

INTERNATIONAL JUSTICE FOR EAST TIMOR

CONSOLIDATED REPORT

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PREFACE

Justice indictment for victims of crimes in 1999 was initially considered to be positive by the national and international community. The United Nations (UN), in January 2000, sent a commission to research the crimes that were committed during the 1999 crisis. The Indonesian government also formed a commission for the same purpose.

The findings of these two commissions came to the same conclusion about serious crimes, which they called “crimes against humanity” during 1999. Both commissions recommended forming a human rights tribunal. The East Timorese community, particularly the victims and victims’ families, have never felt confident that justice would be achieved. Mary Robinson, former the UN High Commissioner for Human Rights, in her meeting with widows whose family members were victims of a massacre at Ave Maria Church in Suai, on 6th August 2000, has shown her sympathy and commitment to justice for the victims.

However time keeps moving, the commitment of the international community to justice for the victims is changing. The way forward to build on demands for justice for the victims is becoming harder. The response for justice for the victims came in the form of the formation of the Ad Hoc Tribunal for Human Rights in Indonesia, and the Special Panel for Serious Crimes in East Timor. The Reception, Truth and Reconciliation Commission was also formed as an alternative way to realize justice for the victims. It can be likened to a dinosaur, which is big but the steps are very slow. It was no surprise that at a second meeting with the victims in Suai on 24th August 2002 during her last visit as High Commissioner of Human Rights, Mary Robinson found many cynical faces.

Currently Yayasan Hak and Fokupers are trying to ensure that justice for the victims and their families is achieved. To this end, they have carried out research on the court processes in East Timor and Indonesia to look at the possibility of an International Tribunal, should the other judicial processes fail. The experiences of establishing International Tribunals in other countries such as Yugoslavia and Rwanda are important references, and can serve as comparative models to inform the East Timorese experience.

There is an expectation that this research will highlight weaknesses that exist in the current court process, and provide alternative ways on achieving justice for victims of crimes against humanity in 1999.

This expectation is very high. Our current capacity to respond to that expectation unfortunately is quite low. Mallesons Stephen Jaques, a renowned legal firm in Australia provided its support by allocating one of its legal clerks, Nehal Bhuta to work with our researcher Rosentino Amado Hei to carry-out research on justice mechanisms in East Timor and Indonesia, and to learn from experiences in other countries.

The final report includes an analysis of economic and political issues, as they impact on the decision making process of the International community in their commitment to the establishment of an International Tribunal. The Ad Hoc Tribunal for Human Rights in

Indonesia is almost complete, and an analysis of its failures are important for a discussion on an international tribunal.

This report consists of two parts:

- 1) *Victims' voices and unsatisfactory responses from the state* by Amado Hei
- 2) *International Justice Mechanisms for East Timor* by Nehal Bhuta

This report was completed with collaboration from many parties, because they are many we are unable to mention them one by one. We want to especially thank Ignatius Sitiwan Cahyo (volunteer at Sahe Institute for Liberation) who worked with Amado in finalising his draft report. We also want to thank Solange Rosa, Jose Mott and Marito de Araujo for their support. They have been our partners in developing ideas, giving valuable support and they have also been our friends in solving problems that we encountered during the research process. With their intelligence and access, this project was granted funding from several donors. We would also like to thank all donors who have funded this project. We believe that the funds are only one instrument of solidarity that these three organizations have showed in terms of achieving justice for all victims.

Justice for the 1999 victims is a long process. Therefore solidarity, support, energy and ideas are always needed in order to continue this difficult task. Successful indictment to realize justice for the 1999 victims will also serve as an important role model for the world in not accepting impunity, so that human tragedy in the world is addressed and democracy can flourish.

Director Team

Fokupers & Yayasan HAK
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Introduction

1 Introduction

1.1 Purpose

This report, at the outset, seeks to examine the status of international accountability for crimes committed in East Timor since 1975. By exploring the views of the victims of these crimes, to establish what should be done in order to in fact achieve criminal responsibility for international crimes committed in East Timor. The views of East Timorese society, including the NGO community, student population, Government and in particular the victims, are thus given a prominent voice in this report.

The report encompasses an overall analysis of the crimes committed, the responses of the international community, East Timor and Indonesia to achieving accountability for those crimes, the success or otherwise of these responses and finally a foundation for debate on other options to bring about accountability for international crimes in East Timor.

This report seeks to give a voice to the many victims who have not yet been heard on their vision for justice and reconciliation in East Timor and the extent to which the existing legal and reconciliatory processes fulfil that vision. It also provides a critical overview of these processes in order to create a deeper understanding of the success or otherwise of attempts to attain individual criminal responsibility for the perpetrators of crimes in East Timor.

Consultations undertaken in the preparation of this report, indicate unambiguously that individual criminal responsibility is perceived by many East Timorese as a priority and a precondition to genuine reconciliation. However, there is a lack of overall analysis as to what extent the current mechanisms for achieving individual criminal responsibility have been successful and there is also a lack of information concerning ways in which individual criminal accountability can best be achieved.

The purpose of this analysis is then also to provide a resource by which East Timorese civil society can make a practical assessment of the options available to further pursue individual criminal responsibility. Other than pointing out the successes and failures of each option, this analysis does not make recommendations as to which model should be pursued. There is an urgent need for informed debate among all relevant stakeholders in East Timorese society about how, and under what conditions, the demand for individual criminal responsibility can be met. It is hoped that this report will form a basis for such consultation and debate, with a view to developing a coherent strategy to challenge the impunity of persons who have perpetrated grave crimes in East Timor.

1.2 Scope

Part 1 of the report examines the current state of accountability of for international crimes committed in East Timor, within East Timor. In particular this includes an overview and analysis of the following processes:

- (a) The Serious Crimes Unit and the Special Panel for Serious Crimes;
- (b) The Commission on Reception, Truth and Reconciliation;

- (c) Amnesty provision in the Constitution of East Timor.

It then reports on the views of victims of crimes in East Timor on justice, and the extent to which the mechanisms outlined above have given victims a sense that justice and accountability is achieved.

Part 2 of the report looks at the process of the Indonesian Ad Hoc Human Rights Tribunal, its strengths and weaknesses, and the extent of its achievement of accountability for international crimes in East Timor.

Part 3 of the report analyses the desirability and feasibility of three possible international mechanisms to achieve individual criminal responsibility¹ for crimes against international law committed within the territory of East Timor:

- (a) an International Criminal Tribunal (“ICT”), whether based on the model of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”), or the “internationalised domestic courts” proposed for Sierra Leone and Cambodia;²
- (b) prosecutions in third states under laws enabling domestic courts to exercise universal jurisdiction, and;
- (c) mutual assistance and extradition arrangements to facilitate the detection, apprehension and transfer of persons suspected of committing crimes against international law to East Timor’s domestic courts for trial.

The legal bases, practical operation and relevant historical experience of each potential mechanism will be reviewed, and consideration given to its suitability to the East Timorese context. Political considerations influencing the feasibility of pursuing one option over another will also be analyzed.

2 Background

2.1 History

The Portuguese-administered territory was invaded and annexed by Indonesia on 7 December 1975. Indonesia continued to occupy the territory, in contravention of international law, from December 1975 to October 1999. The Indonesian military (‘TNI’) invasion of East Timor on 7 December 1975 until after the referendum in October 1999, has become a part of international history. Widespread and systematic human rights abuses were committed by the military regime of Indonesia during that period, including mass killings, violence against women and children, forced removals, cruelty and torture.

¹ “Individual criminal responsibility” refers to the process and outcome of holding *individuals* (as against states or groups) responsible for conduct to which criminal liability is attached by law: Steven Ratner and Jason Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (1997, Oxford University Press) at 13-4. It is to be distinguished from other forms of responsibility, such as individual civil responsibility or state responsibility.

² It is noted that the Serious Crimes Investigation Unit and the Special Panel of the Dili District Court (“**Serious Crimes process**”), established to try international law crimes, is also an example of an “internationalised domestic court”. The operation and efficacy of the Serious Crimes process is reviewed in Section 1 of this report.

On May 5, 1999,³ an agreement was signed by the Government of Indonesia and the Government of Portugal to hold a popular consultation in East Timor. The popular consultation, administered by the United Nations' Assistance Mission in East Timor (UNAMET), was conducted on 30 August 1999. The people of East Timor voted overwhelmingly for independence from Indonesia.

From the beginning of 1999, armed militia groups favouring integration with Indonesia expanded operations against pro-independence groups, and committed grave human rights violations against the civilian population. Between January and October, the paramilitary groups, with direct and indirect participation of TNI special forces, engaged in an escalating campaign of extrajudicial killings, disappearance, torture and sexual violence, punctuated by multiple killings.

A series of thorough investigations⁴ have substantiated that the pro-Indonesia militia, with the full involvement of the TNI, committed gross violations of human rights in East Timor, before and after the referendum in 1999. The acts of violence against innocent civilians, including looting, mass murder, rape⁵, forced removals, and the burning of people's homes and government infrastructure, were not only a reaction to the victory of the pro-independence side, but a series of carefully planned actions by a number of military officials in Jakarta as well as East Timorese militia.

James Dunn reports that at least 1000 East Timorese were killed in the time period around the 1999 poll.⁶ At least two thirds of the East Timorese population were forced to evacuate and around 250,000 were forcibly rounded up by the militia and TNI and evacuated to West Timor. It is still very difficult to determine the extent of financial and non-financial loss that was brought about by the "scorched earth politics", however, at least 70% of buildings in East Timor were destroyed.⁷

Due to grave concerns for the gross violations of human rights committed in Timor Leste and responsibility for upholding the values of justice and Human Rights, an International Commission of Inquiry on East Timor of the Commission on Human Rights and the Indonesian Commission of Investigation into Human Rights Violations (KPP HAM) were set up to investigate the violence and human rights violations of 1999. Both inquiries concluded that the violence and human rights violations formed part of a carefully planned and implemented TNI policy to obstruct the free participation of the East Timorese in the popular consultation of August 1999.

³ Done at New York, 5 May 1999, between Government of Indonesia and Government of Portugal.

⁴ For example, see a thorough investigation report by Yayasan Hak on five big cases on human rights violations in Timor Lorosa'e 1999, Dili, 30 November 2001; Forum Komunikasum Feto Timor Lorosae (FOKUPERS), *Progress Report Number 1: Gender Based Human Rights Abuses During the Pre and Post-Ballot Violence in East Timor, January - October 1999*; James Dunn Report, *Crime Against Humanity, January -October 1999*; Report of the Indonesian Commission of Investigation into Human Rights Violation, Jakarta, 31 January 2000; and Identical Letters Dated 31 January 2000 from Secretary General Addressed to the President of the General Assembly, the President of the Security Council.

⁵ See FOKUPERS report, op cit note 5. It records at least 182 cases of violations based on gender including rape, kidnapping, and slavery.

⁶ Another report states that in 1999, 3000 people were killed. See, *An International Criminal Tribunal for East Timor*, 2002.

⁷ See Colin McDonald Q.C., *Out of The Ashes- A New Criminal Justice System for East Timor*, 30 August 2001.

2.2 International Commission of Inquiry

The Special Session of the Commission on Human Rights on the situation in East Timor convened in Geneva, from 23-27 September 1999, adopted a resolution⁸ condemning the wide-scale, systematic and gross violations of human rights and international humanitarian law in East Timor; the widespread violations and abuses of the right to life, personal security, physical integrity and the right to property; and the activities of the militias in terrorising the population.

It thus called upon the Secretary-General to establish an international commission of inquiry to:

'..gather and compile systematically information on possible violations of human rights and acts which may constitute breaches of international humanitarian law committed in East Timor since the announcement in January 1999 of the vote.'

In accordance with the Commission on Human Rights Resolution, an international commission of inquiry was established. The report of the Commission of Inquiry was made available to the Security Council, the General Assembly and the Commission on Human Rights accompanied by a letter of transmittal from the Secretary-General, Kofi Annan.⁹

The Commission of Inquiry stated that the evidence gathered clearly demonstrated a pattern of serious violations in East Timor of fundamental human rights and humanitarian law. The report states that these violations were directed against a decision of the Security Council and were contrary to the agreements reached by Indonesia with the United Nations to carry out the decision of the Security Council. This fact reinforced the need to hold the perpetrators accountable for their actions.

The Commission of Inquiry recommended ways of holding the perpetrators accountable, which included an international investigation and prosecution body to conduct further investigations into the 1999 violence, and the establishment of an international human rights tribunal to try those accused by this body.¹⁰

The Secretary-General however wished to pursue various avenues to bring justice to the people of East Timor, 'inter alia, by strengthening the capacity of UNTAET to conduct such investigations and enhancing collaboration between UNTAET and the Indonesian Commission of Inquiry into Human Rights Violations in East Timor (KPP-HAM)'.¹¹ He did not endorse the recommendation to create an international criminal tribunal. The Secretary-General accepted the assurances of representatives of Indonesia that they would try Indonesian nationals accused of international crimes, and was 'assured ... of the

⁸ *Situation of Human Rights in East Timor*, Commission on Human Rights resolution 1999/S-4/1 (adopted at its Fourth Special Session).

⁹ *Identical letters dated 31 January 2000 from the Secretary-General addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights*, A/54/26, S/2000/59, 31 January 2000.

¹⁰ *Report of the International Commission of Inquiry on East Timor to the Secretary General*, annexed to *Identical Letters Dated 31 January 2000 from the Secretary General Addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights*, at paras 152, 153.

¹¹ *Identical Letters Dated 31 January 2000 from the Secretary General Addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights*, at para 6.

Government [of Indonesia's] determination that there will be no impunity for those responsible.'¹²

The Secretary-General accepted that the United Nations had an important role to play in investigating and punishing perpetrators of international crimes in East Timor, and committed to 'closely monitor progress towards a credible response in accordance with international human rights principles.'¹³

2.3 Indonesian Commission of Inquiry on Human Rights Violations in East Timor (KPP HAM)

Komnas HAM (Human Rights Commission of Indonesia) established the Commission of Inquiry on Human Rights Violations in East Timor ('KPP HAM'), one day before the special session of the UN Human Rights Commission, on 22 September 1999. The establishment of the KPP HAM was obviously a reaction of the Indonesian Government to the strong and mounting pressure from the international community.

Immediately following that, Indonesia announced new legislation providing for the establishment of ad hoc Human Rights Courts to try past cases, under which it was expected that the East Timor cases would be tried.¹⁴ A Memorandum of Understanding on cooperation in legal, judicial and Human Rights affairs was signed by Indonesia and UNTAET in April 2000 and provides for mutual assistance in investigations and court proceedings.¹⁵

The outcomes of the investigations and inquiries by KPP HAM formed the basis for the prosecution of suspects of gross Human Rights violations in East Timor in the Ad Hoc Human Rights Court.

The mandate of KPP HAM included having to conduct investigations into and inspections of suspected Human Rights violation incidents in East Timor, to process and analyse the evidence in the interest of prosecution, and to publish their outcomes.¹⁶ However the mandate of the KPP-HAM in collecting facts, data and information on Human Rights violations in East Timor was limited in its time frame to the beginning of January 1999, when President Habibie announced the popular consultation, and ratification of the results of the referendum in October 1999.

After completing its investigations, KPP HAM concluded that several gross violations of human rights had occurred in East Timor between January and September 1999, in the form of: mass killings; torture and oppression; forced disappearances; gender based violence (including rape and sexual slavery); forced migration; scorched earth practices and other violence. All the violations above fulfilled the conditions of "gross violations of human rights."

The elements of crimes against humanity were seen by KPP-HAM as systematic and based on a plan to encompass the phase around the announcement of the referendum, the

¹² Ibid para 5.

¹³ Ibid para 8.

¹⁴ Law No. 39, 1999 on Human Rights, and Government Regulation on Legislation Review No 1, 1999 regarding the Human Rights Court.

¹⁵ Memorandum Of Understanding Between The Republic Of Indonesia And The United Nations Transitional Administration In East Timor Regarding Cooperation In Legal, Judicial And Human Rights Related Matters, 5/6 April 2000.

¹⁶ Op cit note 16.

May 5th agreement and the post-referendum phase.¹⁷ KPP HAM concluded further that the gross violations of human rights were instigated by three groups:

1. The perpetrators who were directly in the field, that is the militias, military apparatus and the police force;
2. Those who implemented control of the operation, including, but not limited to – the civil bureaucracy, particularly bupati (regents), governors and military leaders along with the local police;
3. Those responsible for national security policy, including, but not limited to - high-ranks of the military, both actively and passively involved in such crimes.¹⁸

The KPP HAM report also mentions around 30 civil and military officials along with around 100 other names suspected of being responsible for the violence, beginning with militia commanders, bupati, and the District Military Command [KORAMIL], to the Commander of the Military (Korem), and the Governor of East Timor. It also includes General Wiranto as the chief of TNI in the list of suspects who should be questioned on their responsibility.¹⁹

In its recommendations, KPP HAM asked the Attorney General to carry out further investigations. The Attorney General, as the general prosecutor, must investigate and establish the "systematic," "organised," and "wide scale" nature of the crimes that occurred in East Timor throughout 1999. These characteristics of "systematic", "organised", and "wide-scale" are the main elements of "crimes against humanity". If those characteristics are not proven, then there is the possibility that only those perpetrators on the ground can be asked to account for their actions, and not the military leaders who gave the orders.

2.4 Response to calls for Justice and Reconciliation - Accountability for International Crimes in East Timor

In response to the findings and recommendations of the above Inquiries, a number of bodies were set up in East Timor and Indonesia to address international crimes committed in East Timor.

The processes of investigation and prosecution of international crimes committed in East Timor, are exclusively concerned with crimes committed in 1999. In East Timor, investigations and prosecutions have taken place under United Nations' supervision, through the establishment of the Serious Crimes Investigation Unit and the Special Panel for Serious Crimes. Persons indicted by the SCU are tried before the Special Panel for Serious Crimes of the Dili District Court ('Special Panel'). The Special Panel comprises of two East Timorese judges and one international judge, and exercises exclusive jurisdiction over Serious Crimes.²⁰

In Jakarta, Indonesia, an ad hoc Human Rights Court was established in March 2002 to try 25 persons indicted for crimes committed in East Timor in 1999. Indictees include

¹⁷ Report of KPP HAM East Timor, Chapter III Patterns of Human Rights Violations: Crimes Against Humanity, General Patterns of Violence, Paragraph 29, 30 and 3.

¹⁸ Ibid, Chapter VI Conclusions and Recommendations, Paragraph 72.

¹⁹ Republika, 6 September 2000, "Many Roads Approach the Human Rights Court".

²⁰ UNTAET Regulation 15 of 2000.

several high-ranking military figures, as well as middle-level officers and East Timorese pro-integration leaders. The jurisdiction of the ad hoc court is limited to certain districts of East Timor and to events occurring in the months of April and September 1999. The trials of the ad hoc court are almost complete and several appeals are pending.

In addition, the Commission for Reception, Truth and Reconciliation was formed for the resolution of peace and to resolve the effects of trauma.²¹ Its breadth spans as far back as the invasion of East Timor by Indonesia in 1975 and it can refer minor crimes for prosecution.

Several international and local NGOs, and independent groups, both in East Timor and Indonesia, called for the formation of an international court of Human Rights immediately after the events of organised violence in 1999.²² While aware of the lack of political support from both nations and the reluctance of powerful nations to support the formation of an international court, they hold the view that the international court is the best option for achieving justice for the victims.²³

This report examines all these options in more detail in the chapters that follow.

3 The Socio-Political Context

The publication of the KPP HAM Report in Indonesia and the findings of the International Commission of Inquiry by the United Nations strongly support the establishment of an International Tribunal to adjudicate cases of gross violations of human rights in East Timor. Nevertheless, the nature of the courts in Indonesia and East Timor, established to resolve those very cases, demonstrate that there has been a lack of political will on the part of the transitional government of East Timor and influential countries in the UN to convene an international tribunal.

The Ad Hoc Tribunal, established within the Indonesian justice system as a result of influence through the United Nations is by no means able to respond to demands for justice. It was a political decision based on matters outside legal and justice issues. Professor Harold Crouch, an authoritative analyst of the Indonesian military described how the Ad Hoc Tribunal was put into effect in Jakarta:

"Although the investigation until now has uncovered material evidence of killings and other crimes, it has resulted in little justice. Where sentences have been delivered, the sentences were very light, while the people who pulled the strings behind the crimes were not punished."²⁴

The situation is worsened by the fact that judicial systems in Indonesia are influenced by the political reality of Indonesia today. After Megawati Sukarnoputri took over from Abdurrahman Wahid, the Indonesian military quickly succeeded in consolidating its status. Several military officers that were fully involved in military operations in Timor Lorosa'e joined the elite Indonesian Democracy Party (Perjuangan) under the

²¹ See UNTAET Regulation No 10/2000 on the formation of the Commission for Reception, Truth, and Reconciliation.

²² See Press release issued by Judicial System Monitoring Programme [JSMP] in Timor Lorosa'e, NGO Timor Bersatu Menuntut Pengadilan Internasional, (United NGOs of Timor demand an international court) Dili, 17 October 2001.

²³ See daily Seminar report, Keadilan dan Pertanggungjawaban di Timor Lorosa'e: Pengadilan Internasional dan Pilihan Lain, (Justice and responsibility in Timor: International court and other choices.) Dili, 16 October 2001.

²⁴ Cited from James Dunn's report, Crimes Against Humanity In East Timor, January-October 1999.

leadership of Megawati Sukarno Putri. Even Eurico Guterres, a militia commandant, became a member of the board of management of the Indonesian Democracy Party (Perjuangan). Several generals who had worked in Timor Lorosa'e in 1999 have been promoted to key Indonesian military positions. Instead of taking the generals to court, the Megawati government is in actual fact promoting them.²⁵

James Dunn pointed out that the formation of an international court would have implications for several aspects of bilateral relations between Indonesia and East Timor.²⁶ The determining factor is the issue of "good relations" that will be disturbed if a Tribunal is convened. This point was proven during a meeting of supporters of East Timor from the international community with Xanana Gusmao, a few days after 20 May 2002. With diplomacy, he said that the International Tribunal is "not a main priority for the development of Timor Lorosa'e." For nations of great influence in the UN Security Council, security, stability, economic development, and bilateral relations with Indonesia are the reasons that lock the door to the possibility of the formation of an international court. There are also legal concerns regarding the mechanisms of the International Tribunal that have been raised by the experience of past International Tribunals.²⁷

The formation of the Serious Crime Unit and Special Panel was part of a political decision to avoid the formation of an International Tribunal.²⁸ The proposal for an International Tribunal has not received wide political support and is a reflection of a UN compromise with the Indonesian government.

²⁵ Interview and outcome of discussion with Secretary General PBHI, Johnson Pandjaitan of Yayasan Hak, Dili, May, 2002. See also the appendix of James Dunn's report, *Crime Against Humanity in East Timor*.

²⁶ Ibid.

²⁷ Part 3 of the report analyses the desirability and feasibility of three possible international mechanisms to achieve individual criminal responsibility for crimes against international law committed within the territory of East Timor.

²⁸ Interview with an UNTAET staff member interviewed for this investigation on 18 January 2000.

Victims' Voices : Unsatisfactory Responses¹

1 Introduction

*" I am happy and congratulate the political defeat of Suharto-Habibie in East Timor, best wishes to the people of East Timor to build an independent nation: The Democratic Republic of East Timor. That is the very nation and place to punish Suharto and the generals whose hands are bloodied as criminals against humanity. "*²

Pramoedya Ananta Toer, Indonesian Novelist and Human Rights Advocate

The publication of the KPP HAM Report in Indonesia and the findings of the International Commission of Inquiry by the United Nations strongly supported the establishment of an International Tribunal to adjudicate cases of gross violations of human rights in East Timor. Nevertheless, the nature of the courts in Indonesia and East Timor, established to resolve those very cases, demonstrate that there has been a lack of political will on the part of the transitional government of East Timor and influential countries in the UN to convene an international tribunal.

