehensive references of this study see 3 volumes books by Neil J. Kritz (ed.). 1995. *Transitional Justice, How Emerging Democracies Reckon With Former Regimes* USIP Press, WashingtonDC, also Ruti G. Teitel. 2000. *Transitional Justice*, OxfordUniversity Press, New York

⁷ General Assembly resolution 56/83 of 12 December 2001. According to Article 12: There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

⁸ Adopted by Resolution 260 (III) A of the U.N. General Assembly on 9 December 1948. Entry into force: 12 January 1951

Another international law that rules of responsibility of State as institutional is Convention on the Prevention and Punishment of the Crime of Genocide⁸. Article IX states:

Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those *relating to the responsibility of a State for genocide or for any of the other acts ...* shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

All of the States responsibility above has also been admitted in Article 25 (4) Rome Statute states that “No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law”.

It means, if rationale of “institutional responsibility” based on the States responsibility in international public law, could be accepted as legal a solution. Unfortunately, the TOR and Final Report of CTF was not based on the frame of international law, just political views and *Transitional Justice* perspectives.

III. Litigation of Individual Criminal Responsibility

In international criminal law, the general principle applies that no one may be held accountable for an act he has not performed. In the history of international humanitarian trials, the principle notion is that nobody may be held accountable for criminal offences perpetrated by another person. Rationale behind the proposition is that collective responsibility is no longer acceptable or, in other words, a national, ethnic, racial, religious or any other kind of group to which a person may belong is not accountable for acts performed by a member of the group in his individual capacity and interest. That is individual criminal responsibility.

In his discussion of the parameters of individual criminal responsibility within the context of the International Tribunal, the UN Secretary-General emphasized that all persons who commit serious violations of international humanitarian law must be held accountable, no matter what their political or military position, and the responsibility of such persons in positions of authority extends not only to their own actions but also for the actions of their subordinates, in certain circumstances. This is in line with the spirit

that created other international tribunals, from the Nuremberg Tribunal to the International Criminal Court (ICC). While the ICC has yet to bring an indictment to trial, the International Criminal Tribunal for Former Yugoslavia (ICTY) has already concluded dozens of cases against persons charged with genocide, war crimes and crimes against humanity. Its companion court in Arusha, the International Criminal Tribunal for Rwanda (ICTR), has pursued cases against many more persons charged with criminal conduct in connection with the Rwandan massacres.

The Nuremberg Tribunal produced a large number of judgments, which have greatly contributed to the forming of case law regarding individual criminal responsibility under international law. UN General Assembly Resolution 95(I) "Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal" was of such considerable legal importance that the General Assembly "affirmed" the principles of international law recognized by both the Charter and the Judgments of the Nuremberg Tribunal. In 1950, the International Law Commission (ILC) adopted a report on the "Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal". Principle I states that:

"Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment".

The affirmation of the Nuremberg principles by the General Assembly resolution and their formulation by the ILC were important steps toward the establishment of a code of international crimes entailing individual responsibility.

Based on Principle I, it should be identified what "a crime under international law" is to clarify the responsibility of the perpetrator. Antonio Cassese's⁹ notion is that international crimes are breaches of international rules entailing the personal criminal liability of the individuals concerned, as opposed to the responsibility of the State of which the individuals may act as organs. These crimes are not only violations of international customary rules that protect values considered important by the whole international community but also reflect a universal interest in repressing such crimes. The subject alleged may, in principle, be prosecuted and punished by any State regardless of any territorial or nationality link with the perpetrator or the victim. Furthermore it's called universal jurisdiction.

International Military Tribunal (IMT) Nuremberg's legacy and acceptance by the international community in international human rights and humanitarian law development indicates that "crimes against humanity" is a kind of international crime. Consequently the state has the responsibility of prosecuting and punishing the perpetrators based on its international obligation. Although international crimes are the subject of international law, it does not mean automatically that any crime has to be prosecuted in international trial. International law has a specific mechanism to respect the States' sovereignty by the principle "exhaustion of local remedies". Later, if the State indicates it is *unwilling* or *unable*, as a complementary principle, an international tribunal could be formed by a UN Security Council decision or by a call from the International Criminal Court (ICC) prompted by a State or by Security Council authority from ICC Statute¹⁰.

