



## TIMOR-LESTE: JUSTICE IN THE SHADOW

### MORE NEEDED TO IMPLEMENT THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT EFFECTIVELY

#### SUMMARY

Timor-Leste's accession to the Rome Statute of the International Criminal Court (thereafter called the Rome Statute) constituted a significant step towards reaffirming the need to uphold the rule of law and condemning the most heinous crimes under international law, which occurred on a large scale in Timor-Leste during Indonesia's occupation. It stands in sharp contrast with the recent attitude of the Timorese government towards justice for past crimes against humanity and other serious human rights violations which occurred under Indonesian occupation between 1975 and 1999 and the prevailing culture of impunity.

In this report, Amnesty International provides a legal analysis of the 2009 Timor-Leste's Penal Code and the extent to which it has incorporated so far provisions from the Rome Statute and implemented other international criminal law. There are a number of positive elements in the Penal Code with respect to crimes under international law. In particular, Amnesty International welcomes the inclusion of most crimes under the Rome Statute, as well as torture. The organization also welcomes Article 117 of the Penal Code, which states that criminal proceedings and the penalties for genocide, crimes against humanity and war crimes are not subject to statutes of limitations.

Amnesty International recognizes these first steps as important developments in the fight against impunity and implementation of Timor-Leste's complementarity obligations under the Rome Statute. However, Amnesty International is concerned that some aspects of the Penal Code are not consistent with the Rome Statute and other conventional, as well as customary international law. For instance, although some of the definitions in the Penal Code are consistent with those set out in the Rome Statute and other provisions in conventional and customary international law, there are instances whereby these definitions are not consistent with the strictest requirements of international law.

Amnesty International welcomes Article 8 (b) of the Penal Code providing for the exercise of universal jurisdiction for genocide, crimes against humanity and war crimes included in the Penal Code "*as long as the perpetrator is found in Timor-Leste and cannot be extradited or a decision has been made not to do so*". However, the Penal Code does not appear to include a *ne bis in idem* prohibition of retrial if the foreign trial was a sham. Amnesty International recommends that the legislation of Timor-Leste ensure that perpetrators of genocide, crimes against humanity and war crimes can be retried in a Timorese court if the trial in a foreign court was a sham which permitted the perpetrator escape from justice.

Amnesty International notes Article 136 of the Penal Code on responsibility of commanders and other superiors. However, the organization is seriously concerned about certain aspects of this provision. In particular, the expressions "*or, owing to the circumstances at the time, should have known*" and "*about to commit such crimes*" in Article 28 (a) (i) of the Rome Statute are missing, which restricts the scope of superior responsibility. These omissions would restrict the scope of criminal responsibility and could lead to impunity in a Timor-Leste court for conduct that would result in a conviction if the case were tried in the International Criminal Court (ICC).

Amnesty International is also concerned that Article 136 does not provide for equal standards of criminal responsibility for military commanders and other superiors. Article 136 (2) narrows the scope of responsibility of other superiors by only referring to "in connection with control of subordinates under is or her effective authority and

control", in contrast to Article 136 (1) that also includes "or effective responsibility or control". Amnesty International recommends that Article 136 (2) of the Penal Code be amended in order to provide for civilian superiors the same standards of criminal responsibility for military commanders.

Further the Penal Code does not appear to include guarantees that in the future there will be no national amnesties, pardons or similar measures of impunity for crimes under international law, in violation of international human rights law. Of particular concern are Article 120, which states that "*[a]mnesty extinguishes criminal prosecution and halts execution of a sentence yet to be served in whole or in part, as well as its effects and accessory penalties to the extent possible*" and Article 122 which, provides that the pardon (indulto) extinguishes the penalty, totally or partially, or replaces it by other provided in the legislation and more favourable to the convicted person.

Both articles should be amended as a matter of priority to rule out any possible amnesties or pardons pertaining to grave crimes under international law. Such a move is crucial given the current context of enduring impunity for crimes which were committed under Indonesia's occupation between 1975 and 1999.

Furthermore, it is worrying that almost eight years after Timor-Leste acceded to the Rome Statute it has still not implemented its cooperation obligations under that instrument. The obligation of states parties to cooperate with the ICC includes the obligation to ensure that the Prosecutor and the defence can conduct effective investigations in their jurisdictions, that their national courts and authorities provide full assistance in obtaining documents, locating and seizing assets of the accused, conducting searches and seizures of evidence, locating and protecting witnesses and arresting and surrendering persons accused of crimes by the ICC. In addition, states parties should cooperate with the ICC in enforcing sentences by making detention facilities available for convicted persons and develop a program of public education and training of officials on the principles of the Rome Statute and the functioning of the ICC, among other obligations.

## Recommendations

Amnesty International urges the Timor-Leste's leadership to respect their initial commitment in favour of accountability for genocide, crimes against humanity, and war crimes by ensuring that all those responsible for crimes against humanity and other human rights violations which were committed during Indonesia's occupation are brought to justice and that effective steps are taken to deter possible future heinous crimes, wherever and by whom they are committed.

In order to address the current culture of impunity, and to establish strong deterrent mechanisms, Amnesty International recommends that the Timorese authorities undertake the following as a matter of priority:

- Through public-wide consultation with civil society groups, amend the Penal Code as recommended in this paper to bring it into line with the Rome Statute and other international law obligations, including an explicit ban of amnesties, pardons and other forms of impunity for crimes under international law, as well as providing for cooperation obligations under the ICC;
- Through public discussion ensure that these additional measures are adopted and implemented;
- Publicly announce and take concrete steps so that all persons responsible for crimes against humanity and other human rights violations, wherever and whenever they occurred, including those which occurred during Indonesian occupation (1975-1999), will be brought to justice and victims will receive full reparations including restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition.