The formation of the Serious Crimes Unit and the Special Panel was thus part of a political decision to avoid the formation of an international court and is a reflection of a UN compromise with the Indonesian government.

A Memorandum of Understanding between Marzuki Darusman, Attorney General of the Republic of Indonesia, and Sergio De Mello, Transitional Administrator of East Timor, was signed to establish and facilitate a basis for cooperation on serious crimes matters. The content of the MoU includes that the two parties agree to "try their utmost to work together in investigations or court processes". It means that they have the authority to reciprocally send witnesses and defendants and arrest the indictees.³ However, the MoU was not ratified by the DPR RI, the Indonesian parliament, under Megawati Soekarnoputri as it was considered unacceptable in Indonesia, and thus did not have much impact.

Furthermore, the Commission Reception, Truth and Reconciliation was formed to inquire into the history of human rights violations in East Timor between April 1974 and October 1999, and to report its findings to the government, the people of East Timor and the international community. It is also responsible for facilitating community level reconciliation for persons who have committed crimes other than 'serious crimes'. The CRTR will refer crimes to the judiciary and government for prosecution grave human

¹ This section of the report is based on research carried out in two countries, East Timor and Indonesia. It focuses on the efforts of both countries to respond to the judicial challenges of the victims of gross violations of human rights in East Timor from 1999. Field-research in both countries was conducted from November 2001-January 2002. In Indonesia, the field-research focussed on the process of preparing for the Ad Hoc Human Rights Court and supplemented by reports on the process of the trials themselves. Field-research in East Timor was carried out in the districts of Maliana, Liquica, Dili, Suai, Ainaro, Ermera and Oecusse. Research based on investigative reports, case studies, press broadcasts, mass media, interview transcripts, and other literature studies, was conducted prior to the writing up of the research in April to June of 2002.

² Talitakum, 41st edition, 7 June 2002.

³ Memorandum Of Understanding Between The Republic Of Indonesia And The United Nations Transitional Administration In East Timor Regarding Cooperation In Legal, Judicial And Human Rights Related Matters, 5/6 April 2000.

rights violations committed in East Timor. However, due to the minimum levels of resourcing of the judicial system, especially that responsible for gross human rights violations. Furthermore, the victims of these violations will not be entirely satisfied by the process of reconciliation if they do not see justice succeed.

2 The Serious Crimes Unit and the Special Panel for Serious Crimes

2.1 Serious Crimes Unit

The UN Secretary General gave UNTAET the mandate to construct a legal system in East Timor.⁴ UNTAET Regulation 11/2000 was later promulgated as the basis for the legal system in East Timor.

The Serious Crimes Unit (“SCU”) was established in order to investigate, and oversee cases of serious crimes. Regulation 11/2000 defines ‘serious crimes’ as: genocide, war crimes, crimes against humanity, murder, sexual offences and torture.⁵ The regulation is partly based on Article 7 of the Rome Statute, which defines ‘crimes against humanity’. This means that Judges on the Special Panel for Serious Crimes can apply precedent established by other international courts, such as those of the former Yugoslavia and Rwanda, in East Timor.

Based on Regulation 15/2000, the SCU is responsible for investigating and enforcing claims against the perpetrators of gross human rights violations between 1 January 1999 and 25 October 1999.⁶

Initially the SCU was included within the auspices of the UNTAET Human Rights Unit. However, in June 2000, it was moved to the Ministry of Justice. Now the management of the SCU and Special Panel on Serious Crimes has been restructured under the Deputy Attorney General. The Deputy Attorney General is responsible to the Special Representative of the Secretary General (“SRSG”) and Attorney General.

(a) Investigations and Indictments

Since the work of the SCU began, it has issued 46 indictments accusing 141 persons, of which 129 persons are charged with crimes against humanity. As at 31 December 2002, 84 of 141 indictees remain at large in Indonesia.⁷ Due to insufficient resources to investigate all serious human rights violations in 1999, as discussed further below, the SCU has focused its investigations on ten priority cases:

1. The Los Palos Case
2. The Lolotoe Case
3. The Liquica Church Massacre
4. The Attack on the house of Manuel Carrascalao
5. The Passabe and Makaleb Massacres
6. TNI Battalion 745
7. The Cailaco Killings

⁴ Resolution No.1272.

⁵ Ibid, Section 10.1.

⁶ Ibid, Section 10.2.

⁷ Ibid.

8. The Maliana Police Station Killings
9. The Suai Church Massacre
10. The Attack on Bishop Belo's Compound and Dili Diocese.

Thus far, out of these ten cases, six indictments have been issued, and the trial on the Los Palos case has taken place. In that trial 10 East Timorese individuals were convicted of crimes against humanity.⁸ Investigations into the other cases are at different stages: investigations in the cases of the Cailaco killings, the Suai Church massacre and the attack on Bishop Belo's compound have been completed; the investigation into the Maliana Police Station killings are expected to be concluded in the next few months.⁹

23 persons have thus far been convicted of Serious Crimes, including the 10 convicted of crimes against humanity in the Los Palos case. The second 'crimes against humanity' trial has begun before the Special Panel, and will be completed in early 2003.¹⁰ Apart from these, many other cases are still being investigated, such as those involving the discovery of corpses and the forced removal of tens of thousands of people.

(b) Staff

The Serious Crimes Unit ('SCU') is presently made up of 111 personnel. There are 64 international staff, 23 of which are United Nations' Police Officers, and 57 local staff, including 6 East Timorese police officers and 10 East Timorese trainee prosecutors. The SCU has 4 prosecution teams responsible for several districts, and one national team.¹¹

International staff working in the SCU are mainly on three-month contracts which may be extended for a further three months.

(c) Funding

Funds to operate the SCU derived from operational funds of the United Nations Peace Keeping Force (PKF) in East Timor. There are 34 UN staff funded from the UN Assessed Budget. The SRSG requested to continue the SCU mission with the same number of posts and a further 37 posts were granted by the UN in New York ('UNNY') to enable the SCU to continue its mission after Independence on 20 May 2002 last year.

Apart from the aforementioned funds, funds for other resources derived from USAID and UNVs (translators, case managers, and other needs). USAID has provided in excess of US\$500,000 for SCU for two years. These funds, among others, are used to purchase vehicles, computers, special equipment and forensic tools.

In the agreement with the UNNY, there are 20 international investigators of UN CivPol for the SCU and 6 East Timorese staff to be paid by the funding from the Consolidated Fund for East Timor ('CFET'). The main expenditure for operational costs for the SCU

⁸ See Judicial System Monitoring Programme, *The General Prosecutor v. Joni Marques and 9 Ors (The Los Palos Case): A JSMP Trial Report*, March 2002.

⁹ Report of Proceedings: Symposium on Justice for International Crimes Committed in the Territory of East Timor, University of Melbourne, Faculty of Law, January 16-17 2003.

¹⁰ Ibid.

¹¹ Ibid.

come from funds provided by CFET of which the total amount for the years 2001-2002 was approximately US\$400,000.

The estimated total amount needed to run the SCU for a year is US\$5,650,000.00. A large amount of funding is required to carry out investigations, claims, and hearings, including the infrastructural needs (provision of buildings and equipment) and setting up of the system (additional personnel, wages, training and so on).

(d) Limitations of the SCU

(i) Lack of Material and Human Resources

It is obvious from the above priority list that the SCU does not have enough staff to handle the many cases that must be looked at. Difficulties began with a shortage of interpreters, translators and prosecutors. The SCU still needs at least 8 Timorese staff with legal backgrounds but these cannot be recruited immediately because there are very few available law graduates and applicants lack language proficiency. Furthermore, workers at the SCU, which consist of international and local staff, need to have proficiency in English. One of the interviewees mentioned,

“At the moment, 8 local staff are needed in the Serious Crime Unit. However, only 3 people have applied. It's hoped they will work as partners to international staff. After that, they'll become Serious Crime prosecutors.”¹²

A dire lack of human resources will make it extremely difficult to investigate all of the outstanding, uninvestigated cases from 1999. It has been projected that possibly as many as 60 percent of recorded killings will remain uninvestigated when the SCU is downsized at the end of UNMISSET's mandate.¹³

(ii) Unenforceability of Memorandum of Understanding

The most fundamental problem is that while the SCU has no difficulty at all in lining up perpetrators for every serious violation, those who have been successfully prosecuted and brought to court are merely the people involved, the supporters of the serious criminal actions, not the militia commanders and generals in Jakarta. Thus far, there has been no cooperation from Indonesia with requests for the detention and transfer of indictees or provision of witnesses within Indonesia. Many extradition requests have been sent to Indonesia without response. Although these perpetrators and witnesses live in Indonesia, this difficulty should be overcome given the MoU between Marzuki Darusman and the UNTAET Transitional Administrator.

The weakness of the MoU is due to a number of factors: firstly, the Attorney General in Jakarta who negotiated the MoU has been replaced; secondly that there is a lack of political will on the part of Indonesia to bring the generals before the courts, despite the agreement; and thirdly that Indonesia has repudiated the MoU on the grounds that it is not binding without ratification by the Indonesian parliament.

¹² Interview with Attorney General of Timor Lorasa'e Longheiros Monteiro on 1st March 2002 at Dili.

¹³ Ibid.

In order for the SCU to work successfully, it must continue to issue indictments and seek Interpol arrest warrants in respect of persons believed to be Indonesia, with the help of pressure from the international community to encourage Indonesia to detain and transfer these individuals. An agreement that has more legitimacy than the MoU is also needed and its enforcement must then be monitored.

(iii) *Administrative and Mechanistic Constraints*¹⁴

Firstly, there is an imbalance in the composition and expertise of prosecutors, defenders and judges of East Timor and international attorneys. International prosecutors, judges and defenders outnumber East Timorese attorneys. The East Timorese prosecutors, judges and defenders do not have experience in international criminal cases. To prepare the East Timorese attorneys, judges and defenders there should be simultaneous training. However, due to the number of cases that are on waiting lists, this matter is not being prioritised.

The short contract system for international public defenders causes them to work under pressure, and as a result they do not provide on-the-job training to the East Timorese. With minimal amount of equipment and facilities, they work quickly together with the East Timorese public defenders, who then feel that there is not enough time to study the cases.

Secondly, there is a communication problem between local and international prosecutors and defenders. The languages primarily used are English and Indonesian because a large proportion of East Timorese and some SCU people can use Indonesian. Meanwhile, for investigative purposes, Tetum is used a lot because nearly all witnesses, victims and indictees feel more fluent in responding to questions, telling chronologies of events and bearing witness in their mother-tongue. This requires translation at many levels, from Tetum to English, from English to Indonesian, then to Tetum. This is a big obstacle because of the small number of interpreters and translators.

Thirdly, changing the administrative management of the SCU resulted in confusion about the system being used. These changes certainly influence the SCU's efficiency and effectiveness in indicting claims of gross violations. For example, an international staffer expressed in an interview that:

"I get the impression that the Department of Justice itself views the judicial process of serious violations as not a matter of priority. Political leaders in East Timor are not firm in supporting the process of claims against gross violations. This matter causes the investigative processes to slow down, as there has been no clear communication about claim strategy. Consequently, there has been a communication breakdown and lack of transparency between the SCU and victims. In fact, this matter is an absolute condition for supporting the process of claims."¹⁵

(iv) *Public Defender Services*

¹⁴ Thematic Report 1, Judicial Sistem Monitoring Programme [JSMP].

¹⁵ Interview with several international staff members on 18 January 2002. Names are intentionally withheld.

Legal aid services for the indictees were also established. However, the number of lawyers from both local NGOs and international staff are insufficient to deal with the workload. There are two lawyers funded by an NGO, three international staff funded by UNTAET and 12 other East Timorese lawyers working as public defenders.

In particular, the Dili court has 9 people who deal with cases of ordinary and serious crimes. Their task is to accompany and defend the indictees. The number of cases is so great that public defenders are forced to work hard and as quickly as possible to complete the many cases they are faced with. Facilities to support this work are insufficient. Public defenders are also faced with the difficulty that witnesses mostly live in Indonesian West Timor. Thus, only victim witnesses can be presented. Certainly, this matter reduces the judicial integrity of every decision. As a result, those who can be brought to justice are only the lower militia members that in fact were not perpetrators let alone architects of the 1999 events because they themselves are now living in East Timor. Interviews with public defenders, gave a strong impression that it would be best if cases were investigated and tried by an international court so that militia leaders who are living in Indonesia can also be prosecuted.

2.2 Special Panel for Serious Crimes

(a) Regulations and Implementation

The Special Panel for Serious Crimes was formed based on UNTAET Regulation 15/2000. Section 10.1 of the Regulation states that the Dili District Court holds exclusive jurisdiction over serious crimes. It also establishes an Appeal Court for appeals of decisions of any district court and appeals of decisions on serious crimes.¹⁶

At the moment there are two Special Panels that exist within the Dili District court, the English-language special panel and the Portuguese-language special panel. However, only the English-language Special Panel is functioning. This is due to resource constraints faced by the Portuguese-speaking panel.

UNTAET Regulation 15/2000 establishes panels of judges that have exclusive and universal jurisdiction over serious criminal actions.¹⁷ Having universal jurisdiction means that jurisdiction is not dependent on [a] whether the serious criminal action concerned was committed in the region of East Timor, [b] whether the serious crime concerned was committed by a citizen of East Timor, or [c] whether those suffering the serious crime concerned are citizens of East Timor.¹⁸

In all of the cases decided by the Special Panel, there has not been a single indictee who is a general or instigator of the events of 1999. The processes of the Special Panel, although criticized as slow, have been more meaningful than those which have occurred in Indonesia.

¹⁶ UNTAET Regulation 15/2000 Sections 14 & 15.

¹⁷ Section 2.1.

¹⁸ Section 2.2.

The Regulation states further that the formation of a panel of judges that have exclusive jurisdiction over serious crimes **may not obstruct** the jurisdiction of an international tribunal for Timor Lorosa'e, once the tribunal is established.¹⁹

(b) Limitations of the Special Panel

(i) Lack of Resources and Technical and Administrative Support

There is considerable frustration among judges due to the lack of human and material resources and technical and administrative support for the Special Panel courts. This includes irregular access to the internet, few computers on which to work, no support staff and almost no texts or legal materials in Bahasa Indonesia. No transcription service presently exists, which makes it very difficult to verify evidence given in court or carefully review legal arguments.²⁰ In addition, there is no clerk of the court.

"Judges do not only do legal investigations, but also write, edit, and re-read themselves all the drafts of the court's claim. Without any support from an administrative clerk, judges must type and edit claim statements."

(ii) Language

The language factor and lack of translators and interpreters has become very important because the Panel is conducted in English. Of all the indictees and witnesses there are none who can speak English. East Timorese prosecutors and public defenders still have very limited English-language abilities. In addition, there is a shortage of translators with the required legal knowledge. The JSMP report notes this issue very clearly:

"Currently in the court in East Timor there are four official languages: Tetun, Bahasa Indonesia, Portuguese and English. The language of the public defenders is primarily Bahasa Indonesia, ... the only East Timorese judge on the Special Panel uses Bahasa Indonesia or where necessary, Tetun. ... No International judges have been able to speak Bahasa Indonesia or Tetun. To date, all Special Panel Cases have been translated between either English or Portuguese and Bahasa Indonesia as the two main languages, with ad hoc translations into Tetun or other Timorese languages as necessary. ... To meet these complex linguistic needs, the Justice Department has only six translators/interpreters; one Tetun-Bahasa Indonesia-English, three Bahasa Indonesia-English, and two Portuguese-Bahasa Indonesia."²¹

(iii) Court of Appeal

¹⁹ Section 10.4.

²⁰ Op cit note 9.

²¹ See p 24-25, thematic report JSMP 1, Keadilan Dalam Praktek :Hak Asasi Manusia Dalam Administrasi Pengadilan, (Justice in Practice: Basic Human Rights within Court Administration) Dili, Timor Lorosae, November, 2001.

Section 22.2, UNTAET Regulation Number 15/2000, states that:

"... the panel in the Court of Appeal in Dili consists of two international judges together with an East Timorese citizen judge. Due to the importance or seriousness of a case, a council consisting of five judges, three international judges and two East Timorese judges, may be established."

Previously, the Appeal Court consisted of three people (two international and one East Timorese). However, at present there is only one East Timorese judge left, because the two international judges have completed their contracts. This means that the Court of Appeal is not functioning due to the inability of the government of East Timor to appoint an international judge. Many cases appealed are now delayed because there are no international judges.

This is an obvious hindrance to the rights of convicted persons to appeal and undermines community faith in the justice process. The law of East Timor governing the appointment of judges stipulates that Court of Appeal judges must have fifteen years experience and be fluent in English and Portuguese, which makes it difficult to find suitable candidates. However, a Court of Appeal judge has been identified and will be appointed soon. In addition, more Special Panel judges, prosecutors and defence counsel are to be appointed.

With so few judges and the short contract periods of international judges, one can imagine that their ability to respond to the cases would be limited. Also there are other un-met needs, for example a lack of computers, interpreters and other support staff.

2.3 Future of the SCU and the Special Panel for Serious Crimes

The SCU and Special Panel are functioning, but the SCU has only recently achieved the necessary degree of efficiency due to an increase in resources made available to it. However, according to UNTAET last year, large funding support will only continue until 2003. After that, the government of East Timor must find its own funds to run the SCU. This is going to be difficult as it is well known that the political support of the Timorese government for the process of the SCU is very weak. Although the mechanism that was formed by the transitional government provided the opportunity and hope of bringing the perpetrators and generals to justice, now that chance is narrowing. If the Ad Hoc Tribunal in Indonesia is merely a political stage, the judicial process in East Timor in the future will be the same.

The future of the SCU after the end of UNMISSET's mandate in July 2004 is therefore unclear. Various parties have said that the maximum presence of a special UN mission will be up to and including the year 2004. Meanwhile, the judicial/court process is still hearing tens of dozens of cases. The fate of the judicial demands of victims will be further hampered by lack of resources, lack of political support by the government of East Timor, and an unorganised court system inherited from UNTAET. When this occurs the people of Timor Lorosa'e will inherit various seriously unmanageable burdens.²²

2.4 Conclusion

²² See working paper Aderito de Jesus Soares, *Special Panel for Serious Crimes: A Half-Hearted International Tribunal For East Timor*, presented at an International Conference on "Internationalised Criminal Courts: Practice and Prospects", Amsterdam, 25-16 January 2002.

Based on the limitations in the work of the SCU, the Special Panel, and Court of Appeal, outlined above, the impression is that these institutions are unable to resolve serious criminal cases in East Timor. This point does not nullify what they have already done as the crimes already tried are not 'insignificant' or unimportant for the victims of these incidents. However, it cannot be denied that the decision to convene a court for cases of gross violations in East Timor apparently did not take account of obstacles in terms of technical capacity, infrastructure, funding and politics.

Now that the new government of East Timor is officially in charge the issue has grown because the government lacks the political will to seriously deal with the 1999 events. Besides, there are limited resources to do this. These problems began with the decision to ignore the recommendations of the (International) Commission of Investigation to form an international court. From that moment on, courts in the respective nations faced large obstacles. However, there is still public support for the Serious Crimes process, but also a realization that it is presently very unlikely to gain custody over high-level planners and perpetrators, without action from the international community.

3 The Commission for Reception, Truth and Reconciliation

"...Reconciliation as a social process, a cultural process and a legal process, as well as a political process, meaning that in any case the Timor Lorosa'e people, both those in West Timor and those in East Timor can meet heart to heart, can discuss and have dialogue, can forgive each other based on our culture... Reconciliation must be directed at how to create a new society for Timor Lorosa'e, a society that is just and carries high standards of human rights..."²³

**Chief of the Commission for Reception, Truth and Reconciliation,
Aniceto Guterres Lopes, S.H. on his visit to Kupang**

The idea to establish the Commission for Reception, Truth and Reconciliation ('CRTR') emerged at the CNRT congress in August 2000, prior to the independence of East Timor. There were several reasons for the proposal to establish a commission. Firstly, cases of gross and minor human rights violations during the period 25 April 1974 to the end of 1999 needed to be investigated thoroughly. It was felt that it was not sufficient to only investigate cases of human rights violations that occurred in 1999, because violations had been occurring ever since the Indonesian invasion. Secondly, many human rights violations had occurred in the past, so the tendency for East Timorese to blame each other could spark a new conflict, which should be avoided.

Reconciliation between victims and perpetrators is absolutely essential in order for bloodshed to be avoided, so that national stability can be maintained, and to ensure that such atrocities do not occur again in the future. However, many questions and doubts have been raised about the wide scope of this commission, looking at the period 1974-1999.

The Commission is further weakened by the limited time-frame of 2 years within which to do a thorough job. In addition, the Commission is seen as too politically weak to examine political leaders like Xanana and Taur Matan Ruak.

²³ Reconciliation is a Process, produced by Aniceto Guterres Lopes, S.H. in the public arena with refugees in Kupang, Monday, 25 February 2002, *Harian Suara Timor Lorosa'e*.

3.1 Regulations and Implementation

(a) Objectives of the CRTR

The objectives of the CRTR are to:²⁴

1. Investigate human rights violations that occurred in the context of political conflict in East Timor.
2. Seek the truth in connection with human rights violations that occurred in the past.
3. Report the nature of the human rights violations that occurred and identify factors which contributed to such violations.
4. Identify policies and practices of government and non-government organisations that need to be undertaken to prevent repeats of human rights violations.
5. Refer human rights violations to the Attorney General with recommendations for prosecution of violations, if required.
6. Help the process of regaining victims' dignity.
7. Promote reconciliation.
8. Support the reception and reintegration of individuals into communities after they have been alienated by minor criminal actions etc by facilitating reconciliation mechanisms at the grass roots.
9. Promote human rights.

The Commission, headed by 7 national commissioners, has one national office and 6 regional offices. It has 200 East Timorese staff and 20 international staff. Regional commission offices consist of 25-30 Regional Commission Members that will carry out its functions.

The Commission will operate for two years and can be extended only by six months. The CRTR is an independent national institution set up to investigate human rights violations committed between 25 April 1974 and 25 October 1999²⁵, and facilitate reconciliation efforts for those who committed minor violations.

Thus far, the CRTR has collected 180 statements, mostly given voluntarily by perpetrators. The CRTR determines which are suitable for community reconciliation procedures, and which are to be referred to the General Prosecutor's office for possible prosecution. However, at present, the SCU is not adequately resourced to investigate and prosecute cases referred to it by the CRTR.

(b) Functions of the CRTR

The Commission has 3 main functions:²⁶

(i) *Seeking the Truth*

The Commission is given a mandate to investigate a number of violations of human rights that occurred in East Timor in the context of political conflict between 25 April 1974 and 25 October 1999.

The Commission will give special consideration to:

²⁴ Section 3, UNTAET Regulation No.10/2000.

²⁵ The period of the investigation begins 25 April 1974, when there was a coup d'état in Portugal (the so called "carnation revolution") to 25 October 1999 in East Timor, the beginning of the presence of UNTAET.

²⁶ Commission on Reception, Truth and Reconciliation in Timor Lorosa'e, Regulation Summary by Steering Committee, p 2.

Occurrences before and after the referendum of 30 August 1999; the period before and after the invasion of East Timor by Indonesia on 7 December 1975 and the impact of the Indonesian presence until 25 October 1999.

(ii) Community Reconciliation

The second function of this Commission is to facilitate community reconciliation. In principle, pure reconciliation needs justice and every person must take responsibility for his or her behaviour. Those responsible for serious crimes can be prosecuted by the Serious Crimes Panels.

Reconciliation processes recognise that there are many people who committed minor crimes²⁷ and are prepared to reconcile themselves with their respective communities. In these cases, the Commission is given the task of facilitating "A Community Reconciliation Agreement" (PRK) between the local community and perpetrators of minor crimes.