Both an ad hoc tribunal and ICC rules and procedures do not deal with "institutional responsibility". Both have only investigated, prosecuted and punished somebody alleged of international crimes as an individual, neither as States' organ nor member of groups. For example, Article 6 (1) of the Statute of the International Criminal Tribunal for Rwanda (ICTR) states:

"A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime ... shall be individually responsible for the crime."

That provision is similar to Article 25 (2) of 1998 Rome Statute of International Criminal Court that states: "A person who commits a crime within the jurisdiction of the Court shall be individually responsible ...".

The basic rationale of individual responsibility rose from the foundation of criminal responsibility being the principle of personal culpability: that nobody may be held criminally responsible for acts or transactions in which he has not personally engaged in or in some other way participated (*nulla poena sine culpa*). Individual responsibility should be understood to be that there is no collective responsibility or, a member of any kind of group (national, military, ethnic, social, racial, religious or other kind) is not criminally liable for acts contrary to law performed by other members or leaders of the group. By this perception, of course there is no "institutional responsibility" in international crimes.

⁹ see Cassese. *International Criminal Law*. 2003. Oxford University Press. p. 23

¹⁰ See Article 13 (b) of 1998 Rome Statute of International Criminal Court and see Darfur

The CTF found and concluded that in East Timor in 1999 was a gross violation of human rights in “crimes against humanity” classification. “Crimes against humanity” is a kind of international crime. Properly applied international criminal law is based on individual responsibility and ignores collective accountability. However, based on the TOR and its Final Report, the Commission can only state that their mandate is to find kind of “institutional responsibility” because they are not extrajudicial institution only “exclusive truth finder”.

There are two consequences caused by the Commission’s mandate and conclusion. The first, in political and sociological views, is that stigmatisation of the perpetrators of gross violation of human rights in East Timor is as an “institution” therefore “nation” including all its organs and peoples and “TNI” (Indonesia Military) with “innocent” soldiers made the subject of allegations as a result of others conduct. Second dimension, in legal perspective, there are another two situations which could occur. Firstly, according to Article 9, paragraph 1 of Statute of IMT Nuremberg, it is stipulated that:

“At the trial of any individual member of any group or organization the Tribunal declares (in connection with any act which the individual may be convicted) that the group or organization of which individual was a member was *a criminal organization*. (emphasis added)”

This means “each member of a criminal organization was regarded as a criminal, whether or not participation in that organisation was voluntary.” Because Article 10 ordered: “in cases where a group or organisation is declared criminal by the Tribunal, the competent national authority ... have the right to bring individuals to trial for membership..”. According to this argument, if the CTR conclusion that gross violation of human rights in East Timor 1999 occurred and the perpetrators are “institutional” and included “national, army force, civil superior, and militia” it means all of the people of Republic of Indonesia and members of militia Timor Leste are perpetrators and should be surrendered and offered before the trial.

Secondly, in the field of legal science, if “institutional responsibility” is accepted as an “anomaly”, following Thomas Kuhn’s theory¹¹, this could give rise to controversy between legal thinkers and prospective become new paradigm of law. Later, we could find out that *Transitional Justice* or “political justice perspectives” individual responsibility is pushed aside by the “institutional responsibility paradigm” strengthening the States’ responsibility.

IV. Conclusion

As a Transitional Justice's form, what has been done by the CTF is no longer debated and gets justification and legitimacy as a decision between two states. But in the perspective of law, particularly international criminal law, emphasis on institutional responsibility constitutes an anomaly that can invite debate or scholarly difficulty in terms of prospects of being a new paradigm. Indeed dispute is still ongoing and will find be a lengthy process until the body of jurisprudence accepts it as new paradigm. Additionally, it is more important to see if the CTF's final reporting will be used as "new evidence" to reopen East Timor's case in international trials following a lot of international criticism against the final stage of the Indonesian Ad Hoc Human Rights Trial. This case may be considered finished by the UN Security Council and international society based on efforts to date. Deserving of being assessed farther, if acceptance of the "institutional responsibility" concept as a new paradigm of law is taking place, are the concept of impunity and of individual responsibility itself? That study will assist progressive scholars of international law.

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