(iii) Recommendations to Government

The third function of the Commission is to formulate recommendations. Apart from reporting to government and society concerning their findings, the Commission also has a mandate to make recommendations on matters related to its work. Recommendations can be made to the government, parliament, boards or people including the international community. The Regulations request the government to accept all recommendations made by the Commission and consider their implementation.

3.2 Responses to the CRTR

The responses of East Timorese to the formation of the Commission are varied.²⁸ The Timorese accept the mission to be carried out by the Commission, but many are concerned that if the investigations are to be conducted for the years 1974-1999, the Commission may identify one of the leaders of East Timor as responsible. Is it possible to ask them to account for their actions? People even propose that the Commission not investigate events back to 1974 because there are many things that are "not desirable" to raise again.

There is also a concern for members of the Commission because of the complexity of the task and a call for their security protection. People believe that a national agreement is required between political party leaders and the government to support the Commission.

Other questions concern the intersection between the reconciliation process and traditional law. Can criminal perpetrators be dealt with under traditional law? Can perpetrators of serious crimes be asked to pay compensation in accordance with tradition?

²⁷ Crimes that are considered minor by the Commission are determined by:

- The nature of the crime, for example, violations like stealing, looting, arson, slaughtering of livestock, or wrecking of harvest, can be addressed through a process of community reconciliation;
- The number of actions conducted individually;
- The role of each person in crimes - those who followed orders to commit crime can be taken through a process of reconciliation.

²⁸ Processed from various interviews undertaken by the author and Progress Report Selection Panel Consultations, November 2001. This report constitutes the recording of the consultation process of the Steering Committee Commission to 13 districts in Dili and 2 regions in West Timor about the formation of the Commission, November 2001.

A visit by the Commission to East Timorese refugees in Indonesian West Timor produced a variety of responses, some them similar to those raised in East Timor. Refugees supported the Commission but they too did not believe that the Commission could investigate citizens involved in crimes since 1974 because it would mean that Xanana and Taur Matan Ruak would be put in jail.

After two years of living in exile, it was the first time that refugees had received information about reconciliation. They felt that reconciliation must be based on the traditions or customs of East Timor. Reconciliation based on the culture of East Timor involving political elites down to grass roots must be facilitated.²⁹

The refugees also said that the UN must not see the events of 1999 as issues of the people of East Timor only, but must also involve the Indonesian and Portuguese governments because they are mostly responsible for the conflict in East Timor. Some called for Portugal, UDT (Timorese Democratic Union), Apodeti (pro-integration group in East Timor), Fretilin, Indonesia and the Militia to be brought before an International Court.

It was hoped that various goals would be achieved through the establishment of the Commission. But in bringing such ideals to reality we face huge challenges. Concern about the effectiveness of the Commission is not only raised by the East Timorese but also by people inside the Commission itself. Confronted with an enormous responsibility, Aniceto Guterres Lopes said:

“That is one of the issues, because the mandate of the commission is only two years with a possible extension of six months. This mandate was effectively applicable from 7th April 2002. We feel the period of two years is insufficient, as one of the Commission's mandates is to seek the truth from 1974 to 1999. Evidence of violations that occurred long ago will be difficult to obtain.”³⁰

3.3 The Relationship Between The Commission And The Courts

As already explained, the Commission is not a judicial board because it does not function to ensure a person's criminal responsibility and does not hand down sentences. The Commission concerns itself more with the search for general patterns of human rights crimes that have occurred in East Timor and conducts community reconciliation on less serious crimes. In addition it will give recommendations to government and refer matters to the Attorney General of Timor Lorosa'e.

The courts have the authority to determine a person's criminal or civil liability in a specific case and to hand down a verdict. The roles of the CRTR and the Court are thus expected to enhance and complement each other. The courts can thus contribute to transitional justice by providing retributive justice through criminal charges and the legal process, by breaking the chain of impunity and by providing legal certainty.³¹

²⁹ There are still many other reactions interconnected with the unwillingness to return to Timor Lorosa'e including the fact that there is still physical conflict. Taken from the results of the report by the commission's delegates to West Timor for consultation with the Commission, Progress Report Selection Panel Consultation, 14 November 2001, appendix 5.

³⁰ Direito, 14th edition, 30 April 2002, produced by Yayasan HAK.

³¹ *“What is the Truth and Reconciliation Commission?”* By Ildal Kasim, Lembaga Studi dan Advokasi Masyarakat (ELSAM), No. 1, Year 1, July 2000, pg. 8.

However, when studied carefully, several aspects of the relationship between the courts and the CRTR are unclear. For example, according to UNTAET Regulation No.10/2001, the Commission implements community reconciliation through the formation of the Committee of Statement of Community Reconciliation.³² Within this Committee, perpetrators can admit to being involved in or having committed a crime. If the existence of a crime "is recognised in fact" by the perpetrator, the PRK Committee has two options: to continue community reconciliation or to discontinue the community reconciliation process and recommend the case be brought to court through 'Kejaksaan.'

Determination of which option to follow depends on the type of crime admitted to. When it is a gross violation, then the case is brought to court. However, according to the regulations, the SCU and the Special Panel only deal with cases between 1 January-25 October 1999. Thus, when the commission finds cases outside the period of 1999, how does it resolve them? Will the judiciary and court deal with them as ordinary criminal cases? What about when there are findings that the cases before 1999 can be categorised as gross violations?

The Constitution of the Democratic Republic of East Timor, Article 160 states: All crimes committed between 25 April 1974 and 31 December 1999 that can be categorised as crimes against humanity, are targets of criminal processes in authoritative national or international courts. Yet, how can this article be applied when the Special Panel courts only focus on 1999 events and an international court has not been formed?

4 Voices of the Victims

"If they are not punished, we will seek justice by our own means."

The author spent much time listening to the victims and their views on the justice and reconciliation processes in East Timor and Indonesia. The dissatisfaction and strong feelings of victims and victims' families reflected two things. Firstly, that the entire legal process of the settlement of cases of gross human rights violations is very far from the hopes of the victims and the victims' families. Secondly, that there is very limited communication of information about the performance of legal institutions such as the SCU, the Special Panel and the CRTR. Information is mainly centred in Dili, and is not widely disseminated or accessible to all districts. Consequently, there is uncertainty at the community level about what is actually being done by political leaders, the UN and the government in forming those institutions, and their progress. A far-reaching result of this is that a lack of an immediate response to dissatisfaction and lack of information, raises the likelihood of people "taking the law into one's own hands".

The Serious Crimes Unit is also considered too slow and powerless to bring perpetrators who are in Indonesia to justice and there is no faith in the ad hoc Human Rights Court in Indonesia. Hence there is a clear desire for the establishment of an international court³³ for cases of gross human rights violations in 1999 in East Timor. The government of East Timor however, is not seen as serious in supporting the process of justice demands in Timor Lorosa'e especially the demands for an international court.

³² UNTAET Regulation No.10/2001 Sections 24 and 27.

³³ International Court for gross violations of human rights and war crimes, for instance, the International Tribunal for the former Yugoslavia (ICTY) and International Tribunal for Rwanda (ICTR), both formed on the basis of a United Nations Security Council resolution. See Part 3 of this report.

During visits to East Timor, the International Commission of Inquiry became very aware of the suffering of the East Timorese people due to the Human Rights violations that had occurred. The commission also noted that a large proportion of the East Timorese people who talked to the Commission did not call for revenge or compensation, but sought justice, recognition of their rights and reconciliation.³⁴

The International Commission of Inquiry believed they had a special responsibility to speak on behalf of the victims who do not have access to international forums. The voices of the victims cannot be forgotten in redefining relations in this region, such as on Human Rights and compensation, so that the truth is fully appreciated. This is a responsibility that must be carried out by the United Nations in both the short term and the long term, especially in its guardian relationship with the Timorese people, particularly as the UN is the transitional administrator of East Timor as it strives for independence.³⁵

4.1 Dissatisfaction with Progress of SCU and Special Panel Legal Processes

(a) Slow progress

Many victims have been involved in investigations by the SCU, but because there are still no substantial results, people feel bored and frustrated with the process that has occurred. Victims feel that the Serious Crime Unit is too slow in processing the cases in court.

The many voices of victims in Liquisa are essentially similar in sentiment - that the justice process must be implemented quickly. Elisa Dos Santos from Liquisa says:

“Many come looking for information yet up until now the process in court is unclear. The government must try as hard as it can for those (militia) in West Timor to be taken to court in East Timor because some of them are able to enter and exit East Timor with an Indonesian passport and the police just keep quiet. Meanwhile, we do not believe that the ad hoc Indonesian court can punish them.”

In general, people feel vengeful towards perpetrators, including towards East Timorese citizens themselves. "If the court does not drag them in, then blood-letting will occur again" they say. This view is very worrying for the future. Very few understand that their East Timorese brethren are not entirely at fault because they got caught up in the militia as part of a strategy from Jakarta to prevent East Timorese independence. They demand that their own relatives and people should be brought to justice, not the Jakarta generals who were the instigators behind the 1999 events.

Meanwhile, the victims living in Dili have a rather different voice. Like that of Leonato Soares, a victim of events in the Dili Diocese on September 5th 1999. At the time the militia attacked the Dili Diocese, he experienced a stab in the stomach and other forms of torture. He knows the process that has occurred in the SCU and Special Panel:

“We saw for ourselves what they have done to us. Our children themselves gave into them (the militia) seeing what happened. We have been investigated as many as five times and finally we were part of a pledge concerning Human Rights and justice carried out in Lecidere together with KPP HAM Indonesia but until now we do not know how far the case has

³⁴ Identical letters dated 31 January 2000 from the Secretary-General addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights, A/54/26, S/2000/59, 31 January 2000.

³⁵ Ibid.

been processed. When will it all end? Yes, we know and are aware that it all takes time, but time marches on and we don't know when it will all end. Who knows, we'll all be on our death-beds and these cases will still not be settled."

According to eyewitnesses, the massacre that occurred at the church of Joao de Brito Liquisa on 6th April 1999 involved military personnel and civilians of the Liquisa district. Not one of the perpetrators has been punished for this crime. Maria Fernanda Mendes, from the Grupo Rate Laek Liquisa explains the demands from the victims' viewpoint:

"On 5 and 6 April 1999 the militia killed many people in Liquisa. We ask that the legal processes not to be too drawn out. I want to ask our people's leaders about the international court, will it be established or not? I hope the government can give us an explanation. If not, the possibility of a second war between us can emerge because we still harbour resentment towards those militia. Moreover, we still do not know where our husbands and other relatives are buried."

(b) Lack of information

There is a lack of sufficient and clear information for victims and their families about the development of cases handled by the Serious Crime Unit, especially for those who live outside the Dili district.

Felisberto Dos Santos from Liquisa said:

"My child died on 5th April 1999, I have been investigated so many times that maybe they (serious crime unit) have got bored investigating me, but I still do not know when the court process will be carried out."

Victims' statements also cover information from the Serious Crime Unit about ten big cases that have been given priority. They wanted to know what was going to happen in regard to the cases of individual victims not included in these ten priority cases.

Calsinda Fernandes from Ermera said:

"Since 26 October 1999 I have given reports to Civpol Ermera and Dili but there is still no follow up action. What about the bodies of victims that have not yet been found? And, I see there is a well-known individual from TNI who previously killed a UNAMET staff member but he now enters Timor Lorosa'e using an Indonesian passport so we cannot arrest him. So how can we arrest a person like that?"

(c) The suffering of Women - Widows and Mothers

Three rape victims aged 17, 18 and 19 years-old, from Lolotoe, Maliana district told their stories to Fokupers (East Timorese Womens' Communication Forum) concerning their experiences as prisoners of three offenders (two militia and one TNI). The events occurred on 26 May 1999 when the militia were unsuccessfully searching for the older sibling of one of the victims. They were detained together with 13 other Lolotoe people, who were suspected of being connected with Falintil.

"The following day, we were brought to a losmen in Atambua. Over three consecutive days and nights we were raped by three men. One of us was

raped by a member of the TNI. One of us was forcibly injected with a contraceptive medicine. During those three days, we were forced to serve under threat of homemade weapons and a pistol belonging to the TNI member who joined in the rape. They threatened to kill us and throw us into the sea if we did not obey them. Afterwards, we were returned to a lock-up in the TK building of Lolotoe and after a week we were then returned to our parents.³⁶

Of these three victims, one of them experienced serious trauma and for 6 months was in the care of Fokupers. The victims hope the offenders will be punished as quickly as possible.

There are many other cases of the rape of pregnant and elderly women. There have been children born as a result of rape and forced abortions as a result of rape. All of these contribute to the history of the suffering of East Timorese women in 1999.³⁷

The voice of another victim comes from the district of the Oecusse Enclave. She is a woman who lost her husband. Her husband was the backbone of her family. Her name is Marselina Poto.

“My husband, Victor Pune, was killed before my eyes in the kampung of Kiubiselo Oecusse. I witnessed how my husband, powerless, was shot in the head until he died. We have five children. All of them are still small. Now, with the death of my husband, I alone am raising my five children. My room is getting smaller because there is no longer a husband to assist me in earning a living and educating our children who are still small. I hope for justice for my family, and government attention to the children that have been left behind. I ask how is the UNTAET government going to act towards the militia in the near future?”³⁸

Demands for justice and expressions of dissatisfaction were also conveyed by victims at a Remembrance Day of the Indonesian Military Invasion on 7 December and Human Rights Day on 10 December 2001. This program, devised by East Timorese NGOs, brought together victims from all over East Timor with personnel from the UNTAET government and ETTA [East Timor Transitional Administration] connected with the legal process. In a piercing voice, a woman who was widowed as a result of the 1999 events, Filomena Pereira da Silva from group 99 in Maliana district said:

“I ask the leaders of this nation who have now taken up good positions to not fall asleep. Pay attention to us victims and to the future of our children whose fathers have died for East Timor. Before, in the referendum period, all of us shouted dead or alive “ukun rasik an!” (freedom!) until my husband himself was killed on 8 September 1999 by Joao Tavares, Guilherme Goncalves and Dandim (Komandan Kodam Maliana) in Bobonaro, we accepted everything happily. Now that we hold the ideals of freedom in our hands, we ask our leaders not to fall asleep!! Bring the cases of Bobonaro to Court as quickly as possible! Why is our fate as

³⁶ The data from Fokupers includes as many as 276 cases concerning women which occurred around 1999, and estimates that there were more than 276 cases.

³⁷ Data from Fokupers, LSM Nasional that was active within the pemberdayaan sector. Perempuan Timor Lorosa'e, Jl. Farol, Dili, Timor Lorosa'e.

³⁸ Oecusse Enclave faced two slaughtering cases which were in Pasabe with as many as 82 people and Maquelab with as many as 5 people (this slaughtering occurred one month after the INTERFET troops had landed in Dili) and were included as priority cases with the Serious Crime Unit even though there were also larger-scale murders in other locations in Oecusse.

widows not given any attention? We hear much more about refugees who are returning whereas our fate as widows or victims is not mentioned! The leaders have forgotten about our suffering during these past two years."³⁹

Ibu Filomena felt that the government was more concerned with refugees whereas the widows and victims who are demanding justice and struggling with financial worries are not receiving any attention.

4.2 Demands of Traditional Justice

Despite Portuguese colonisation for centuries and Indonesian occupation, the traditional social system of East Timor still exists strongly in the regions outside Dili. The largest portion of East Timorese society conducts their lives based on traditional tribal values and norms which govern behaviour, law and kinship. People still very much adhere to traditional courts and their regulations. Those who are no longer familiar with specific traditional rules still follow "values and principles" of traditional law. The clearest example is that a community will report to the police only if an issue cannot be resolved according to tradition and custom.

There are many traditional communities in East Timor with their own respective languages and values. Languages differ greatly between regions and are more than just dialects. The Tetum language which is developing now, for example, has developed from Tetun Terik, the mother tongue of people living in the Viqueque district. It differs a lot from Fataluku, a region on the eastern side of the Viqueque district.

The traditional law operating in East Timor centres on scores of traditional leaders known as liurai. These liurai are the guardians of traditional law. The same traditional practices have been carried out for hundreds of years up until the present day and have also been applied to cases of gross human rights violations committed in 1999.

For example, there have been demands from most victims, especially those in Tumin in the district of Oecusse, to use traditional methods in dealing with perpetrators of human rights crimes of 1999. Most of the militia who committed murders in the Pasabe case are believed to come from the village of Abani, Kecamatan Pasabe, in Oecusse district. Victims want the relatives of the militia in Abani to sit down in the traditional way to decide on compensation to victims besides also wanting a legal process for perpetrators. The victims want a traditional resolution so that peace can be made with the village of Abani. However, the Abani side think that it is the state's responsibility to take people to court and punish those responsible for crimes accordingly.⁴⁰

The custom of sitting together on the ground to resolve a dispute is rooted in traditional belief. It is usually done within the same ethnic group in Oecusse to resolve bloody conflicts and to reach a peaceful agreement. For them, a traditional process is essential before an issue can be considered resolved and the desired equilibrium achieved.

However, a traditional court is not valid in all places. Traditional justice will apply for a long time to come in traditional communities even though the laws exist in verbal rather than written form. Whether it works or not depends very much on the society that requires

³⁹ The largest case in Maliana was the slaughtering in the Maliana POLRES complex on 8 September 1999. Another case is the one in Cailaco on 12 April 1999, Lolotoe, Bobonaro, and other locations scattered in Maliana.

⁴⁰ Official Statement from the Tumin village head of Oecusse district and several victims from Tumin in November 2002. Demands of the local traditional belief may be taken into account by non-governmental human rights organisations and the Human Rights Unit of UNTAET.

it. Communities will defend matters of traditional law due to the nature, legal sanctions and means of resolution which are desired by society. Sanctions set down, sometimes heavily, depend on the crime committed. The resolution produced is not just for the sake of providing compensation for victims but also to restore community ties, at the same time as restoring the situation.

In a study on East Timor conducted by Dr David Mearns, he concludes that:⁴¹

- Diverse local practices in the fields of justice and conflict resolution are based on core principles of exchange and compensation about what is just and fair. Social and physical violence produces a substantial debt.
- The movement of a perpetrator of a crime from where the incident occurred to a point of arrest, or shifting of the payment of a fine to some other party in the area will not get rid of the need to repay the debt to the person who has suffered from the actions of the perpetrator.
- Resolutions of disputes at the local level are indeed not always according to ideas of equality, democracy and international human rights.
- The local systems will run underground and act as a hidden alternative to the formal system if they are not given acknowledgment.
- 400 years of the presence of the Roman Catholic Church has not yet wiped out belief in mystical things that can influence a person's life.

In daily life, East Timorese still resolve issues through "Biti Boot" (sitting down on the ground together), which is carried out in accordance with local traditions and gives a sense of justice as commonly understood by the community. Therefore, in resolving serious Human Rights violations of 1999, traditional law ought to be taken into account.

4.3 Calls for an International Tribunal

The murder of 82 young people⁴⁰ from the village of Kiubiselo, Nonkikan and Tumin by militia and members of the Indonesian military on 8 September 1999. This occurred on the border of Pasabe Kecamatan, a district of the Oecusse Enclave. A survivor, Marcus Baquin states:

*"Victims, mostly young people, were gathered together in the meeting place of a village called "Imbate" in West Timor and they started to be interrogated by the militia one by one while some were tortured. The parents of the young people tried to save their children by offering various things to the militia but the militia did not want to accept. The victims were tied up one by one, and at night were taken quite far from the Imbate village hall and chopped up one by one from behind."*⁴¹

Marcos Baquin escaped. However, a part of his ear and his head were severely injured by the militia. He is now requesting assistance from the government for medical treatment for his ear and head. He very much hopes that the government will bring the offenders who are in West Timor to trial.

⁴¹ See the research results of Dr. David Mearns which was prepared for Australian Legal Resources International, *Keberagaman Dalam Sebuah Tema: Koalisi Kekuasaan di Timor Lorosae*, (Variations within a theme: Coalitions of Power in Timor Lorosae), Australian Legal Resources International.

⁴⁰ Data from the Tumin village head.

⁴¹ Interview with victim, September 2000.

Batista Elu of Tumin Oecusse shouted in a meeting:⁴²

“Perpetrators of 1999 should be dragged to court as quickly as possible! If that is not done then it is likely that there will be more bloodshed between us in Oecusse . And, I ask for an international court to be established quickly for those that are still in Indonesia. I also ask the East Timorese government to pay attention: how about the dead bodies that are still in the region of West Timor – are they just going to be left to become carrion?”

Meanwhile, other voices clearly express doubts about the justice process of the Ad Hoc Tribunal in Jakarta. Francisco da Costa from Suai district, one of the surviving victims who lost his mother at the Suai Ave Maria Church on 6 September 1999, said:

“It is best if the court process is not carried out in Indonesia because we all already know that we do not trust the Indonesian court process. How about the Indonesian military leaders involved directly with massacres in Suai, will they just be let off?”

Another victim, Adriano Coelho da Silva, from the sub-district of Hatoudo, Ainaro, asked:

“What about the responsibility of perpetrators who are still in West Timor if they do not return to Lorosa’e or they choose to become Indonesian citizens?”

Dominggas Casimira from the Group 99 Maliana questioned all court processes that are underway:

“Why during two years of investigations has not one been processed yet? Why doesn’t the Ad Hoc Tribunal in Indonesia mention cases of POLRES Maliana as one of the cases that will be tried? Just what criteria are used for a case to be called a Serious Crime? Why haven’t the leading perpetrators of Human Rights crimes in Timor Lorosa’e been processed in the Ad Hoc Tribunal of Indonesia? Why if the court in East Timor and Indonesia found it difficult to respond to justice demands, has an international court not been established yet? We ask the UNTATET government and Timor Lorosa’e to demand the establishment of an international court.”

An interesting event occurred on 24 and 25 November 2001. This event was a reflection of how East Timorese society perceives the interconnection between justice, law and reconciliation. The program was a reconciliation in Suco Cassa, Ainaro District which involved nearly all the victims and militia members of the entire district of Ainaro.⁴³ There was communication and admission between victims and militia members involved in several cases in Ainaro in this reconciliation program. A strong inference could be drawn that most of the victims were able to accept their fellow East Timorese who had joined the militia. However, they still expected the law to try those involved in serious human rights crimes. Militia members in attendance also said if they were indeed involved in crimes, then they would go before the court.

⁴² Remembrance day of the Indonesian Military Invasion on 7 December 2001 and Human Rights Day on 10 December 2001.

⁴³ The reconciliation plans were organised by the Cassa youth and the facilitation by LSM HAM Yayasan HAK on the initiative of the victims and militia who had already returned to Ainaro district.

Further interviews gave a strong impression that the business of forgiveness differs from the business of justice. Victims can forgive the perpetrators as long as a court process is conducted fairly. Some interviews showed that perpetrators have been accepted upon return to their home villages and the court process entrusted to the relevant authority.

5 The Public Discourse and the Discourse of Political Leaders

5.1 Demands for an International Tribunal

It has been clearly illustrated above, that the victims and families of victims of the 1999 events feel frustration with the court processes undertaken both in East Timor and in Indonesia. To them the court process in East Timor is slow, and does not pay attention to victims that are not included within the priorities of the East Timorese court process. They expressed distrust in the mechanisms and slowness of the Ad Hoc Tribunal in Jakarta.

Those who know about the slow progress of the SCU and the special panel in bringing cases to justice, and about the corrupt Indonesian court system, demand an international court. Those who do not have information on the developments of the SCU and Special Panel can only express deep disappointment and frustration. Nevertheless, they still have high hopes that there will be a moment when a court can fulfil their need for justice.

Besides the voices of victims, a discourse from international and national NGOs in East Timor has also clearly developed. The vast proportion of NGOs in Dili are very aware that the courts in East Timor and in Indonesia are the outcomes of political compromise. Consequently, they are pessimistic about the processes of the ad hoc Human Rights Court in Jakarta and the Special Panel in Dili. For them, the court structure that is best for the 1999 events is a court that can drag the perpetrators and architects of the 1999 events to court. Only an international court is seen as likely to achieve that. This attitude is reflected in nearly every interview conducted and at various discussions and seminars that have been held in Dili.

In a seminar held by international and national East Timorese Human Rights NGOs in Dili on 16 October 2001, this group of NGOs gave reasons as to why an international court is critical:

- To uphold justice;
- To require the TNI and Indonesian government officials to be responsible;
- To increase dignity and humanitarian values;
- To become one of the common forms of struggle without bias about differences in ethnicity, religion or race and economic importance or political affiliation;
- To become a lesson for people of other nations not to commit the same crimes; and
- To protect minority groups.⁴⁴

The participants, mostly Human Rights activists, recognise that an international court is not only significant for victims in Timor Lorosa'e but would also place value on the dignity of human life in the world.

To counter arguments that an international court would create problems between Timor Lorosa'e and Indonesia, one of the speakers in the above discussion stated why an international court must be convened:

⁴⁴ Seminar Report *Justice and Responsibility in Timor Lorosa'e: International Court and Other Options*, Dili, Timor Lorosa'e, 16 October 2001, pg. 16.

1. Only an international court would have jurisdiction over the high ranks of the Indonesian military, who planned the destruction in East Timor in 1999.
2. Exposure of high-ranking Indonesian military and other perpetrators will be a historical record for Indonesia and East Timor of "a hidden war that is forgotten" that was carried out by Indonesia against the East Timorese people.
3. An international court truly supports reconciliation. At the moment, people in villages look at low-level militia who may have committed criminal actions on orders from their superiors and focus their anger and revenge on their own people in Timor Lorosa'e. In other words, conflict inherited from Indonesia disrupts the society and the feelings of solidarity of the East Timorese people. An international court would place responsibility on high-ranking Indonesians and assist people to see clearly that the TNI were responsible for the destruction of the nation of East Timor.
4. An international court would help to prevent the same actions happening in the future. East Timor is not separated geographically from the rest of Indonesia. Because of this, high-ranking Indonesian military need to learn a lesson from history, so that in future they will not use this small nation to fulfil their territorial ambitions in the same way.⁴⁵

The Bishop of Dili, Mr. Carlos Fillip Ximenes Belo, SDB, as the highest representative of the Roman Catholic Church in East Timor, and a recipient of the Nobel Peace Prize has also requested international support for an international court to be established:

*"Prosecuting the crimes of 1999 is essential for East Timor, but also for Indonesia. Democracy there is fragile and the military continue to intrude on both government and civil society. Much remains to be done. We call on the international community to push for an international legal process for the generals and top militia leaders, whose crimes are not only against the people of East Timor, but also against the international community itself for breaches of international criminal Law. This requires the international community to call them to account before an international criminal tribunal."*⁴⁶

While the NGOs, the leader of the Roman Catholic Church, and the victims themselves are very clearly in favour of an international court, the attitude of the Cabinet of Timor Lorosa'e itself is the unclear. There has never been an official inquiry on public opinion about the need for an international court. Isabel da Costa Faria, SH, Human Rights Advisor to the second Timor Lorosa'e transitional cabinet was quoted in *Suara Timor Lorosa'e (Voice of East Timor)* as saying, "An international court is a special and important agenda because as a newly independent nation there are conditions where we must consider looking to these things".⁴⁷

In its development, the East Timorese government has never firmly asked for the establishment of an international court. In fact, in establishing a good relationship with the Indonesian government, it has entrusted justice to Indonesia in the formation of the Ad Hoc Human Rights Court.

Xanana Gusmao, former president of CNRT (*Concelho Nacional Resistencia Timorese*) also then elected president, said:

⁴⁵ *International Court*, by Joaquim Fonseca, Yayasan HAK, in Seminar Report Justice and responsibility in Timor Lorosa'e: International Court and Other Options, Dili, 16 October 2001, pg. 14.

⁴⁶ *The Path to Freedom*, by Carlos Belo, Tuesday 28 August 2001, www.jsmp.minihub.org .

⁴⁷ STL 2/10/2001.

“ I very much want to see reconciliation between the people of Timor Lorosa’e ... only between the East Timorese. I do not want to talk about an international court because I am not a Human Rights activist or an attorney to discuss that. ”⁴⁸

In another opportunity, when Xanana Gusmao was elected President, before the International Solidarity for East Timor he said that an international court might disturb the good relations with Indonesia that East Timor is hoping to develop. His statement can be said to be representative of the attitude of the Timor Lorosa’e government. Moreover, the Timor Lorosa’e government has supported the Ad Hoc Human Rights Court by sending its witnesses to Jakarta.

4.2 The Question of Amnesty

The people of Timor Lorosa’e are confused by the technical term “reconciliation” in dealing with the crimes that happened in 1999. After a bitter past, society is now faced with a political process to reconcile. Most people identify reconciliation as meaning "mutual forgiveness" between the criminal perpetrators and the victims of crimes. There is also an interpretation of reconciliation as "rujuk-kembali" (reconcile again) among Timor Lorosa’e people. However, regardless of the interpretation of reconciliation, most victims want reconciliation to be accompanied by a legal process for those involved in serious human rights crimes in 1999.

So the demand emerges that although there is reconciliation, the legal process must continue to be carried out. Many of the victims interviewed for this report wanted reconciliation to involve them and the criminal perpetrators, not only the leaders. The main dilemma lies with developing an appropriate concept of reconciliation.

There are two main periods in the history of the struggle of East Timor towards independence:

(a) 1974-1999

Conflict began in 1974 between the parties of that time, including FRETILIN, UDT, APODETI, KOTA and Trabalhista and worsened with the invasion of the Indonesian military on 7 December 1975. The Indonesian military then began a campaign of integration to control East Timor by killing whoever rejected that integration.

(b) January-October 1999

President Habibie created a heated political climate in East Timor by announcing a referendum in East Timor. To prevent Timor Lorosae’s people from undertaking a referendum freely, the Indonesian military started to support Indonesian pro-autonomy militia with terror campaigns and massacres in several places in East Timor. The peak of the campaign culminated when the result of the referendum was announced on the 4th of September 1999 with the victory of the pro-independence vote. Militias and Indonesian military then

⁴⁸ Interview between Amado Hei and Xanana Gusmao, 3 March 2002.

scaled up its widespread killings, undertaking a 'scorched earth' campaign in Timor Lorosae.

These periods have challenged East Timorese people to determine what is to be a priority for the future of their nation. Xanana Gusmao says that the concept of reconciliation is a very complex one, involving several factors within it:

Human Psychology: How humans can forgive each other.

Politics: What made East Timorese kill each other? The difference between true criminals and those that are motivated by political factors.

National Stability: There are still many Timor Lorosa'e people in Indonesian West Timor, and until they return, they remain a constant concern. Other concerns relate to the impermanence of the United Nations Peace Keeping Force (UNPKF) post and hence future insecurity along the border.

Justice: In order for reconciliation to be strong, the process of justice must be implemented.

Based on these factors, Xanana took a personal approach with autonomy leaders in Indonesian West Timor, in encouraging them to return to Timor Lorosae. He gave them clear information about the process that they will face in Timor Lorosa'e.

At the same time Xanana is aware that he is only a facilitator for a group of Timor Lorosa'e people and that reconciliation is really a process for the perpetrators and the victims within society, not between the leaders.

We must view the granting of amnesty in the political context of Timor Lorosa'e, with help from the perspective of countries that have faced political transition such as South Africa and certain Latin American countries. These countries, after being freed from authoritarian government regimes and making the transition to democratic political regimes, formed commissions for truth and reconciliation to respond to political needs.

In some of these countries, amnesty was granted based on clear political conditions of the respective nations, and the means of granting it was often criticised from various sides. Such criticism was concerned with the compatibility of granting amnesty with international law. Granting amnesty evades the national responsibility principle based in international law. International human rights law, as generally acknowledged, puts the burden on nations to investigate and prosecute perpetrators of gross Human Rights violations. This includes the authority to provide restitution or compensation to victims.⁴⁹

International law is mentioned not only in relation to international multilateral agreements on human rights, but international customary law and even humanitarian law. The granting of amnesty is also against Articles 2 (3) and Article 7 of the International Covenant on Civil and Political Rights.

In South Africa, the role of granting amnesty was derived from the outcomes of tough political negotiations between the political forces supporting apartheid and the anti-apartheid forces. To smooth the transition to democracy, amnesty involved guarantees that people would not be dragged into court. The South African truth and reconciliation

⁴⁹ *Facing the past: Why amnesty?* Ildal Kasim, Lembaga Studi dan Advokasi Masyarakat (ELSAM), Briefing Paper Series about the Truth and Reconciliation Committee No. 2, 1 August 2000, pg. 6.

commission was based on this agreement, and it tried to integrate the granting of amnesty with the process of finding truth and granting compensation to victims.

In South Africa, requests for amnesty were processed by an Amnesty Committee and amnesty was granted individually based on the perpetrators' motives. Blanket amnesty, as a collective approach without individual recognition of the perpetrator, occurred in Latin American nations.

According to the South Africa model those who can request amnesty are limited to:

1. Members of a publicly known political organisation or members of a freedom movement.
2. Employees or members of "security forces" of a nation responding to the struggle by members of a political party or a freedom movement.
3. Employees or security forces involved in a political struggle against a nation (or former nation).
4. Persons involved in a coup d'état or coup d'état attempt.⁵⁰

This kind of amnesty is only given to those who have committed crimes with a political motive. Criminals do not become the responsibility of the truth and reconciliation commission. Thus those who do not fulfil the above criteria are not granted amnesty.

The truth of the admissions of the people who request amnesty is investigated in a public judicial process, in which all parties involved with the case are invited to attend.

Amnesty as suggested by Xanana Gusmao, recognises that its intention is "not to forgive" but is a "specifically determined amnesty", meaning that a person is given amnesty if after he has faced a legal process, been proven guilty and has undertaken a period of sentence and shown good behaviour, that person can be given amnesty after agreement is obtained from the victims or society. Xanana also said that it is only an idea of his as a citizen of East Timor concerned about reconciliation among East Timorese.

If such a process of reconciliation occurs in East Timor it is to be an individual amnesty not a collective one. According to the Constitution of Timor Lorosa'e, amnesty can only be authorised by Parliament not the President or a specific commission.⁵¹

The Commission for Reception, Truth and Reconciliation of East Timor with its mandate in terms of UNTAET regulations number 10/2001, does *not* mention an amnesty process but the Commission is given a mandate to deal through a process of reconciliation with minor crimes that occurred in the context of the East Timorese political conflict – crimes like theft, insignificant attack, arson, looting, the killing of live-stock, wrecking or stealing crops. Serious crimes will be referred to court. With regard to Indonesian citizens, the truth seeking process will collect evidence and materials that can be used by Indonesia and the International community.

The granting of amnesty in the context of East Timor needs to take into consideration the need to develop Timor Lorosa'e as a democratic regime and the victims' demands for justice.

⁵⁰ Ibid, page 11.

⁵¹ Article 95 (3) (g) of the Constitution of the Democratic Republic of East Timor.

Ad Hoc Human Rights Court for East Timor

1 International Political Pressure on Indonesia

'In facing this challenge, I am encouraged by the commitment shown by President Abdurrahman Wahid to uphold the law and to fully support the investigation and prosecution of the perpetrators through the national investigation process under way in Indonesia. I have also been strongly assured by Foreign Minister Alwi Shihab of the Government's determination that there will be no impunity for those responsible... I will closely monitor progress towards a credible response in accordance with international human rights principles.'¹

Secretary-General of the United Nations, Kofi Annan

1.1 International Commission of Inquiry

Following the violence and terror in East Timor before, during and after the popular consultation in 1999, the UN Commission on Human Rights passed a resolution calling for an International Commission of Inquiry to be set up and calling upon the Indonesian government to do the following:²

"(a) To ensure, in cooperation with the Indonesian National Commission on Human Rights, that the persons responsible for acts of violence and flagrant and systematic violations of human rights are brought to justice;..."

The joint reports of the Special Rapporteurs of the Commission for Human Rights further recommended that:

"Unless, in a matter of months, the steps taken by the Government of Indonesia to investigate TNI involvement in the past year's atrocities bear fruit ... the Security Council should consider the establishment of an international criminal tribunal for the purpose."³

In the final report of its findings, the International Commission of Inquiry clearly stated the importance of the UN establishing an international human rights tribunal consisting of judges appointed by the UN.⁴ This recommendation by the International Commission of Inquiry however, was not supported by the Secretary General in its transmittal of the report to the UN Security Council, the General Assembly and the Human Rights

¹ In relation to the need to hold the perpetrators accountable for serious human rights violations in East Timor. *Identical letters dated 31 January 2000 from the Secretary-General addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights, A/54/26, S/2000/59, 31 January 2000.*

² *Situation of Human Rights in East Timor*, Commission on Human Rights Resolution 1999/S-4/1 (adopted at its Fourth Special Session).

³ *Ibid*, Recommendations, para. 6.

⁴ *Op cit* note 1. Report attached to Letter of Transmittal.

Commission.⁵ The Secretary-General however wished to pursue various other avenues to bring justice to the people of East Timor, '*inter alia*, by strengthening the capacity of the United Nations Transitional Administration in East Timor ('UNTAET') to conduct such investigations and enhancing collaboration between UNTAET and the Indonesian Commission of Inquiry into Human Rights Violations in East Timor ('KPP-HAM')'.⁶ The Secretary-General accepted the assurances of representatives of Indonesia that they would try Indonesian nationals accused of international crimes

1.2 KPP HAM

The Indonesian National Commission on Human Rights ('Komnas HAM') established the Indonesian Commission of Inquiry on Human Rights Violations in East Timor (KPP HAM), one day before the special session of the UN Human Rights Commission, on 22 September 1999. The establishment of the KPP HAM was clearly a reaction of the Indonesian Government to the strong pressure from the international community.

The authority of KPP HAM was as follows:⁷

- (1) *To conduct investigations into and inspections of suspected Human Rights violation incidents in East Timor;*
- (2) *To request a statement from the victims;*
- (3) *To call and examine witnesses and parties suspected of being involved in Human Rights violations;*
- (4) *To collect evidence about suspicions of Human Rights violations;*
- (5) *To examine various locations, including buildings which are necessary for the investigations, with the agreement of the Head of the Human Rights Court;*
- (6) *To examine and request documents owned by both official authorities and other agencies that are necessary for investigation, with the agreement of the Head of Human Rights Court;*
- (7) *To provide protection for witnesses or victims of Human Rights violations; and*
- (8) *To process and analyse the uncovered evidence in the interest of prosecution, and to publish their outcomes.*

The mandate of the KPP-HAM in collecting facts, data and information on Human Rights violations in East Timor was limited in its time frame from the beginning of January 1999, when President Habibie announced the popular consultation, to ratification of the results of the referendum in October 1999.

After completing its investigations, KPP HAM concluded that several gross violations of human rights had occurred in East Timor from January until post referendum, September 1999, in the form of: mass killings; torture and oppression; forced disappearances; gender based violence (including rape and sexual slavery); forced migration; and scorched earth practices and other violence.

⁵ Document dated 31 January 2000 from the Secretary General directed to the Chairman of the General Committee, the Head of the Security Council, and the Head of the Human Rights Commission, concerning Agenda 96 regarding the Issue of East Timor.

⁶ *Identical Letters Dated 31 January 2000 from the Secretary General Addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights*, at para. 6.

⁷ According to Law No. 39, 1999 on Human Rights, Article 89 (3), and Government Regulation on Legislation Review No 1, 1999, regarding the Human Rights Court, Articles 10 and 11.

The gross violations of human rights were seen by KPP-HAM as systematic and based on a plan to encompass the phase after the announcement of the holding of a referendum, the phase around the May 5th agreement and the post-referendum phase.⁸ KPP HAM concluded further that gross violations of human rights were instigated by three groups:

1. The perpetrators who were directly in the field, that is the militias, military apparatus and the police force;
2. Those who implemented control of the operation, including, but not limited to – the civil bureaucracy, particularly bupati (regents), governors, military leaders and the local police;
3. Those responsible for national security policy, including, but not limited to high-ranks of the military, who were both actively and passively involved in such crimes.⁹

The KPP HAM report also mentions around 30 civil and military officials along with around 100 other names suspected of being responsible for the violence, from the militia commanders, bupati, and the District Military Command [KORAMIL], to the Commander of the Military (Korem), and the Governor of East Timor. It also includes General Wiranto as the chief of the Indonesian military ('TNI') in the list of suspects who should be questioned on their responsibility.¹⁰

In its recommendations, KPP HAM asked the Attorney General of Indonesia to carry out further investigations. The Attorney General, as the general prosecutor, is tasked with investigating and establishing the "systematic," "organised," and "wide scale" nature of the crimes that occurred in East Timor throughout 1999 - the main elements of "crimes against humanity".¹¹

The findings of the KPP HAM stating that serious crimes against humanity occurred in East Timor, were supported by the interim findings of the International Commission of Inquiry, as put forward by the Head of the International Commission of Inquiry, Sonia Picado Sotela:

*"The findings of the International Commission of Inquiry on East Timor are much the same as the interim findings of KPP HAM East Timor. There is no doubt in the least that the destruction of East Timor was total and systematic. The destruction in all cities reached 70-80 percent, in fact in several places it was up to 90 percent."*¹²

1.3 International Political Pressure on Indonesia

The findings of KPP HAM and the international pressure brought to bear upon Indonesia by the International Commission of Inquiry were the basis for the establishment of an Ad Hoc Human Rights Court in Indonesia. Immediately following the KPP HAM report, the

⁸ Report of the Indonesian Commission of Investigation into Human Rights Violation, Jakarta, 31 January 2000, Chapter III Patterns of Human Rights Violations: Crimes Against Humanity, General Patterns of Violence, Paragraph 29, 30 and 3.

⁹ Ibid, Chapter VI Conclusions and Recommendations, Paragraph 72.

¹⁰ Republika, 6 September 2000, "Many Roads Approach the Human Rights Court".

¹¹ If those characteristics are not proven, then there is the possibility that only those perpetrators on the ground can be asked to account for their actions, and not the military leaders who gave the orders.

¹² Kompas, 6 December 1999, CIET Findings the same as KPP HAM, "The Systematic Destruction of East Timor."

Indonesian legislature announced new legislation providing for the creation of a permanent Human Rights Court.

Evidence of international pressure was highlighted by Mr Arief Budiman, head of the Indonesian programme at the University of Melbourne:

'There is tremendous pressure on Indonesia to deal with the atrocities in Timor Leste. The country is still dependent on foreign aid and has to showcase how it takes the trials seriously.'

In addition to financial aid, there is the issue of military assistance, which a number of Western countries, including the US and Australia, have suspended pending the trials' completion.¹³ In 1999 the US banned weapons sales and direct military assistance to Indonesia due directly to the violence in East Timor at the time of the vote for independence from Indonesia.

The pressure was squarely on Indonesia to hold their own military leaders accountable and in that way the international community managed to temporarily abdicate responsibility.

Adnan Buyung Nasution, barrister for the generals including General Wiranto, stated that:¹⁴

"The commitment to set up an Ad Hoc Human Rights Court is not due to international pressure, but is the effort of this nation to seek the real truth of the past through the process of the Human Rights Court."

The formation of the Ad Hoc Human Rights Court of Indonesia to bring to justice the perpetrators of gross violations of human rights in East Timor in 1999, provoked much doubt in various circles, including amongst victims in Timor Lorosa'e, certain sectors of Indonesian society and the international community. This lack of faith in the establishment of the Ad Hoc Court was predicated on the political conditions in Indonesia, which are still largely dominated by the military.

Nevertheless, the establishment of the Ad Hoc Human Rights Court received praise and support from the Head of the UN Human Rights Commission in the 58th Session of the United Nations' Human Rights Commission, on 22 April 2002:

"The United Nations Human Rights Commission welcomed the important steps taken by the Government of Indonesia to bring to justice perpetrators of gross Human Rights violations in East Timor in the period leading up to and immediately following the popular consultations in East Timor in August 1999."

The British government represented by Foreign Minister, Ben Bradshaw, echoed this sentiment:¹⁵

"I warmly welcomed the start of the long-awaited ad hoc tribunal for Human Rights cases in the former province of East Timor. This is a positive development but is just the first step in a long process to bring to justice those responsible for gross violations of human rights in East Timor in 1999. It is a good start, but we

¹³ The Straits Times, March 13, 2003, *Jakarta general found guilty in Timor rampage.*

¹⁴ Solidamor, Report of the Ad Hoc Tribunal Seminar: *Can the Ad Hoc Tribunal for East Timor Fulfil our Sense of Justice?* Jakarta, January 2000.

¹⁵ Daily Report of Current Affairs in Indonesia, Thursday 14/06/2002.

hope that the jurisdiction of the tribunal will soon be extended to cover all the events of 1999.”

Praise and commentary from the UN and the British Foreign Minister are further evidence that the important political players in the international community supported the Ad Hoc Human Rights Court of Jakarta and chose to ignore the misgivings of victims, Indonesian society and others as well as the recommendation of the UN's own International Commission of Inquiry to establish an international tribunal for East Timor.

2 Ad Hoc Human Rights Court for East Timor

In 2000, the Indonesian legislature created a permanent Human Rights Court as a special Chamber of the General Courts.¹⁶ The purpose of the establishment of Ad Hoc Human Rights Courts was to try past cases of serious human rights violations in East Timor and elsewhere in Indonesia. The law establishing the Human Rights Court, provides that the Komnas HAM is the sole body empowered to initiate and carry out the preliminary inquiry into allegations of gross human rights violations.

The Ad Hoc Human Rights Court for East Timor was later created by Presidential Decree, based on a provision of Law 26/2000 authorising the creation of ad hoc courts to try gross human rights abuses committed before the law was enacted. The Presidential Decree establishing the Ad Hoc Human Rights Court for East Timor provides for the investigation and prosecution of crimes that took place in April and September 1999 in the districts of Dili, Covalima and Liquica. The outcomes of the investigations and inquiries by KPP HAM formed the basis for the prosecution of suspects of gross human rights violations in East Timor in the Ad Hoc Human Rights Court. The jurisdiction of the Ad Hoc Human Rights Court was very limited, both geographically and in terms of time. Therefore, the violent incidents that happened in the other parts of East Timor and during the rest of 1999 were not included.¹⁷

The court began its work on 14 March 2002 and finished the first round of hearings in April 2003. A total of 18 defendants were charged before the court in 12 separate trials. The defendants were not accused of personally committing or commanding the commission of crimes against humanity, but as accomplices to the commission of crimes committed by others or on a theory of command responsibility via omission – with failing to prevent, stop, or take steps to investigate and prosecute the commission of crimes against humanity committed by persons under their command or authority. The indictments alleged widespread or systematic acts of murder and persecution directed against a civilian population, and that the defendants failed to prevent their subordinates from carrying out such crimes. These charges carried minimum sentences of 10 years' imprisonment and maximum death sentences. The defendants included officials from the military, the police and the civil administration.

2.1 Judges

The Bench of the Human Rights Court is composed of two career judges and three ad hoc judges. The ad hoc judges were appointed to the Human Rights Court and the Court of Appeal by the President on the recommendation of Benjamin Mangkoedilogo, Chief Justice of the Supreme Court and head of the working party for the preparation of the Ad Hoc Human Rights Court. The ad hoc judges were selected from academia and must serve

¹⁶ Law 26/2000 on the Human Rights Court.

¹⁷ *Indonesian Ad Hoc Human Rights Court Proven Not Able To Fulfil International Demands*, Dili, August 17, 2002, Statement by East Timor National Alliance for International Tribunal.

for five years with the right to a one-time renewal of their tenure.¹⁸ Career judges were decided on by the Head of the Supreme Court from judges in the Ministry of Justice circles, and then appointed by the President.

The ad hoc appeal judges of the Supreme Court were appointed by the President on the recommendations of the DPR.

(a) Tenure

The main weakness of Article 28 is the period of tenure of judges. The five-year term means that a non-career judge who sits in this position must leave his work for five years. In practice, those who became non-career judges of the Ad Hoc Tribunal were lecturers in tertiary institutions, not practitioners, because practitioners were reluctant to be nominated as judges in an Ad Hoc Tribunal of Human Rights in light of the political issues raised earlier.¹⁹

(b) Delays in Appointment process

Another concern around the appointment of the judges was that the appointment process took one year as from the time the legislation came into force. The order to find the ad hoc judges was brought into force on 23 November 2000, when Law No. 26/2000 was legislated but only long after the legislation was published did the issue of the appointment of ad hoc judges arise. On 10 December 2001, the Head of the Supreme Court finally announced the 12 names of career judges for the first level of the Human Rights Court, and the five names for the Human Rights Court of Appeal and at the same time submitted those names to the President for inauguration.²⁰

President Megawati Soekarno Putri delayed the process of the preparation of judges further by endorsing non-career judges in order to “not cause any problems later on” and to ensure that “it is completely free of political influence”.²¹ Megawati explained to the public that the reason for the delay was due to the need for accountability and transparency.²²

Kusnanto Anggoro, a CSIS researcher, stressed that the slowness in the process of the preparation of ad hoc judges would “ruin the image of Indonesia in the international community”.²³ Two days later, Indonesian Presidential Decree No. 6/M/2002 was issued, appointing 12 first level judges and six judges for the Ad Hoc Human Rights Court of Appeal, as had been proposed in December 2001.²⁴

First level Ad Hoc Tribunal of Human Rights – Supreme Court Judges

Name	Origin
1. Dr. Komariah Emong Sapardjaja	Universitas Padjajaran
2. Abdul Rahman MH	Universitas Sumatera Utara

¹⁸ Article 28, Law No.26/2000.

¹⁹ Read also comments of Munir S.H. in Tempo, 12 January 2002, *I'm Pessimistic About the Capability of the Human Rights Courts*.

²⁰ Resolution No.KMA/060/sk/XII/2001.

²¹ See, *Presiden Belum Tandatangani Soal Hakim ad hoc*, (President Not Yet Handling Legal Problem) Kompas, 10 January 2002.

²² See, *Ad hoc Trial Could Harm Indonesia's Image*, The Jakarta Post, 10 January 2002.

²³ Ibid.

²⁴ *Perkara Tim-Tim Lebih Dulu ke Pengadilan ad hoc HAM*, Suara Pembaruan, Selasa, 15 January 2002.

3. Kabul Supriyadie Mhum	Universitas Diponegoro
4. Winarno Yudho	Universtias Indonesia
5. Heru Susanto	Universitas Surabaya
6. Rudi M. Rizki LLM	Universitas Padjajaran
7. Muhammad Guntur Alfie	Universitas Hasanuddin
8. Kekelong Bukit	Universitas Sumatera Utara
9. Sulaiman Hamid	Universitas Sumatera Utara
10. Prof. Dr. Rachmat Syafe'I MA	IAIN Sunan Gunung Jati
11. Amiruddin Aburaera	Universtias Trisakti

Ad Hoc Tribunal of Human Rights - Appeal Judges

Name	Previous position
1. Seyfulina Fahrudin	Retired judge of PTUN Jakarta
2. Prof. Dr. Soedjono Dirdjosisworo	Universitas Katholik Parahyangan
3. Prof. Dr. Amir Summa	IAIN Syarif Hidayatullah
4. Dr. Ahmad Sutarmadi	IAIN Syarif Hidayatullah
5. Prof. Sanwan Nasution	Universitas Sumatera Utara
6. Dr. [He] SPB Roero MBA	Universitas Kristen Indonesia Tomohon.

(c) Qualifications for Candidature

Several parties responded immediately after the Presidential Decree was released. They were of the view that, given the speedy candidature of the judges, there had been no transparency and there had been no community participation. They argued that society needed to know the degree of integrity and commitment of the candidates and their level of understanding of the need to uphold human rights.²⁵ Indeed, during the process there had been no opportunity for public participation.

The qualifications needed for the candidature of a judge of the Human Rights Court were in fact quite subtle and lacked transparency. With the exception of technical criteria, it was not clear what minimum criteria such candidates should hold. The selection process was simply conducted in an inadequate manner, with no fit and proper test of candidate judges conducted by a relevant authority, such as Parliament.

The background of a candidate judge had evidently not been an important point of consideration.²⁶ As a result, Rudi M Rizki LLM, one of the judges from Universitas Padjajaran, became an ad hoc judge although he had been a legal advisor to the TNI and POLRI officers suspected of involvement in gross violations of human rights in East Timor. Nevertheless, Benjamin Mangkoedialaga guaranteed Rudi M Rizki's impartiality by stating that the military had only "bought knowledge" from this former Universitas

²⁵ See Siaran Pers KontraS NO. 03/SP-KONTRAS/1/02 concerning the appointment of Human Rights Court judges and the seriousness of the Government with regard to the establishment of an independent and impartial Human Rights Court.

²⁶ For example, there were three career judges chosen who had a poor reputation in handling cases involving human rights issues. There was also one candidate chosen, Hendra Nurcahyo, who did not fulfil the minimum age requirement. Benjamin Mangkoedilaga, the Chair of the Selection Panel, dispensed with the age requirement in this case due to the potential of the person concerned. However it was not clear what that potential was. Hendar Nurcahyo himself in the end withdrew his own candidature as a judge of the human Rights Court as a result of pressure by the Dean of the Law Faculty of the University of Indonesia.

Padjajaran lecturer.²⁷ As a result of the appointment of such judges, Hendardi, Head of PBHI, maintained that the court would be run as a "theatrical stage".²⁸

There was also an imbalance in the composition of the non-career judges: with four judges from the Syarif Hidayatullah IAIN [State Islamic Tertiary Institution] in Jakarta, while only a couple were appointed from other tertiary institutions. The public was given no real explanation regarding the composition.

(d) Lack of Training on International Human Rights and Criminal Law

It was also widely observed that the nominated judges did not have experience in the field of human rights, as many of them came from administrative and civil law backgrounds. The Supreme Court, the recruiting institution, was aware of the lack of human rights knowledge of the judges and therefore planned human rights training for the judges. Nevertheless, the plan to recruit speakers and experts from Sweden and Norway who had had experience in undertaking litigation involving gross violations of human rights was not implemented. Some training was carried out by three experts from Indonesia including Prof.Dr.Muladi, Prof.Dr.Romli Atmasasmita, and Dr.Adnan Buyung Nasution. These three experts were later team members of the legal advisers of the TNI for East Timor cases.²⁹

The Special Rapporteur on the Independence of Judges and Lawyers submitted a report to the Commission on Human Rights, wherein they noted that the judges had informed the Special Rapporteur that they had received "very little specific training on the international standards and international practice relevant for the prosecution of gross violations of human rights and crimes against humanity."³⁰

2.2 Prosecutors

The appointment of prosecutors is regulated by Article 23 of Law No.26/2000:

2. *In conducting the tasks as stated in paragraph [1] the Attorney General may appoint ad hoc prosecutors consisting of government personnel and or civilians.*

4. *To be an ad hoc prosecutor, one must fulfil the following conditions:*
 - a. *a citizen of the Republic of Indonesia;*
 - b. *minimum age 40 (forty) years and maximum 65 (sixty-five) years;*
 - c. *have a law degree and experience as a prosecutor;*
 - d. *be healthy physically and mentally;*

²⁷ See *Pengadilan HAM Berangkat dari Keraguan* (Human Rights Court Starts From Doubt) Kompas, 2 February 2002.

²⁸ *Tergantung Pada Integritas Hakim*, (Depends on Legal Integrity) Koran Tempo, 15 January 2002.

²⁹ As noted by Kompas, an Indonesian daily newspaper, all the first level ad hoc judges were university lecturers. There was not one who had had any involvement in human rights issues, debates or efforts to strengthen human rights. Only Rizki M Rahman has a background as an international criminal law teacher. Unfortunately he was a former legal adviser to military generals. Kompas, op cit 2 February 2002.

³⁰ Report Of The Special Rapporteur On The Independence Of Judges And Lawyers, Report On The Mission To Indonesia, 15-24 July 2002, E/Cn.4/2003/65/Add.2. 13 January 2003, Commission On Human Rights Fifty-Ninth Session.

e. have dignity, honesty, fairness, and be of good behaviour;

f. have loyalty to the Pancasila and UUD 1945; and

g. have knowledge and interest in the field of Human Rights.

The contradictions within the above-mentioned articles are apparent, particularly as between article (2) and article (4) (c). The statement that the Attorney General can appoint “civilians” automatically contradicts the statement that a prosecutor is required to “have a law degree and experience as a prosecutor.” Thus, the chance for ordinary members of society, of practitioners, and of human rights activists to be prosecutors in these cases was closed off because they could only be drawn from former prosecutors, current prosecutors or military officers who can be prosecutors.

The opaque and inappropriate selection process and appointment of prosecutors was tantamount, if not worse, to that of the judges. There was also no participation by the public in this process.

The delay in announcing the names of judges of the Human Rights Court led to a delay in the announcement of the names of those on the prosecution team. In the end the Chief Prosecutor, MA Rachman, announced the appointment of 24 prosecutors for court sessions of incidents of gross violations of human rights in East Timor.³¹ They consisted of 14 career prosecutors, 7 former prosecutors and 2 military *oditur* (prosecutors).

Prosecutors for Ad Hoc Human Rights Court for East Timor

No	Name	Position/Office
1.	Abdul Hamid	Head of the Kejaksaan Tinggi
2.	Darmono	Head of the Kejaksaan Negeri West Jakarta
3.	Roesmanan	Expert staff from Kejaksaan Agung
4.	K Lere	-----
5.	Ketut Murtika	----
6.	Cirus Sinaga	---
7.	James Pardede	----
8.	Widodo Supriyadi	----
9.	S.Hozie	----
10.	Diah Srikanti	----
11.	Zainal Djaprin	---
12.	Maman Suherman	---
13.	Maju Ambarita	---
14.	Harry Ismi	-----
15.	Colonel CHK Djojo Djohari	Auditor General TNI
16.	Letkol CHK Muchtar	Auditor General TNI
17.	G Simangunsong	Former Jaksa
18.	Syaefudin	Former Jaksa
19.	AM Nainggolan	Former Jaksa

³¹ No Kep 092/A/JA/02/2002 regarding the Appointment of Ad Hoc Prosecutors in Incidents of Gross Violations of Human Rights in East Timor, 5 February 2002.

20.	Ruslan	Former Jaksa
21.	Pieters J Silalahi	Former Jaksa
22.	Dien Murdinah	Former Jaksa
23.	Iskandar Mansur	Former Jaksa

On the morning of the announcement by the Supreme Court of the appointment of prosecutors for the Ad Hoc Human Rights Court, the Coalition of Observers of the Human Rights Court released a statement.³² This statement summarised all the weaknesses in the process of the recruitment of the prosecutors, and reflected the frustration of human rights activists about the actions of the Indonesian government in neglecting principles of justice:

“Principles of transparency within the process of the appointment of ad hoc prosecutors have been totally neglected. The nomination process gives the impression of being sudden and representing a closed recruitment mechanism implying an absence of responsibility concerning the quality of such prosecutors. Also, the closed recruitment mechanism of the Ad Hoc prosecutors does not provide the public with an opportunity to provide any input about the credibility, integrity and track record of such Ad Hoc prosecutors... there are at least two Ad Hoc prosecutors whose professionalism and credibility are in doubt.”³³

Concerns were also raised about the meaning and testing of the requirement that ad hoc prosecutors “have knowledge and interest in the field of human rights”.³⁴ The Coalition observed that there should be a test, based on the candidate prosecutor’s respective track record, of their knowledge of human rights and this should be conducted through a fit and proper test and through their interest in human rights.³⁵

The involvement of people drawn from the military within a team of ad hoc prosecutors was also seen to clearly violate the basis of an independent judiciary, being a most fundamental requirement of a court. It was suggested strongly that the condition of such impartiality could not be fulfilled if ad hoc prosecutors are appointed from members of the TNI, when there are cases where those indicted are also from the TNI. The Coalition was concerned that the military esprit de corps would more influential for ad hoc prosecutors drawn from the TNI than truth and justice.³⁶

The Coalition also questioned the unequal gender composition of the ad hoc prosecutors. This imbalance demonstrates the absence of any genuine effort to provide a place for gender sensitivities in cases of gross violations of human rights. Apart from that, the Coalition did not see any evidence of an effort to form a kind of gender unit for the team of ad hoc prosecutors within the Human Rights Court system.³⁷

³² Consisting of 17 institutions, including ELSAM (Institute of Study and Advocacy of Society), KONTRAS, PBHI, YLBHI, Komnas Perempuan, KRHN.

³³ Ibid.

³⁴ As per Article 23 (4)(g) of Law No. 26/2000.

³⁵ Op cit note 32.

³⁶ Ibid.

³⁷ Ibid.

2.3 Witness Protection and Compensation to Victims

The jurisdictional characteristics of these matters were laid out in Articles 34 and 35 of Law No.26 of 2000 which states:

Article 34

- 1. Each victim and witness in matters of the gross violations of human rights has the right to physical and mental protection from threat, disturbance, terror, and violence from all parties.*
- 2. Protection as far as stated in paragraph [1] is obliged to be conducted by law enforcement personnel and security at no monetary cost.*
- 3. Protection rules of the victims and witnesses is to be regulated in detail by Government Regulations.*

Article 35

- 1. Each victim of gross violations of human rights and or their inheritors are entitled to compensation, restitution and rehabilitation.*
- 2. Compensation, restitution and rehabilitation as stated in paragraph [1] should be declared in the verdict of the human rights court.*
- 3. Compensation policy, restitution and rehabilitation will be coordinated by Government Regulations.*

Two important instruments required to assist in the process of implementation of the Human Rights Tribunal were not immediately attended to and this delayed the trial even further.³⁸ Due to the importance of these instruments, one day before the hearings began on 14 March 2002, the Indonesian government announced and authorised two government regulations: Government Regulation No. 2 of 2002 regarding *The Protection of Victims and Witnesses in Gross Human Rights Violations*, and Government Regulation No. 3 of 2002 regarding *The Compensation, Restitution and Rehabilitation of Victims of Gross Violations of Human Rights*.

However, this was announced and implemented only one day before the trial began, and created the impression that these Government Regulations were implemented merely to facilitate the trial. On this basis it was very hard to argue that the Indonesian government was serious in its preparations for the Ad Hoc Tribunal for Human Rights.

(a) Government Regulation No. 2 of 2002 - The Protection of Victims and Witnesses

Government Regulation (PP) Number 2/2002 states that every victim or witness in a case of a gross violation of human rights has the right to receive protection and security from physical and mental threats. Witnesses and victims also have the right to confidentiality of their identity and to be able to provide evidence before the court without having to face the perpetrators.

³⁸ *Menkeh dan HAM: Perlindungan Saksi Sudah diatur dalam UU Pengadilan HAM (Minister of Justice and Human Rights: Witness Protection already arranged for Ad Hoc Human Rights Tribunal)*, Kompas, 31 January 2002.

It also states that each victim or witness has the right to receive protection and security from law enforcement authorities from the beginning of the investigation up until the court hearing. Such protection can be provided at the initiative of law enforcement personnel or as a result of a request by victims or witnesses. The requests can be directed to Komnas HAM, their lawyer or the Court. All protection facilities received from law enforcement personnel or from security bodies for each victim or witness are to be provided free of charge. The cost of protection will be charged to the law enforcement budget of each institution. The provision of protection will cease if requested by a witness or victim or if they are no longer alive. Protection will also be discontinued when law enforcement or security personnel consider protection is no longer required. However, the decisions to discontinue must be put in writing to the witness or victim at least three days before the protection is stopped.

The major flaw in the Government Witness Protection Regulation was the timing of its release, one day before the trial. The second weakness was the absence of credible witness security protection. The victims and eyewitnesses that were called to give testimony did not receive sufficient protection, resulting in several key witnesses from East Timor refusing to testify due to the lack of a guarantee of security.³⁹

For example, in relation to the protection of witnesses coming from Timor Lorosa'e, there were to have been several people sent by the Serious Crimes Unit to be witnesses. However, the Timor Lorosa'e Attorney General considered that the absence of security guarantees required him to stop sending witnesses. Many witnesses in Timor Lorosa'e felt insecure to be witnesses in Jakarta, despite the Government Regulation concerning witness protection. Their concerns arise from trauma and from the long experience of daily interaction with the Indonesian military in East Timor. The lack of guarantee for the safety of witnesses and lack of alternative means of testifying in the Ad Hoc Court, resulted in few witnesses giving evidence in the trials, and hence few convictions.

The third flaw was the absence of regulations concerning rights and obligations of law enforcement personnel, which meant that if there was a breach of these rules, law enforcement personnel would not be charged.

(b) Government Regulation No. 3 of 2002 - The Compensation, Restitution and Rehabilitation of Victims

The Government Compensation Regulation regulates the amount of compensation that must be paid by the perpetrator to the victim. It also states that compensation or rehabilitation must be provided by government agencies, perpetrators or third parties, within 30 working days of the verdict of the human rights court.

This Government Regulation is too simplistic considering the scale of loss that was caused by looting, the burning of homes, and the evacuation and mass murders/killings surrounding the events of 1999. Further, there was never any discussion or clear criteria of how much compensation should be paid or what form victim rehabilitation should take.

2.4 Jurisdiction of the Ad Hoc Human Rights Court

The final report of KPP HAM East Timor, should be the basis for the prosecution of around 30 civil and military officials, in 13 districts, in 5 of the worst cases of violations.

³⁹ *Indonesian Ad Hoc Human Rights Court Proven Not Able To Fulfil International Demands*, Dili, August 17, 2002, Statement by East Timor National Alliance for International Tribunal. Also see *Saksi Tetap Berhak Tak Bertatap Muka dengan Tersangka*, Koran Tempo, 14 March 2002.

These officials are strongly suspected of being responsible for gross violations of human rights and crimes against humanity that occurred from the announcement of the popular consultation by former President Habibie, until post-referendum. However, the publication of Presidential Decree No. 53/2001, which was later changed by Presidential Decree No. 96/2001 Article 2, limits the jurisdiction of the Ad Hoc Human Rights Court to only bring to justice the perpetrators of gross violations of human rights and crimes against humanity in three districts in East Timor: the legal districts of Liquica, Dili and Suai in the months of April and September 1999.

Presidential Decree No. 53, 2001 went as follows:

[1] Establish the Ad Hoc Human Rights Court at the District Court of Central Jakarta;

[2] The Ad Hoc Human Rights Court as intended in article 1 has the authority to examine and resolve cases of gross violations of human rights which occurred in East Timor post-referendum and which occurred in Tanjung Priok.

Presidential Decree No. 53, 2001, published by Abdurrahman Wahid, needed to be refined by further detailing the location and time of the criminal actions [locus and tempus delicti] of the gross Human Rights violations that occurred in East Timor and Tanjung Priok. The form of the refinement was as follows:

Article 1: The provision of Article 2 of Presidential Decree No. 53, 2001 regarding the establishment of an Ad Hoc Human Rights Court at the District Court of Central Jakarta was changed to proceed as follows:

Article 2: The Ad Hoc Human Rights Court as intended in Article 1 has the authority to examine and resolve cases of gross Human Rights violations that occurred in East Timor in the districts of Liquica, Dili and Soae [Suai. ed] in April 1999 and September 1999, and what occurred in Tanjung Priok in September 1984.

The formal reason for setting up the time and location restrictions in the Presidential Decree came from the Director General of the State Board of Court and Administration, Soejatno. He stated that the Ad Hoc Tribunal has a special character so that it has to have clear limits, namely time of event, location, and criminal action.⁴⁰

The narrowing of jurisdiction in the Presidential Decree No.96, 2001 has serious consequences for cases of human rights violations that occurred in East Timor outside the boundaries of those months and locations, in that it makes it so much more difficult for them to ever be uncovered.

(a) Formulation of gross human rights violations

The formulation of gross Human Rights violations over which the court has jurisdiction, includes the following:⁴¹

[a] crimes of genocide;

[b] crimes against humanity.

⁴⁰ *The State is not consistent in implementing the Human Rights courts*, TEMPO, 28 June, 2001.

⁴¹ Article 7, Law No. 26/2000.

In the explanation of this article it was said that crimes of genocide and crimes against humanity in this provision are consistent with Article 6 and Article 7 of the Rome Statute of The International Criminal Court. Besides an uncertainty over the translation of one of the articles quoted from the Rome Statute, as will be explained later, this article does not include two other elements of gross violations of human rights as per the Rome Statute: crimes of aggression and war crimes. This means that the 1975 Indonesian invasion of East Timor and its consequences cannot be brought to the Ad Hoc Human Rights Court. The definition of these gross Human Rights violations could thus be said to be an effort to avoid responsibility for the 1975 invasion of East Timor.

(b) Crimes Against Humanity

Article 9 of Law No. 26/2000 says:⁴²

A "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directly against any civilian population, with knowledge of the attack:

- a. Murder;*
- b. Annihilation;*
- c. Slavery;*
- d. Forced deportation or migration of populations;*
- e. Arbitrary robbery of independence or other physical freedoms that contravenes the bases of the fundamental provisions of international law;*
- f. Torture;*
- g. Rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilisation or infertility, or other forms of sexual violence on the same scale;*
- h. Terrorisation of a specific group or community based on similarity of political views, race, nationality, ethnicity, culture, religion, sex or other reason that has been recognised universally as banned according to international law;*
- i. Forced loss of homes; or apartheid crimes.*

This formulation has certain fundamental weaknesses.

Firstly, three important elements in this article are not clearly defined: *widespread*, *systematic*, and *intentional*. The lack of clarity in the definition of these three elements is a serious issue because it gives rise to problems of interpretation by judges.⁴³

Secondly, explanation of Article 9 says:

*What is intended by "attacks which are aimed directly at civilians" is a series of actions carried out against a civilian resident as a repercussion of management policy or policies connected with an organisation.*⁴⁴

⁴² Same as Article 7 (1) of the Rome Statute.

⁴³ See for example definition of 'intent' and 'knowledge' in Article 30 of the Rome Statute.

The explanation of this article seems to incorporate the policy makers as a party that can be held to account. Nevertheless, when read carefully, there is not one article in this legislation that regulates the “management policy” as mentioned. The consequence of lack of clarity in the words used in the Article 9 makes it difficult to bring the *policy-maker generals* to court to account for their actions.

Thirdly, the interpretation of this article from the Rome Statute experiences a constriction: the word ‘directed’⁴⁵, which should be translated as “*ditujukan*”, is interpreted by this legislation as “*ditujukan secara langsung*”. The word “*langsung*” means directly, and therefore clearly limits the scope or nature of the attack. That is, it only includes systematic and widespread attacks aimed directly at civilians. Therefore, those which are not direct cannot be considered actions that can be punished. This implies that only direct perpetrators in the field will be covered by this article, while the perpetrators above them who make the policy decisions, will not be covered. If this “narrow definition” is applied under Law No.26/2000, then it will be disregarding Article 42 under section VI Criminal Provisions, of the Rome Statute, concerning the responsibility of the military command. This means that the Ad Hoc Human Rights Court process does not meet international standards.

(c) (ii) Article 42 (1) – Responsibility for Omissions

Article 42 (1) of Law No. 26/2000 states:

Military commanders or a person who effectively acts as a military commander can be held responsible under the jurisdiction of the Human Rights court, for criminal actions carried out by troops under their effective command and control, and such criminal action is the outcome of not carrying out proper control of the troops... (underline added)

The essence of Article 42 (1) and its detailed expansion in points (a) and (b) is the offence of omission by a commander or a person who effectively acted as a military commander. That is, a commander can be prosecuted in the Human Rights court if he does not take actions to prevent or stop criminal actions by troops or subordinates in his effective command.

In comparison, the Rome Statute on this matter⁴⁶ established the offence of omission, not only based on whether or not commanders carried out steps to prevent or stop the actions of troops under their effective command, but also in terms of the results: whether he succeeds or fails to stop the actions. If he fails, although he has carried out preventative actions, he can still be questioned over his responsibility. Phrased differently, if a military commander can prove that he has “taken proper control of troops”, although his troops do not pay attention to their commanders’ efforts and still commit gross violations of human rights, then he cannot be questioned over his responsibility. The precondition of the Offence of Omission in the Rome Statute is more objective because it is the outcome that is valued, while Law No.26/2000 is more subjective, as based on whether commanders have taken measures to prevent or end troop behaviour.

The above examples are only a few of the many provisions that show that Law No.26/2000 nullifies altogether a person’s responsibilities at the level of military

⁴⁴ Article 9.

⁴⁵ Rome Statute Article 7.

⁴⁶ Article 28 (1).

command. This is why the generals responsible, like General Wiranto, were not included in the suspect list.

2.4 Indictments

From the start of the trial process, investigations conducted by the prosecutors immediately revealed inadequacies caused by the flaws in their recruitment. This undermined the credibility of the Ad Hoc Human Rights Court process from the start.

According to their mandate, prosecutors were responsible for investigating and charging suspected perpetrators of being involved in cases of gross violations of human rights in Timor Lorosa'e. Their investigatory work was based on the recommendations of KPP HAM Timor Lorosa'e. However, the announcement of the indictments by the Attorney General's joint investigatory team surprised various parties including members of Timor Lorosa'e KPP HAM itself.⁴⁷ Of the 118 people suspected of being involved in cases of gross violations of human rights in Timor Lorosa'e by KPP HAM Timor Lorosa'e, the prosecutor only accused 18 people. The indictees included three high ranking military officials, one from the high ranks of the Police force, and several middle level staff. However, these charges allowed 15 other suspects to slip through, including several high-ranking ABRI [Indonesian Armed Forces] who had command responsibility, as recommended by KPP HAM East Timor. In particular, they were:⁴⁸

1. General Wiranto was Minister of Defence and Security and in command of the TNI. He is suspected by KPP HAM of having prior knowledge of actions of violence, including violations of human rights, and did not take action or make any effective effort to prevent and sanction the perpetrators of violations in the field. He has not denied the existence of a close relationship between the militia and the TNI.⁴⁹
2. Lieutenant General Johny Lumintang, Deputy Staff of the Defence Forces. He released a "GUNKUAT" order for the use of force in the name of KASAD in preparing preventative action, repressive/coercive action, and plans for the "retreat" or evacuation if the special autonomy option was rejected, as per an Order dated 5 May 1999. The Order released by TNI Lieutenant General Johny Lumintang was the basis of the policy of forced migration that occurred in Timor Lorosa'e after the Referendum.
3. Major General Zacky Anwar Makarim, Satgas member P4-OKTT and Adviser of security Satgas P3TT. He conducted intelligence and operational activities in addition to being the P3TT security adviser.
4. Major General (Retired) H.R. Garnadi, Deputy Head Satgas P4KTT and P3TT. He was involved in supporting a repressive and scorched earth policy. He suggested steps that needed to be taken if the special autonomy option was rejected, as revealed in a document known as "the Garnadi document."

Asmara Nababab, Secretary General of the National Commission on Human Rights and member of KPP HAM East Timor, explained the political context of the weaknesses of the ad hoc Human Rights Court:

⁴⁷ See *Pengadilan HAM ad hoc Timor Timur, Keterlibatan Wiranto diyakini Tak Muncul dalam Persidangan*, (Ad Hoc Human Rights Court: on East Timor: Wiranto's Involvement Certain not to Emerge) Koran Tempo, 13 November 2001. Also, *Jika Pengadilan ad hoc Tak Kredibel, Tuntutan ke Mahkamah Internasional Akan Muncul* (If the Ad Hoc Tribunal is not Credible International Demands will Emerge) Kompas, 16 March 2002.

⁴⁸ Op cit note 8.

⁴⁹ The Serious Crimes Unit recently indicted General Wiranto.

"There are political barriers in the establishment of the Human Rights Court. Mainly from groups that know that if the Human Rights Court proceeds well, then they will become its victims. Both perpetrators, groups and their institutions."

This indicates a clear lack of political will on the part of the Indonesian government in bringing the perpetrators of human rights violations in East Timor to the Ad Hoc Human Rights Court. Besides appealing the international community, Munir, SH, Advisory Council for the Commission on Missing Persons and the Victims of Violence (Kontras) remarked on the purpose of the court as:⁵⁰

"This will not be about justice or getting to the truth but about protecting senior officials."

Nevertheless, many circles in Indonesia feel that the formation of the Ad Hoc Human Rights Court is a step forward for the Indonesian Nation in the process of upholding the law and the protection of Human Rights. However, behind those hopes was concern that the Human Rights Court established would be unable to fulfil the hopes of justice seekers. The legal framework prepared to support the processes of the Indonesian Human Rights courts had many weaknesses which made it difficult to reach those directly responsible for Human Rights violations in East Timor in 1999, especially leaders of the military, Indonesian Police force and civilian society. The results of the prosecutions of the Ad Hoc Human Rights Court are evidence of this, as discussed further below.

List of suspects of Cases of Gross violations of human rights in Timor Lorosa'e

Mayjend Adam Damiri [Former Panglima Kodam IV Udayana]
Kolonel Yayat Sudrajat [Former Komandan Satgas Tribuana]
Kolonel M. Noer Muis [Former Komandan Korem 164/WD]
Brigjend (Pol) Timbul Silaen [Former Kepala Polda Timor Timur]
Brigjend FX Tono Suratman [Former Komandan Korem 164/ WD]
Letkol (Pol) Drs HulmanGultom [Former Kepala Polres Dili]
Letkol Endar Priyatno
Letkol Soejarwo [Former Komandan Kodim Dili]
Abilio Jose Osario Soares [Former Governor of East Timor]
Eurico Gutteres [Wakil Panglima Pejuang Pro-Integrasi/PPI]
Kolonel Herman Sedyono [Former Bupati Kovalima]
Letkol Lilik Koeshardiyanto [Former Komandan Kodim Suai]
Letkol (Pol) Gatot Subiakto [Former Kepala Polres Suai]

⁵⁰ Washington Post, Rajiv Chandrasekaran, "Indonesian Officials Face Trial for War Crimes in East Timor", Wednesday, 13/06/2002.

Kapten Achmad Syamsudin [Former Kasdim Suai]
Letnan Sugito [Former Komandan Koramil Kota Suai]
Letkol Asep Kuswandi [Former Komandan Kodim 1638 Liquica]
Leonito Martins [Former Bupati Liquisca]
Letkol (Pol) Drs Adios Salova [Former Kepala Polres Liquica]

By not naming the generals responsible for command in Jakarta and limiting the suspected perpetrators only to holders of local power and authority, the Attorney General relegated the gross human rights violations in Timor Lorosa'e to mere ordinary crimes.⁵¹

Furthermore, the indictments did not accurately reflect the widespread and systematic crimes that happened in East Timor in 1999, and did not indicate the role of the Indonesian military in the formation and support of the militia groups in East Timor.⁵²

2.5 The Trials

Judges for the trial of the perpetrators consisted of a panel of 5 judges with one chair. There was one General Prosecutor for each indicted person, except in the case of Abilio Soares, and a TNI and Polri barrister team, almost always consisting of four people, assisted each perpetrator.

The court sessions were filled with a variety of tragi-comedy events that gave the impression that the court had become some type of "theatrical stage." From the beginning of the hearings, the court was coloured by the actions of demonstrations. These consisted of more than 100 people from several social groups calling themselves the Forum Supporting the Red White Troops ("*Forum Bersama Laskar Merah Putih*") and the Indonesian United People's Front ("*Front Persatuan Bangsa Indonesia*") who attempted to stop the trials and called for no foreign intervention. They wore uniforms such as those worn by the TNI and behaved wildly in the hearings and some of them even carried sharp weapons.⁵³

When the trials were being held, high ranking TNI/Polri officers attended "to give moral support" to its members and to lend support to a "court process that is clean and respected." The Head of the TNI legal team sent a letter to Asmara Nababan (Komnas HAM) and Munir (Kontras) saying that they were considered to have "abused the trial session" by providing commentary to various mass media.

(a) Inexperienced Government Officials

⁵¹ Hendaridi, Ketua PBHI Jakarta, www.lndohukum.com, 3 September 2000.

⁵² Op cit note 17.

⁵³ See observations of Division of Kajian and Monitoring Kontras concerning the ad hoc East Timor Human Rights Court.

Inexperienced government officials, including the judges and prosecutors, prepared carelessly written court documents, made statements and performed cross-examinations that did not effectively explore the evidence.⁵⁴

(b) Procedural Law not in line with International Law

It appears that Law No. 26/2000 does not specify all matters required to guarantee a just court and to fulfil the basis of a fair trial. Based on Article 10,⁵⁵ this legislation only allows the application of procedural law as per the Criminal Procedure Code (KUHAP). KUHAP has many weaknesses and is not suitable for hearing cases of gross violations of human rights, which have special characteristics. Provisions in KUHAP are far from compatible with standards of international law in bringing to justice serious violators of Human Rights, such as the procedural law used by several international tribunals, for example in courts in Nuremberg, Tokyo, Rwanda and Yugoslavia.⁵⁶

KUHAP regulates the issue of authentication, which includes evidence material, standards of evidence material and authentication procedure, in articles 184-190. In one of the mentioned articles evidence material includes:

- (1) witness statement;
- (2) expert statement;
- (3) documentation;
- (4) clues/evidence;
- (5) accused's statement.

Restricting evidence to only this material in KUHAP, makes it difficult for an attorney to prove the three elements of a crime against humanity: widespread, systematic and intentional. It would also be very difficult to prove the involvement of TNI in these cases because more than the five points above are required to prove it.

International experience in trying cases of gross human rights violations have often included evidence other than those mentioned in KUHAP such as: recordings in the form of film or cassettes that contain speeches, press broadcasts, interviews with victims, interviews with perpetrators, conditions of the crime scene and so on. They have also used other evidence material such as photocopied documents, newspaper clippings, independent articles, opinions connected with cases being heard, which are not accepted by KUHAP.

Difficulties also emerge with the authentication procedure because not all evidence material can be brought into the court session, in particular witnesses. Criminal elements of gross violations of human rights are, in the majority, located in East Timor. To convey witnesses from East Timor to Jakarta was not easy (see section above). If witnesses, due to fear, security reasons and matters connected with relations between the two nations, are only willing to give evidence from East Timor through video recordings or through teleconferencing, KUHAP does not regulate how a witness fulfils his or her obligations

⁵⁴ Op cit note 17.

⁵⁵ Article 10 says: In matters not determined elsewhere in this legislation, the law of procedure on gross violations of human rights is carried out based on the provisions of criminal law.

⁵⁶ See Part 3 of this Report.

other than by directly attending the court session. However, witnesses were able to give evidence via teleconference in 2002.

(c) Evidence

The main evidence of the direct involvement of the Indonesian military in serious crimes was not presented in the trials. Such evidence actually was absent even in the investigations, including those conducted by the National Commission for the Investigation of Human Rights Violations in East Timor (KPP HAM), and from investigations done by the UN Serious Crimes Investigation Unit in East Timor.⁵⁷

2.6 Judgements

The East Timor rights trials in Jakarta acquitted 11 of the 18 officials on trial for crimes against humanity. At the time of writing, only five defendants had been convicted to prison terms, ranging from three to 10 years, however, all the convicted remain free pending appeals of their cases.⁵⁸ All the generals have been acquitted.

Critics say the acquittals by the Ad Hoc human rights court in Jakarta of six military officers, three policemen and two former East Timor government servants on charges of crimes against humanity show that Indonesia is not serious about seeking justice. The rulings and sentences of the East Timor ad hoc rights tribunal have been wholly dissatisfactory and if the appeals do not deliver justice then Indonesia will not have discharged its obligation to deliver justice for the people of East Timor. Following are a selection of the judgements and sentences handed down in the trials.

(a) Abilio Jose Osorio Soares

On Wednesday, August 14, 2002, the Indonesian Ad Hoc Human Rights Court on East Timor sentenced Abilio Jose Osorio Soares, an East Timorese civilian and the former governor of East Timor, to three years' imprisonment. He was accused of involvement in crimes against humanity in East Timor, in 1999.⁵⁹

(b) Suai Church Attacks

On August 15, 2002, the Indonesian Ad Hoc Human Rights Court found five military and police officers accused of involvement in attacks on civilians at the Ave Maria Church compound in Suai, not guilty. The former Police Chief of East Timor, Timbul Silaen, was also acquitted of all charges.

(c) Brigadier General Tono Suratman

Brigadier General Tono Suratman was accused of failing to prevent attacks on pro-independence leaders and civilians in East Timor. Ex-president B.J. Habibie, testified at the trial of Brig. Gen. Tono Suratman, that the bloodshed in East Timor after its independence referendum in 1999 was the result of the work of criminals, not the result of any order from his administration.

(d) Brigadier General Noer Muis

⁵⁷ Ibid.

⁵⁸ Joyo Indonesia News, Associated Press, March 20 2003, *Ex-Indonesian President: Govt Never Sanctioned Timor Violence*.

⁵⁹ Op cit note 17.

On March 12 2003, the tribunal sentenced former East Timor military commander Brigadier General Noer Muis to five years in jail for gross human rights violations in 1999. The human rights court convicted Brig. Gen. Noer Muis of failing to prevent massacres of independence supporters and others. Judges said Brig. Gen. Noer Muis had prior knowledge of the militia's plans, but allowed them to go on a rampage after Timorese voted overwhelmingly to separate from Indonesia. Brig. Gen. Noer Muis was convicted on three specific incidents - two in the capital of Dili and one in Suai region - where nearly 40 people died.⁶⁰ He remains free pending an appeal.

Brig. Gen. Noer Muis, who served as a colonel in charge of 10,000 troops at that time, is the highest-ranked Indonesian military officer to be found guilty by the courts on Timor-related charges to date. Muis is now a Brigadier General and deputy head of the military academy.⁶¹

(e) Lt. Col. Hulman Gultom

The ad hoc human rights tribunal sentenced the former chief of Dili Police to three years in jail for involvement in the violence surrounding East Timor's independence from Indonesia in 1999. Lt. Col. Hulman Gultom was found guilty of failing to prevent pro-Jakarta militiamen from committing violence on April 17, 1999 in Dili.⁶² Hulman was the second official to be convicted in the tribunal on the violence in East Timor. He maintained his innocence throughout the case and remains free pending appeal.

(f) Lt. Col. Soejarwo

In December 2002, the ad hoc human rights court in Jakarta sentenced Dili's military commander, Lt. Col. Soejarwo, to five years in prison.

(g) Eurico Guterres

Militia leader Eurico Guterres, and East Timorese, was sentenced to 10 years in jail.

2.7 Appeals

As at March 2003, prosecutors had submitted appeals to the verdicts acquitting Indonesian police and military officers accused over the violence in East Timor in 1999.⁶³ The appeals were to be filed with the Supreme Court in April.

The appeal judges were appointed by President Megawati Soekarnoputri on February 24, 2003.⁶⁴ Supreme Court Chief Bagir Manan swore in the six judges in March 2003, to try the appeals. The six appeal judges, four of whom are academics, are: Sumaryono Suryokusumo, Eddy Djunaedi Karnasudirdja, A. Masyhur Effendi, Ronald Zelfianus Titahelu, Sakir Ardiwinata, and Tomy Boestomi.⁶⁵

⁶⁰ The Straits Times, March 13, 2003, *Jakarta general found guilty in Timor rampage*.

⁶¹ AFP, March 12 2003, *Former military chief in East Timor jailed for five years*.

⁶² The Jakarta Post [online] January 20, 2003, *Former police chief sentenced to jail over East Timor violence*.

⁶³ Associated Press, March 17, 2003, *Appeals over acquitted East Timor suspects to be filed next month*.

⁶⁴ Jakarta Post, March 18, 2003, *Appeal justices sworn in*.

⁶⁵ *Ibid.*

3 International Responsibility for Justice on East Timor

Now that the Indonesian Ad Hoc Human Rights Court has completed its task to try those responsible for gross human rights violations in East Timor, it is abundantly clear that the Indonesian military cannot be brought to justice in Indonesia.

Various political constraints have caused the Ad Hoc Tribunal of Jakarta to work very slowly and inadequately. A corrupt Indonesian justice system, lack of political will by the Indonesian Government to support fair justice, domination by the Indonesian military since Megawati Soekarnoputri was elected president, amongst other factors, made the Ad Hoc Tribunal a "theatrical stage" for the Indonesian military to wash their hands of their involvement in gross violations of human rights in East Timor, particularly in 1999.⁶⁶ Furthermore the court has only managed to convict those members of the military operating at a low level, not members of the military who had full responsibility for military command.

The United States Ambassador to Jakarta has recently stated that Indonesia must make better progress in holding its military to account for human rights abuses before the US fully normalises relations.⁶⁷ The US has indicated that it will not easily restore relations while accountability for past abuses is still very much "an open question".⁶⁸

Human rights activists have openly criticized the trials as a sham, saying that the human rights court was set up in order to detract from an international drive to set up a U.N. war crimes trial for East Timor similar to those for ex-Yugoslavia and Rwanda. Rights groups have correctly pointed out that the real perpetrators of the violence have not yet been indicted, never mind brought to trial, in Indonesia.

Therefore the decision of the UN and other political powers in the international community to support Indonesia's trials has proved to be highly questionable, and places responsibility firmly back on those international powers to undo the injustice that has been done in the Indonesian Ad Hoc Human Rights Court.

⁶⁶ See Press release KONTRAS No. 03/SP-KONTRAS/1/02 about the Ad Hoc Tribunal process Jakarta along with a transcript of discussion with Secretary General PBHI concerning the process of the Ad Hoc Tribunal that was organised by Yayasan HAK, Dili, May 2002.

⁶⁷ British Broadcasting Corporation, February 21, 2003, *US Warns Jakarta on Rights*.

⁶⁸ However, the US is keen not to have relations completely cut off, especially relations to the Indonesian military. This much is clear from the \$50m anti-terrorism assistance package for Indonesia, including \$400,000 to restart an exchange programme for high-level military officers, announced in August 2002.

International Justice Mechanisms for East Timor

1 Background and Characterisation of Crimes

Section 2 provides an overview of the grave human rights violations alleged to have been committed in East Timor between its abandonment by the former colonial power (Portugal) in 1974, and the retreat of the occupying power (Indonesia) in October 1999. The overview does not assess the veracity of the allegations or describe them in detail. It relies on publicly available sources to formulate a legal characterisation of the alleged conduct at international law. The international legal characterisation of the conduct is, in turn, a factor in determining which mechanisms of accountability are appropriate.

The following analysis is divided into two broad categories: conduct between 1974 and January 1999, and conduct between January 1999 and October 1999. This division does not imply a qualitative difference between nature of the crimes alleged over these two periods. On the available evidence, the crimes committed in 1999 were a continuation of policies pursued by the *Tentara Nasional Indonesia* (TNI, or formerly, *Angkatan Bersenjata Republik Indonesia*, ABRI) throughout the belligerent occupation. However, while the crimes of 1999 have been extensively documented and are well-recognised by the international community, a comprehensive and systematic accounting of the most serious crimes committed during the invasion and occupation has not yet been undertaken. This reflects a relative lack of international concern for human rights abuses committed in East Timor over this period, compared to the intense focus on the territory during 1999 (even though the number of violations committed between 1975 and 1999 is far higher). As a consequence, governments are less cognisant of, or remain reluctant to acknowledge, the scale of human rights abuses committed throughout the Indonesian occupation. The level of international consciousness of human rights violations is a factor which must be considered when determining which mechanism can be pursued and achieved.

1.2 1974 - January 1999

(a) 1974 to 1983 - Portuguese Withdrawal and Indonesian Invasion

(i) *International Law Status of Territory - Internal Armed Conflict between East Timorese Groups*

Chapter XI of the *Charter of the United Nations* ('*UN Charter*') obliges member states which have responsibility for the administration of territories '*whose peoples have not yet attained a full measure of self-government*' to administer them in accordance with Article 73 of the *UN Charter*, and report regularly to the Secretary General concerning the economic and social conditions in those territories. Subsequent practice of the General Assembly and its Decolonization Committee have resulted in the view that Article 73 imposes upon an "administering power" an obligation to prepare non-self-governing territories for the exercise of their right of self-determination. As such, an "administering

power” does not retain full sovereignty over a non-self-governing territory, but holds it subject to the population’s unexercised right to self-determination.¹

Portugal refused to accept that article 73 applied to its colonial territories until the Carnation Revolution of 1974, after which it submitted its territories to the Decolonization Committee’s scrutiny. The Portuguese government ended its effective control over the territory with the advent of armed conflict between the Timorese Democratic Union (“UDT”) and the *Frente Revolucionaria de Timor Leste Independente* (“Fretilin”) in August 1975,² but did not concede its responsibility as “administering power” until after the Popular Consultation of August 1999.

Representatives of the International Committee of the Red Cross (“ICRC”) present during the armed conflict between UDT and Fretilin estimated to James Dunn that approximately 1500 people were killed during the two weeks of hostilities.³ Information concerning the circumstances of these deaths is scarce, as is evidence relating to other human rights violations, such as arbitrary imprisonment or torture and cruel, inhuman and degrading treatment. James Dunn’s account, based on a field visit to Dili in the immediate aftermath of the coup, suggests that there were instances of mistreatment of prisoners and circumstances amounting to arbitrary detention of UDT leaders and supporters, but no evidence of more serious abuses.⁴ However, no view can be formed on whether there was conduct amounting to systematic persecution of political, ethnic or religious groups, or widespread or systematic attacks directed against the civilian population, or other conduct that may amount to a violation of international humanitarian law or international criminal law. In any event, the available information about the UDT - Fretilin conflict of August 1975 does not reveal sufficient Indonesian military involvement to amount to an international armed conflict. As at 1975, customary international humanitarian law probably did not criminalize violations of the laws and customs of war in non-international armed conflicts.⁵

(ii) *Indonesian Covert Operations and Invasion*

Australian diplomatic correspondence indicates that Indonesian intelligence and military personnel were preparing covert operations from July 1974 to destabilise East Timor and create conditions that could justify a full-scale military invasion.⁶ Cross-border armed attacks by Special Operations (“OPSUS”) forces and East Timorese irregulars (recruited, trained and led by OPSUS and National Intelligence Coordination Agency (“BAKIN”) personnel) commenced from

¹ *Case Concerning East Timor (Portugal v Australia) (Jurisdiction and Admissibility)* [1995] ICJ Reps at paras 23-35.

² John G Taylor, *Indonesia’s Forgotten War: The Hidden History of East Timor* (1991, Zed) at 47-55; James Dunn, *Timor: A People Betrayed* (1996, ABC Books) at 185.

³ Dunn, above n 5, 185-6.

⁴ *Ibid* 186-7.

⁵ Ratner and Abrams, above n **Error! Bookmark not defined.**, 94-101; *Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/135*, 18 February 1999, at 21.

⁶ “Letter from Furlonger to Feakes, Jakarta, 3 July 1974, ‘Indonesia: Clandestine Operation in Portuguese Timor’”, reproduced in Department of Foreign Affairs and Trade, *Documents on Australian Foreign Policy* (2000, Melbourne University Press) at 62 and “Report by Fisher, Jakarta, July 1974” at 74-6. United States’ Intelligence Agencies were also aware, in great detail, of the covert action being undertaken: see Central Intelligence Agency (“CIA”) and Defence Intelligence Agency (“DIA”) reports reproduced in Brian Toohey and Marian Wilkinson, *The Book of Leaks* (1987, Allen and Unwin) 143-196.

September 1975. Indonesia mounted a full invasion of the territory on 7 December 1975.

(iii) *Indonesian Military Operations 1975 - 1983*

Available historical accounts of the Indonesian military operations conducted during and subsequent to the invasion of 7 December 1975 describe an intense armed conflict and war of attrition between ABRI and the armed forces of the national liberation movement of East Timor (FALINTIL). While not definitively documented, contemporary testimonies⁷ and secondary sources⁸ describe a war waged without quarter, in which ABRI did not distinguish between combatants and non-combatants, and engaged in conduct including: armed attacks against unarmed civilian populations, leading to acts of extermination; large scale forced displacement and resettlement; imposition of conditions likely to cause starvation; mass killing of civilian populations in reprisal for military losses; conscription of non-combatants as human shields;⁹ aerial bombardment of civilian populations, including bombardment with harmful biological agents; torture and sexual violence as instruments of terror and intimidation; other conduct amounting to persecution of civilian populations for reasons of imputed or actual support for FALINTIL.

(b) **1983 to December 1998 - “Normalization” of Indonesian Occupation**

Between late 1983 and 1984, FALINTIL’s reorganization of the armed resistance, and a grudging acceptance of stalemate by ABRI, resulted in a shift from direct confrontation to sporadic armed encounters, within the continued counterinsurgency posture maintained by Indonesian forces. ABRI continuously deployed between 20 and 30 battalions in East Timor throughout the 1980s, and periodically mounted intensive assaults to capture FALINTIL units and supporters.

ABRI personnel were integrated into every level of the occupation’s administrative structure, and thus controlled key dimensions of everyday life. Policies designed to “win hearts and minds” of the population were paralleled by widespread instances of extrajudicial execution, arbitrary arrest and imprisonment, “disappearance,” torture, and the use of sexual violence as a means of intimidating the civilian population.¹⁰ This period also saw mass killings, such as the murder of over 1000 civilians in the Kraras locale, and the notorious Santa Cruz massacre of 1991. There were also reports of measures designed to prevent births within the East Timorese through the non-consensual administration of hormonal contraceptives to women.¹¹

⁷ Michelle Turner, *Telling East Timor: Personal Testimonies 1942 - 1992* (1992, UNSW Press) 81-202.

⁸ Dunn, above n 5; Taylor, above n 5; Amnesty International, *East Timor, Violations of Human Rights: Extrajudicial Executions, Disappearances, Torture and Political Imprisonment, 1974-1984* (1985); Carmel Budiardjo and L Liong, *The War Against East Timor* (1984, Zed Press).

⁹ “Operasi Kikis” (Operation Final Cleansing) and “Operasi Keamanan” (Operation Security) reported to have occurred in 1981.

¹⁰ See, eg, *Visit of the Special Rapporteur to Indonesia and East Timor*, UN Doc E/CN.4/1992/17/Add.1, paras 73-4, *Situation in East Timor, Report of the Secretary General*, 25 February 1998, E/CN.4/1998/58 at 15ff.

¹¹ Miranda Sissons, *From One Day to Another: Violation of Women’s Reproductive and Sexual Rights in East Timor* (1997, East Timor Human Rights Centre)

1.3 Legal Characterization

(a) *Aggression*

The invasion, and the armed attacks preceding it, contravened article 2(4) of the *UN Charter* and the principles of customary international law set out in *Friendly Relations Declaration*,¹² which prohibit the use or threat of force against the territorial integrity or political independence of any state and proscribe the acquisition of territory through the use of force.

The armed attacks, and the act of invasion itself, arguably constitute aggression, which was made the subject of individual criminal responsibility by the *Nuremberg Charter*.¹³ The *Nuremberg Charter* criminalized as “*crimes against peace*” the “*planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances...*”¹⁴

The offence of “aggression” has continued to appear under the rubric of “crimes against peace” in several documents attempting to codify crimes against international law,¹⁵ but no definition of the term has yet been settled.¹⁶ Indeed, the definition of “aggression” was regarded as so controversial in the drafting of the Statute of the International Criminal Court¹⁷ that the Court’s jurisdiction over “aggression” will be suspended for seven years after the Statute enters into force, to allow further time to reach consensus on a definition.¹⁸ Thus, while there appears to be agreement that aggression is a crime, there does not yet exist an accepted definition for the purpose of determining individual criminal liability. Efforts to prosecute individuals for aggression may therefore be confounded by the principle of *nullum crimen sine lege* (“there is no crime without law”).

(b) *War Crimes*

Broadly, the concept of “war crimes” refers to violations of laws governing the conduct of armed conflict to which individual criminal responsibility is attached. Not all violations of the laws and customs of war give rise to individual criminal responsibility, and international criminal law differentiates between international and non-international armed conflicts: conduct which is a criminal offence in an international armed conflict may not be a criminal offence in a non-international armed conflict. Whether the conduct outlined in section 1.2 above amounts to a “war crime” depends upon: (i) whether the invasion and war of occupation is classified as an “international” or “non-international” armed conflict, and (ii) the

¹² *Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations*, GA Res 2625, 25 UN GAOR, Supp (No 28), 121, UN Doc A/8028 (1970).

¹³ Annex to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, London, 8 August, 1945 (*Nuremberg Charter*), 82 UNTS 279.

¹⁴ *Nuremberg Charter*, *ibid*, Art 6(a).

¹⁵ See, eg, *Friendly Relations Declaration*, above n 12; *Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal*, GA Res 95(I), UN Doc A/64/Add.1 (1946); *Draft Code of Crimes Against the Peace and Security of Mankind in Report of the International Law Commission on the Work of its Forty-Eighth Session* (1996) UN Doc. A/46/10, 25, Art 16.

¹⁶ See discussion in Benjamin Ferencz, “The Crime of Aggression”, in Gabrielle Kirk McDonald and Olivia Swaak-Goldman, eds, *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* (2000, Kluwer) at 35ff.

¹⁷ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 37 ILM 999 entered into force 1 July 2002 (*Rome Statute*).

¹⁸ *Rome Statute*, *ibid*, Art 5(2).

customary international law and international treaties binding on Indonesia at the time of the commission of the acts.

An “armed conflict” has been defined as existing “*wherever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.*”¹⁹ A state of armed conflict may be held to exist within a territory as a whole, even if there are no armed clashes occurring at the time and place of the alleged crime. An alleged crime may still have the necessary nexus to armed conflict where it is “*closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.*”²⁰

An armed conflict is “international” where the conflict is between the armed forces of two states, or between the armed forces of one state and armed groups within that state which are under the “effective control” of another state.²¹

Events in East Timor clearly fit the description of an “armed conflict”, but whether they were “international” in character is less certain. When the Democratic Republic of East Timor was hastily proclaimed on November 28, 1975, it was recognized by only 15 states and never entered into legal relations with other states. As such, it is doubtful whether the conflict between ABRI and FALINTIL can be regarded as occurring between the armed forces of two states. Troops under the effective control of Portugal never engaged ABRI. Article 1(4) of the *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts*²² includes struggles against colonial domination and alien occupation within the meaning of “international armed conflict,” but Indonesia has never acceded to this instrument, and Article 1(4) is not considered part of customary international law.²³

While the situation may not have amounted to an “international” armed conflict, international humanitarian law (both customary and by treaty) does protect civilians living under a belligerent occupation imposed on the territory of one state by the armed forces of another state. Article 42 of the Regulations annexed to the *Hague Convention (No. IV) Respecting the Laws and Customs of War of 1907*²⁴ provides that a territory is occupied “*when it is actually placed under the authority of the hostile army. The occupation only extends where such authority has been established and has been exercised.*” The Hague rules are widely regarded as being declaratory of customary international law.²⁵ The *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*²⁶ (“*Fourth Geneva Convention*”) extends its application not only to armed conflict

¹⁹ *Prosecutor v Tadic*, IT-94-1-AR72, 2 October 1995, para 70.

²⁰ *Ibid.*

²¹ *Prosecutor v Delalic & Ors*, IT-96-21-T, 16 November 1998, para 234; *Prosecutor v Rajic* (Rule 61 Hearing), IT-95-12-R61, 13 September 1996; cf *Prosecutor v Tadic*, IT-94-1-AR72, 2 October 1995, paras 66-70.

²² 1125 UNTS 3, entered into force Dec 7, 1978.

²³ Judge George Aldrich, “Violations of the Laws and Customs of War” in Gabrielle Kirk McDonald and Olivia Swaak-Goldman, eds, *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* (2000, Kluwer) at 102.

²⁴ *Convention Respecting the Laws and Customs of War in Land* (Hague, IV), October 18, 1907, 1 Bevans 631, Annexure, art 42.

²⁵ See judgment of the International Military Tribunal for the Trial of Axis War Criminals at Nuremberg, 22 IMT Trials at 475; Theodor Meron, *Human Rights and International Humanitarian Law Norms as Customary International Law* (1990, Clarendon) at 37-41.

²⁶ 12 August 1949, 75 UNTS 287.

between High Contracting Parties (ie two states) but also “to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets no armed resistance.”

Indonesia acceded to the Fourth Geneva Convention on 30 September 1958 and Portugal ratified the Convention on 14 March 1961. Portugal did not exercise full sovereign rights over East Timor, but had territorial control pursuant to its status as the legal “administering power” under Article 73 of the *UN Charter*. Thus, East Timor was, at 7 December 1975, part of the “territory” of a High Contracting Party, and was then invaded and occupied by another High Contracting Party. Portugal did not renounce its status as administering power until after the announcement of the results of the Popular Consultation in September 1999, and Indonesia’s “occupation” never gained sufficient recognition to be converted into *de jure* acquisition of the territory at international law. The Fourth Geneva Convention therefore applies to Indonesia’s occupation of East Timor.²⁷

The Convention provides that certain conduct in respect of “protected persons” is a “grave breach”, and that High Contracting Parties have an obligation to search out and prosecute persons responsible for grave breaches. A “protected person” under the Fourth Geneva Convention includes persons who find themselves in the hands of an occupying power of which they are not nationals. “In the hands of” means that the person is “in territory which is under the control of the Power in question.”²⁸

Indonesia purported to ascribe Indonesian nationality to the inhabitants of East Timor. If this ascription of nationality were accepted, it would deny the East Timorese the status of “protected persons” under the Fourth Convention. However, as Indonesia’s never legally acquired the territory and its inhabitants, and its invasion and occupation occurred in violation of the inhabitants’ right of self-determination and the *UN Charter’s* prohibition on the use of force, it seems unlikely that Indonesia had the legal authority to ascribe its own nationality to the East Timorese. Moreover, forcing inhabitants of an occupied territory to change allegiances is prohibited by Article 45 of *Hague Convention IV*. In its decision in *Celebici*, the Trial Chamber of the ICTY refused to recognise or give effect to a state’s granting of nationality to individuals when applying international humanitarian law.²⁹ Nationality for the purposes of international humanitarian law is not resolved by considering only formal bonds and legal relations, but allegiance to a state.

A grave breach of the Fourth Geneva Convention is defined as:

²⁷ The Fourth Convention and its key provisions form part of customary international law, and would be binding even if Portugal and Indonesia were not parties at the time of invasion and occupation: Aldrich, above n 23, 100.

Article 6 of the Fourth Convention provides for the cessation of application of its provisions in cases of occupation, one year after the close of general military operations. It is questionable whether “general military operations” ever ceased in East Timor, but even if they did, certain key provisions continued to apply: Arts 1-12, 27, 29-34, 47, 49, 51-3, 59, 61-77 and 143. The conduct alleged against TNI would violate most of the duties placed upon occupying powers. Whether these violations incur individual criminal liability is untested, although several of the prohibitions in the Fourth Convention are expressed in terms resembling a criminalised proscription: see, eg, Arts 27, 29-34.

²⁸ Jean S Pictet, *Commentary: IV Geneva Convention relative to the Protection of Civilian Persons in Time of War* (1958, ICRC) at 47.

²⁹ IT-96-21-T at para 259.

“involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering³⁰ or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”³¹

The conduct alleged against Indonesian forces in section 1.2 above raises prima facie cases of grave breaches. High Contracting Parties have an obligation to search for and prosecute, or extradite, persons who have committed, or ordered to be committed, grave breaches, irrespective of the person’s nationality.³²

Common Article 3 to the Geneva Conventions is expressed to govern both international and non-international armed conflicts, and prohibits: violence to life and person; mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity; and the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

In *Tadic*, the appeal chamber of the ICTY held that by the 1990s, international humanitarian law had developed to a stage where violations of Common Article 3 in an internal armed conflict incurred individual criminal responsibility.³³ However, it is doubtful that this law applies to conduct between 1975 and the mid-1980s.³⁴

(c) *Crimes Against Humanity*

The status of crimes against humanity as a violation of international law to which individual criminal responsibility attaches is uncontroversial, but there have been several different formulations of the definition of the crime since Nuremberg.³⁵ The Group of Experts for Cambodia, considering which definition of crimes against humanity applied to Khmer Rouge conduct between 1975 and 1979, found that the crime had four principal elements:³⁶

- (i) acts involve one or more of a list of serious assaults on the individual, including murder, extermination, deportation, enslavement, forced labour, imprisonment, torture, rape, other inhumane acts and various kinds of persecutions;

³⁰ Rape and sexual violence has been held to fall within the phrase “wilfully causing great suffering.”

³¹ Fourth Geneva Convention, Art 147.

³² *Ibid* Art 146.

³³ *Prosecutor v Tadic*, IT-94-1-AR72, 2 October 1995, paras 128-36

³⁴ See above n 8 and references.

³⁵ Olivia Swaak-Goldman, “Crimes against Humanity” in Gabrielle Kirk McDonald and Olivia Swaak-Goldman, eds, *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* (2000, Kluwer) at 145.

³⁶ The Experts list five, but discount one of those: the requirement of nexus with armed conflict: Group of Experts, above n 5, 18-19.

- (ii) those acts are of a systematic or mass nature, against a civilian population;
- (iii) the acts are committed with a discriminatory motive based on race, religion, political opinion or other attribute of the population; and
- (iv) the acts involve governmental action or reflect a policy.

This definition would apply to much of the conduct alleged in section 1.2 above.

(d) *Torture*

Torture is defined as “*any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed, or intimidating him or other persons.*” The person inflicting torture must be a public official, or a person acting at the instigation, or with the consent or acquiescence of a public official.

This definition, contained in the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,³⁷ was adopted unanimously by the General Assembly in 1975 and incorporated into a convention in 1984.³⁸ The Declaration stated that torture was an “offence against human dignity” which states must criminalize.

The *travaux preparatoires* of the Convention against Torture indicate that its drafters regarded the Declaration definition to reflect customary international law,³⁹ and the purpose of the Convention was primarily to establish legal machinery for the prosecution of torturers. Although there may be some dispute about when the definition above became customary international law, it probably has application to most of the period under consideration.

All historical sources indicate that the practice of torture by TNI against persons suspected of supporting FALINTIL, or opposing integration with Indonesia, was frequently alleged, and alleged to have been committed in a systematic manner.

(e) *Genocide*

Genocide is a violation of international law to which individual criminal responsibility is attached. The definition of genocide is set out in the *Convention on the Prevention and Punishment of the Crime of Genocide*,⁴⁰ and is a codification of pre-existing customary international law that is binding on all states.⁴¹ The definition has three main elements:⁴²

³⁷ GA Res 3452, 30 GAOR, Annex, Supp. 34 at 91, UN Doc A/10034 (1975).

³⁸ United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85.

³⁹ J Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment* (1986, Kluwer) at 1.

⁴⁰ 9 December 1948, 78 UNTS 277 (“Genocide Convention”).

⁴¹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* [1951] ICJ Rep 15;

⁴² Group of Experts, above n 8, 16.

- (i) the accused undertook one of a series of specified acts - killing, causing serious bodily or mental harm; deliberately inflicting conditions of life calculated to bring about physical destruction; imposing measures intended to prevent births; or forcibly transferring children from the group;
- (ii) the accused committed these acts against a “national, ethnical, racial or religious group;”⁴³ and
- (iii) the accused did so “with intent to destroy, in whole or in part,” one of these groups “as such.”⁴⁴

The conduct alleged in section 1.2 above, if proven, would satisfy the *actus reus* of genocide. The criminal intent (*mens rea*) required to be shown to convict someone of genocide is more difficult. A person who commits acts listed in 1.3(e)(i) above does not commit genocide unless she or he commits them with the specific intent (*dolus specialis*)⁴⁵ to destroy the group *as such*. Thus, exterminating the inhabitants of several villages because they were suspected of being *pro-FALINTIL East Timorese* does not amount an intention to destroy the *East Timorese* national group *as such*, but an intention to destroy persons with a certain political opinion *within* a national or ethnical group. While this would certainly be a crime against humanity, it would not meet the test for genocide unless there was evidence which could establish the necessary intent.⁴⁶

(f) *Command Responsibility*

The principle that superiors may be criminally responsible for the acts and omissions of their subordinates in certain circumstances is a venerable one.⁴⁷ A commander who orders a subordinate to commit a war crime or crime against humanity is responsible for the latter’s acts. A commander will also be responsible for the acts of his subordinates at international law where: (i) he knew or had reason to know that the subordinate had committed, or was about to commit, such acts, and (ii) he did not take necessary and reasonable measures to prevent those acts and punish the subordinate.⁴⁸

⁴³ The meaning of these categories is explored by the ICTR in *Prosecutor v Akayesu*, Case No ICTR-96-4-T (2 September 1998) at para 511 and *Prosecutor v Rutaganda*, Case No ICTR-96-3-T (6 December 1999) at para 57.

⁴⁴ Also punishable are: conspiracy to commit Genocide; direct and public incitement to commit Genocide; attempt to commit Genocide; complicity in Genocide.

⁴⁵ *Prosecutor v Rutaganda*, Case No ICTR-96-3-T (6 December 1999) at para 59.

⁴⁶ This evidence need not be an admission by the accused or an express statement of intent. Intent can be inferred from the context of the perpetration of the acts. But the inference must lead to an intent to destroy the particular group *as such*, not just a class within the group: *Prosecutor v Akayesu*, Case No ICTR-96-4-T (2 September 1998) at para 523.

⁴⁷ Andrew Mitchell, “Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes” (2001) 22 *Sydney Law Review* 381; Ratner and Abrams, above n **Error! Bookmark not defined.**, 119.

⁴⁸ Ratner and Abrams, above n **Error! Bookmark not defined.**, 120; *United States v List et al*, 11 CCL No 10 Trials 1230; *United States v von Leeb et al*, 11 CCL No 10 Trials 462; *In re Yamashita*, 4 War Crimes Reports 1, 35; *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts*, 1125 UNTS 3, entered into force Dec 7, 1978, Art 87. Article 87 of Protocol I is regarded as a codification of existing customary international law: L Green, “Command Responsibility in International Humanitarian Law” (1995) 5 *Transnational Law and Contemporary Problems* 321.

1.4 January 1999 to October 1999 - Military and Paramilitary Terror and “Scorched Earth”

The report of the International Commission of Inquiry on East Timor,⁴⁹ the joint reports of the Special Rapporteurs⁵⁰ of the Commission on Human Rights and the Indonesian Commission of Investigation into Human Rights Violations (KPP HAM)⁵¹ all concluded that the violence and human rights violations of 1999 formed part of a carefully planned and implemented TNI policy to obstruct the free participation of the East Timorese in the popular consultation of August 1999. The policy was effected through the formation, arming and coordination of paramilitary groups by TNI and intelligence officers. Between January and October, the paramilitary groups, with direct and indirect participation of TNI special forces, engaged in an escalating campaign of extrajudicial killings, disappearance, torture and sexual violence,⁵² punctuated by multiple killings (Cailaco, Suai, Liquica, Dili and elsewhere). The policy culminated in the “scorched earth” campaign of September 1999, in which paramilitary groups and TNI orchestrated a mass “evacuation” of 270,000 civilians to West Timor (planned, apparently, since June or July 1999), systematically eliminated identified pro-independence figures and comprehensively destroyed civilian infrastructure and property. During this time, mass killings of civilians were perpetrated in Maliana, Suai and Oecussi, as well as numerous instances of extrajudicial killings of individuals.

1.5 Legal Characterization

(a) *Security Council Resolution 1246*

The Popular Consultation of August 1999 was mandated by the Agreements of 5 May 1999, between Portugal and Indonesia.⁵³ The 5 May Agreements were endorsed by Security Council Resolution 1236 of 1999. The Security Council established the United Nations Mission in East Timor (UNAMET) pursuant to Security Council Resolution 1246 of 1999, in order to assist the conduct of the ballot. Resolution 1246 called upon all parties to cooperate with UNAMET to ensure the “security and freedom of its staff,” and stressed “*the responsibility of the Government of Indonesia to maintain peace and security in East Timor ... in order to ensure that the popular consultation is carried out in a fair and peaceful way...*”

The sources referred to in section 1.4 above present evidence that personnel employed by organs of the Indonesian state planned and implemented a campaign to disrupt the Popular Consultation, primarily by using violence to create a situation of insecurity to inhibit the fair and peaceful conduct of the ballot. This amounts to conduct intended to thwart a resolution of the Security Council and is a breach of the *UN Charter*.

Such conduct *per se* is unlikely to be a separate basis for individual criminal responsibility. However, the International Commission of Inquiry on East Timor and the Secretary-General of the United Nations concluded that the circumstances

⁴⁹ *Identical Letters Dated 31 January 2000 from the Secretary General Addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights, A/54/26, S/2000/59, 31 January 2000.*

⁵⁰ *Situation of Human Rights in East Timor, A/54/660, 10 December 1999.*

⁵¹ *Report of the Indonesian Commission of Investigation into Human Rights Violation, Jakarta, 31 January 2000.*

⁵² See also Forum Komunikasum Feto Timor Lorosae (FOKUPERS), *Progress Report Number 1: Gender Based Human Rights Abuses During the Pre and Post-Ballot Violence in East Timor, January - October 1999.*

⁵³ Done at New York, 5 May 1999, between Government of Indonesia and Government of Portugal.

placed a special responsibility on the international community to ensure that crimes committed as a consequence of this conduct are punished. The International Commission of Inquiry found that:

“The actions violating human rights and international humanitarian law in East Timor were directed against a decision of the United Nations Security ... and were contrary to agreements reached by Indonesia with the United Nations to carry out the Security Council decision ... The organized opposition in East Timor to the Security Council decision requires specific international attention and response... Effectively dealing with this issue will be important to ensuring that future Security Council decisions are respected.”⁵⁴

This statement, and the reasoning behind, adds weight to the contention that impunity for the crimes committed in 1999 is a threat to international peace and security, because it undermines the capacity of United Nations’ personnel to carry out their duties pursuant to Security Council mandates. Also threatened is the fundamental principle that compliance with the *UN Charter* is among states’ paramount obligations in international law.⁵⁵

(b) *War Crimes*

The consideration of the application of international humanitarian law to conduct of TNI during the Indonesian occupation, set out in section 1.3(b) above, applies equally to the 1999 violence.

East Timor remained under belligerent occupation, and general military operations were recorded in late 1998 in the vicinity of Alas.⁵⁶ The information gathered by the international and Indonesian commissions of inquiry indicates that paramilitary groups were under the effective control of TNI, and thus, their conduct may be imputed to the armed forces of a High Contracting Party.⁵⁷

As discussed in section 1.3(b) above, the ICTY in *Tadic* held that violations of Common Article 3 of the Geneva Conventions in the 1990s resulted in individual criminal liability. It follows that violations of Common Article 3 committed in 1999 would be prosecutable.

(c) *Crimes Against Humanity*

The elements of the offence of crimes against humanity outlined in section 1.3(c) above have application to the violence of 1999. Moreover, the customary international law definition of crimes against humanity applicable in 1999 is wider than that applicable in 1975. The element of discriminatory intent may no

⁵⁴ *Report of the International Commission of Inquiry on East Timor to the Secretary General*, January 2000, para 147; comment reiterated by Secretary-General of United Nations in Letter dated 31 January 2000, above n 49, para 4.

⁵⁵ *UN Charter*, Art 103.

⁵⁶ See eyewitness accounts in John Martinkus, *A Dirty Little War* (2001, Allen and Unwin), Chapter 2.

⁵⁷ *Prosecutor v Delalic & Ors*, IT-96-21-T, 16 November 1998, para 234; *Prosecutor v Rajic* (Rule 61 Hearing), IT-95-12-R61, 13 September 1996.

longer have to be shown, and the acts included in the *actus reus* could now extend to those listed in Article 7 of the *Rome Statute*.⁵⁸

(d) *Torture*

The definition of torture discussed in section 1.3(d) above remains effective and has application to conduct in 1999.

(e) *Genocide*

The definition of Genocide outlined above applied in 1999. Whether conduct in 1999 amounted to Genocide would once again depend upon the availability of evidence to establish the requisite specific intent. The difficulties discussed in section 1.3(e) above in establishing the necessary intent are of equal application in respect of the events of 1999.

(f) *Command Responsibility*

Where it can be established that the relationship between TNI commanders and paramilitary groups was effectively that of superior and subordinate, and that TNI officers had the material ability to prevent and punish the commission of offences by paramilitary groups,⁵⁹ the principles of command responsibility set out in section 1.3(f) above have application. It seems likely that TNI commanders could be held individually responsible for the commission of crimes by paramilitary groups, either because (in light of available information) the TNI commanders ordered the commission of the crimes⁶⁰ or because they failed to prevent and punish the paramilitaries' criminal conduct.

1.6 Which Time Frame for Accountability?

A critical strategic decision for East Timorese justice advocates is which period will be the focus of demands for accountability. In making that decision, several factors should be taken into account:

(a) *Availability of Evidence*

The evidence required to convict an individual of a criminal offence is considerably more voluminous and detailed than that required to establish a credible allegation of human rights violations. An assessment needs to be made of the likelihood of obtaining evidence probative of the elements of international crimes for the relevant period of time. This evidence is broadly of two kinds: physical evidence and witness evidence.

Physical evidence consists of human remains, structures and mechanical objects and documents. Human remains must be located and forensically analysed to establish the identity of the victim and a cause of death consistent with or probative of acts alleged against the accused. Structures and mechanical objects may need to be identified in order to establish elements such as systematic detention, torture and extrajudicial killing. Documentary evidence will be critical

⁵⁸ *Rome Statute*, above n 20, Art 7; Preparatory Commission for the International Criminal Court, *Finalized draft text of the Elements of Crimes*, June 2000 PCNICC/2000/INF/3/Add.2

⁵⁹ *Prosecutor v Delalic & Ors*, IT-96-21-T, 16 November 1998, para 378.

⁶⁰ See, eg, *Doe v Lumintang*, US District Court, District of Columbia, No.00-674 at para 17

in establishing that the acts were committed pursuant to a policy or with an intention to destroy a group, and to establish command responsibility for ordering or acquiescing in the acts.

Witness evidence consists of testimony from persons who witnessed, participated in or were victims of atrocities. It will be essential for establishing that the crimes in fact occurred, and that they were committed by the person or persons accused. Witness evidence implicating commanders or higher level officials will generally be more difficult to obtain, but may be critical in order to avoid reliance on circumstantial evidence.

As a general comment, the evidence in respect of the crimes of 1999 is likely to be preserved and recorded. First, there have been three separate inquiries into the 1999 violence,⁶¹ clearly establishing its nature and consequences, and; secondly, criminal investigations have been, or are being undertaken, such that forensic evidence has been collected and preserved, structures connected with crimes can be identified and some crime scene analysis has taken place. The events are comparatively fresh in the minds of witnesses, most of whom remain alive and can be located.

By contrast, no systematic investigation of the crimes of the Indonesian occupation has yet occurred. The “Historical Crimes” Unit of Civpol commenced investigations into the 1975 killing of 5 foreign journalists in Balibo, and the 1981 murder of 1000 civilians in the Kraras locale. However, in the aftermath of several managerial restructures of the Serious Crimes Unit since its establishment, the status of these investigations is unclear. There is confusion about whether the Historical Crimes Unit remains operative and whether the Deputy Prosecutor for Serious Crimes will act on “historical crimes” investigations referred for prosecution. It is reasonable to assume that the forensic evidence, victim identification, witness statements and crime scene analysis are lacking for even the worst atrocities of the occupation. Witness evidence is also likely to be complicated by the length of time elapsed and the possibility that witnesses have died or cannot be located.

The passage of time makes prosecutions more difficult, but not impossible. The experience of attempts to prosecute persons accused of war crimes and crimes against humanity in the European theatre of conflict during World War Two suggests that the evidentiary hurdles are not insurmountable, even though such trials occur four decades after the event.⁶² Assuming that the CRTR is adequately resourced, and its mandate not altered by the National Assembly, its work may result in the first comprehensive record of atrocities committed during the Indonesian occupation. The CRTR’s power to conduct on-site investigations (including exhumations) and compel witnesses⁶³ gives it the potential to identify

⁶¹ See above n 49.

⁶² See, eg, the successful prosecution of Klaus Barbie in France for war crimes committed during World War Two [case citation], and the successful prosecution of Anthony Sawoniuk for the 1942 murder of two Jews in what is now Belarus: *R v Sawoniuk* [2000] EWCA Crim 9 (10 February 2000). Compare, however, the experience of the Australian war crimes prosecutions, in which unreliable witness testimony made it impossible to convict any of the persons prosecuted and led to the winding up of the Special Investigations Unit: see Attorney General, *Report on the Operation of War Crimes Act 1945* (1991, AGPS); interview with Mr Michael Duffy, former Commonwealth Attorney General, 4 December 2001.

⁶³ See *Regulation No. 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor*, 13 July 2001 sections 14 and 15.

crime scenes, gather basic forensic evidence and identify key witnesses to earlier atrocities, which could lay the groundwork for future prosecutions.

(b) *International Consciousness of Atrocities*

As a consequence of the number of international personnel in East Timor during 1999, and the comparatively high level of international scrutiny of events unfolding in the territory, international consciousness of the atrocities of 1999 is high. That grave violations of international criminal law were committed in 1999 with TNI involvement is almost universally accepted by the international community, and the need for justice is recognized. Mobilising international opinion in respect of these crimes will be easier.

International acknowledgment of the level and nature of human rights abuses committed during the years after the Indonesian invasion is less uniform. This may derive in part from the absence of an internationally sanctioned commission of inquiry, but probably also relates to the not inconsiderable support for the Indonesian “integration” of East Timor among European, North American and Australasian states. Acknowledgement that grave human rights abuses may have been perpetrated in East Timor by Indonesian forces threatened to undermine Indonesia’s efforts to gain recognition of its annexation of the territory, and to impede the close relationship with Indonesia sought by these states throughout the 1970s and 1980s. Unsurprisingly, states such as Australia strongly contested claims that the human rights abuses committed by Indonesian forces reached the scale alleged by the sources referred to in section 1.2 above.

If demands for judicial accountability are to encompass this wider historical period, a concerted effort must be made to increase states’ awareness and condemnation of the abuses alleged. This, in turn, may depend on the availability of an internationally credible and authoritative account of the human rights abuses of the earlier period, such as that which may emerge from the CRTR report. Consideration should be given to taking advantage of periods of heightened international awareness to promote understanding of the crimes of the earlier period. One such opportunity may well be the renewed interest in accountability provoked by the CRTR hearings, and the release of its report on human rights violations during the Indonesian occupation.

(c) *Scale of Atrocities and Gravity of Crimes*

Which time frame forms the best basis for demanding international action also depends on the scale of atrocities and the gravity of crimes. As can be seen from sections 1.3 and 1.5 above, the legal characterisation of the crimes allegedly committed in either period are substantially the same. However, the scale of the killings and other violations alleged in the ten years after the Indonesian invasion is many times greater than those alleged in 1999.

It is ironic that although international consciousness of the 1999 violence is higher, the scale of the criminal conduct does not approximate the circumstances that provoked the creation of the ICTY or ICTR.⁶⁴ By contrast, the number of

⁶⁴ The United Nations Commission of Experts, established to inquire into violations of international humanitarian law and international criminal law in the Former Yugoslavia, estimated that between 1991 and 1995, 200,000 to 250,000 persons were killed, and recorded 50,000 victims of torture, 20,000 cases of rape and the large scale destruction of public and private property: M Cherif Bassiouni, “Current Developments: The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), (1994) 88

East Timorese victims of the period 1975 - 1985 (common estimates of which range between 100,000 and 200,000)⁶⁵ is directly comparable in scale to the former Yugoslavia and Rwanda, particularly if considered as a proportion of the total East Timorese population.

The argument that the atrocities are so numerous that they cast an obligation upon the entire international community to punish persons responsible for them, is more plausibly made in respect of the whole period of the Indonesian occupation. Moreover, persons most responsible are likely to be Indonesian nationals not within the territorial jurisdiction of East Timorese courts, or the temporal jurisdiction of Indonesia's newly created Ad Hoc Human Rights Tribunal. Conditions suggesting an inability or unwillingness to try responsible persons in either the state of nationality (Indonesia) or the *locus delicti* (East Timor) strengthen the argument that an international response is necessary.

(d) *East Timorese opinion*

The authors' brief and unsystematic survey of East Timorese opinions concerning which time frame for accountability is preferred suggests considerable ambivalence. On the one hand, many NGO representatives and some victims of the 1999 violence expressed the pragmatic view that it was more realistic, and more likely to achieve concrete results, to demand justice for the crimes of 1999. Their frustration with the slowness of current justice mechanisms led them to conclude that justice for the 1999 violence would be "hard enough," and that pursuing accountability for earlier crimes was beyond their energy and resources. Moreover, the crimes of 1999 burn brightest in the memory of the East Timorese, and thus are most commonly mentioned in discussions about judicial accountability.

On the other hand, consciousness of the brutality of the Indonesian occupation remains close to the surface of everyday life. Conversations with older East Timorese move quickly to recollections of the suffering caused by invasion and occupation, and crimes which are notorious within living memory. There is some bewilderment, perhaps resentment, at the amount of international attention given to the 1999 period, in comparison to the rest of the occupation. However, some interviewees expressed trepidation in extending the criminal prosecutions back to 1975 because of the perception that more East Timorese, including current leaders, may be implicated. No specific examples were given, but the concern seemed rooted in the sense that, in the early years of the invasion, more East Timorese may have collaborated with Indonesian forces, and thus could have been involved in grave human rights violations. The plausibility of this concern cannot be assessed in the absence of a documentation of the atrocities, to determine the extent of East Timorese involvement.

Those directly affected by human rights abuses in either period legitimately believe that their justice demands deserve equal attention. Prioritising one class

American Journal of International Law 784, 801 n.129. (The full report of the Commission is accessible at: http://www.ess.uwe.ac.uk/comexpert/REPORT_TOC.HTM and [http://www.ess.uwe.ac.uk/comexpert/\(annexes\)](http://www.ess.uwe.ac.uk/comexpert/(annexes))).

The Commission of Experts established to inquire into the Rwandan genocide concluded that at least 500,000 unarmed civilians were murdered: *Final Report of the Commission of Experts established pursuant to Security Council resolution 935 (1994)*, S/1994/1405 (Annex), 9 December 1994 at para 57.

⁶⁵ See *East Timor: Final Report of Senate Foreign Affairs, Defence and Trade References Committee* (2000, Parliament of the Commonwealth of Australia) at 79-90.

of victims over another on the basis of an arbitrary time demarcation may foster divisions within East Timorese society, and hamper the prospects for reconciliation. However, there also appears to be a reluctance and ambivalence about scrutinising some aspects of the more distant past. The bases for this reluctance remain unclear, but it indicates a strong need for widespread education and debate about the advantages and disadvantages of different options for judicial accountability.

1.7 International Principles concerning Accountability and Impunity

(a) *Jus cogens norms, obligations erga omnes and the duty to prosecute*

The crimes discussed in sections 1.3 and 1.5 above are among the gravest in international law. The International Law Commission has classified them as “crimes against the peace and security of mankind.”⁶⁶ The prohibitions against genocide, crimes against humanity, war crimes and torture are commonly characterised as *jus cogens* norms: norms of international law from which no derogation is permissible.⁶⁷ Underlying the concept of a *jus cogens* norms is the idea that some rules of international law are so fundamental to the interests of the international community, that to depart from them is to threaten the international order itself. A cognate principle is that all states have an interest in preventing and punishing such crimes, and that any state *may* do so, even if the crime was not committed in its territory, or by or against one of its nationals.

Thus, every state has an obligation to prevent and punish violations of *jus cogens* norms committed on its own territory or by one of its nationals, and it owes this obligation to all other states (*erga omnes*). The corollary is that all other states have a legal interest in ensuring that such conduct is in fact prevented and punished.⁶⁸ On 14 October 1994, the President of the Security Council stated (on behalf of the Council) that:

*“The Council reaffirms that all those responsible for grave breaches of international humanitarian law and genocide must be brought to justice. It underlines that the persons who participated in such acts ‘cannot achieve immunity from prosecution’ by fleeing the country ... In this context, the Council is currently examining the recommendations of the Commission of Experts on the creation of an international criminal court and intends to make haste on this question.”*⁶⁹

The grave breaches provisions of the Geneva Conventions,⁷⁰ and the Convention Against Torture⁷¹ each oblige States Parties to prosecute or extradite persons suspected of conduct criminalized by the relevant treaty, even if the suspect is not a national of the state in which he is found and the crime was not committed on

⁶⁶ See *Draft Code of Crimes Against the Peace and Security of Mankind*, above n 15.

⁶⁷ See Lyal Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation* (1997, Kluwer) at 229-234.

⁶⁸ See *Barcelona Traction, Light and Power Co. Ltd. Case (Spain v Belgium)* [1970] ICJ Reps at para 33-4. Morris and Scharf conclude that “the *erga omnes* character of the prohibitions of crimes under international law is reflected in the competence of all States to prosecute and punish any individual who violates such a norm without consideration of the usual requirements for the exercise of the national criminal jurisdiction of a state”: V Morris and M Scharf, I *The International Criminal Tribunal for Rwanda* (1998, Transnational) at 287.

⁶⁹ S/PRST/1994/59, 14 October 1994.

⁷⁰ Art 146, GC IV (identical provisions in each of the other GCs: 49/50/129).

⁷¹ Art 4.

that state's territory. The Genocide Convention⁷² obliges States Parties to "prevent and punish" genocide and to criminalize genocide under their domestic laws. The International Court of Justice has held that the "obligation each state has to prevent and punish genocide is not territorially limited by the Convention."⁷³ Arguably, the *duty* to prosecute acts of genocide, where ever they are committed, forms part of customary international law but this remains controversial.

The recognition by the international community that all states *can* and should prosecute crimes of the kind allegedly committed in East Timor falls short of a strict *duty* to prosecute such crimes where committed extraterritorially or by a non-national, in the absence of a binding treaty obligation. It cannot therefore be argued that all states *must* (individually or collectively) search out and prosecute persons suspected of crimes under international law. Where a binding treaty obligation to prosecute exists, it generally only becomes operative *when a suspect is found within the territory* of State Party. States are not compelled to take measures to bring a suspect within their jurisdiction, although they arguably may do so.

(b) *Principles against Impunity*

States have consistently expressed the importance of cooperating to prevent and punish crimes under international law, and to that extent, may be argued to have accepted the need to do so internationally where other options have been exhausted. The third, fourth, fifth and sixth preambular paragraphs of the *Rome Statute*⁷⁴ read:

"... Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes..."

On 3 December 1973, the United Nations' General Assembly passed Resolution 3074, entitled "*Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity*"⁷⁵. The Resolution provides:

"1. War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom

⁷² Arts 1, 4 and 5.

⁷³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* [1996] ICJ Reps at para 31.

⁷⁴ *Rome Statute*, above n 20.

⁷⁵ GA Res 3074(XXVIII), 28 UN GAOR Supp (30A) at 78, UN Doc A/9030/Add.1 (1973), 94 votes in favour, 0 against, 29 abstentions.

there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.

....

3. States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose.

4. States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them.

5. Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that connection, States shall co-operate on questions of extraditing such persons.

6. States shall co-operate with each other in the collection of information and evidence which would help to bring to trial the persons indicated in paragraph 5 above and shall exchange such information.

...

8. States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.

...”

Subsidiary organs of the United Nations have similarly passed resolutions, and adopted Expert reports, which reject impunity for crimes under international law and emphasise the need for international cooperation to bring perpetrators to justice.⁷⁶ Underlying the condemnation of impunity is the presumption that a failure to punish crimes of this nature will both “stoke the fire of long term social conflict”⁷⁷ and fail to discourage future atrocities:

“[T]he international community, frustrated with the inability of civil sanctions, military reprisals and the doctrine of State responsibility to deter atrocities, has increasingly moved towards a criminal model that

⁷⁶ See: Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Administration of Justice and the Human Rights of Detainees: Question of the Impunity of Perpetrators of Human Rights Violations (civil and political): Final Report prepared by Mr Joinet pursuant to Sub-Commission decision 1996/119, E/CN.4/Sub.2/1997/20*; Commission on Human Rights, *Civil and Political Rights, including the Questions of Independence of the Judiciary, Administration of Justice, Impunity: The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: Final report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, E/CN.4/2000/62, 18 January 2000, Annex at para 4*; “Impunity”, Commission on Human Rights resolution 1998/53, para 5, 17 April 1998; “Impunity”, Commission on Human Rights resolution 1999/34, para 4, 26 April 1999; *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, ECOSOC Resolution 1989/65 of 24 May 1989, para 18.

⁷⁷ Mary Robinson, “Genocide, War Crimes and Crimes Against Humanity” (1999) 23 *Fordham International Law Journal* 275, 277-8.

treats the commission of atrocities as unacceptably disruptive behaviour, for which individual offenders must be tried and punished...

... Certainly, it is hoped, although not empirically demonstrable, that erecting a system of international criminal justice (including national and international prosecutions) will prevent the reoccurrence of abuses and assist in repairing the havoc wreaked upon society thereby.”⁷⁸

The international community’s antipathy to impunity does not form a rule of international law, but may indicate an emerging principle of non-toleration for situations of impunity arising where a national jurisdiction is unable or unwilling to prosecute persons suspected of crimes under international law. If (as seems likely), the Indonesian Ad Hoc Human Rights Tribunal will be ineffective in prosecuting persons accused of crimes against humanity and war crimes, and Indonesia continues to refuse to surrender suspects to East Timorese courts, it can be argued that the international community must act to avoid a state of continuing impunity for these crimes.

(c) *National Amnesties and International Law*

A number of states undergoing a transition from *internal* armed conflict to cessation of hostilities, or from authoritarian rule to electoral democracy, have implemented amnesties or pardons for persons suspected or convicted of human rights abuses.⁷⁹ The ethical, political and pragmatic advantages and disadvantages of an amnesty process for *national* reconciliation are much debated,⁸⁰ but it is noted that these debates principally concern contexts in which human rights abuses are committed by authoritarian regimes or combatant groups against their fellow nationals. Their application to a situation where abuses were perpetrated by agents of foreign domination or alien occupation is less clear. The current “reception and reconciliation” process in East Timor has relevance primarily to East Timorese collaborators who committed low-level crimes, and who voluntarily return to the territory. It does not apply to “serious crimes” (defined to include crimes under international law), or to persons who have left the territory, never to return or play a role in the reconstruction of East Timor.

The policy considerations which favour respect for domestic amnesty laws, such as maintaining social cohesion and minimising internal threats to the new order, are thus not as persuasive when applied to Indonesian officials suspected of war crimes and crimes against humanity in East Timor. In any event, it is questionable whether national laws conferring immunity from prosecution for crimes of the kind discussed in sections 1.3 and 1.5 above are valid at international law. Treaty-based organs, such as the Inter-American Court of

⁷⁸ Leila Nadya Sadat, “Universal Jurisdiction and National Amnesties, Truth Commission and Other Alternatives to Prosecution: Giving Justice a Chance” in Stephen Macedo, Ed, *The Princeton Papers on Universal Jurisdiction* (forthcoming, Princeton University Press) at 3-4 of manuscript (emphasis in original, footnotes omitted). The author is indebted to Professor Stephen Macedo of Princeton University for making the Princeton Papers available before publication.

⁷⁹ See US Delegation Draft “State Practice Regarding Amnesties and Pardons”, submitted to PrepCom for International Criminal Court (copy on file with author); Margaret Popkin and Nehal Bhuta, “Latin American Amnesties in Comparative Perspective: Can the Past be Buried?” (1999) 13 *Ethics and International Affairs* 99; Naomi Roht Arriaza and Laura Gibson, “The Developing Jurisprudence on Amnesty” (1998) 20 *Human Rights Quarterly* 843.

⁸⁰ See, for an overview of the principal arguments, Steven Ratner, “New Democracies, Old Atrocities: An Inquiry into International Law” (1999) 87 *Georgetown Law Journal* 707.

Human Rights (established under the Convention on Human Rights)⁸¹ and the Human Rights Committee of the International Covenant on Civil and Political Rights⁸² have found unconditional amnesties for human rights violations such as extrajudicial execution and torture to be inconsistent with States Parties' obligations under these treaties.⁸³ At the level of customary law, it is difficult to reconcile the *jus cogens* nature of the prohibitions against war crimes, crimes against humanity, genocide and torture, with national amnesty laws shielding persons suspected of such crimes from prosecution.⁸⁴ At the level of treaty law, a failure to prosecute (or extradite to another state willing to prosecute) war crimes, genocide or torture would contravene the duties of parties to the Geneva Conventions, the Genocide Convention and the Convention against Torture, respectively.⁸⁵

Amnesty laws are generally domestic laws of the state concerned. Where a state's domestic law conflicts with its international law duties, it must bring national laws into conformity with international law or otherwise ensure that it can fulfil their international law obligations. An international tribunal may therefore refuse to recognise a national amnesty law, if it regards the law as inconsistent with international law. Similarly, a criminal court in another state applying international law (or domestic laws reflecting international law) may simply disregard an amnesty law in the accused's state of nationality, because it cannot bind another sovereign. Alternatively, a domestic court may have regard to policy considerations in determining whether it will disregard an amnesty law in the accused's state of nationality. Relevant factors which may affect a court's decision include:⁸⁶

- whether the amnesty has been adopted democratically, with participation and consent from victims, or whether the amnesty is a "self-amnesty" by powerful groups;
- whether the amnesty purports to provide a blanket immunity from prosecution, irrespective of the gravity of the crime or the accused's level of responsibility, or whether the amnesty is conditional and limited;

⁸¹ American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992)

⁸² G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 ("ICCPR"); Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force March 23, 1976

⁸³ *Velasquez-Rodriguez*, Inter-American CHR, Ser C, No 4 (1988); Human Rights Committee, *Bautista de Arellana v Colombia*, Comm. No. 563/1993, P8.6, UN Doc CCPR/C/55/D/563/1993 (1995); General Comment 20(44), art 7, P15, in *Report of the Human Rights Committee*, 47 UN GAOR Supp No 40, Annex VI at 193, 195, UN Doc A/47/49 (1992); Human Rights Committee, "Preliminary Observations on Peru", P9, UN Doc CCPR/C/79/Add 67(1996).

⁸⁴ Special Rapporteur Louis Joinet, *Preliminary Report: Study on Amnesty Laws and their Role in the Safeguard and Promotion of Human Rights*, UN Doc E/CN.4/Sub.2/1985/16 (1985).

⁸⁵ V Morris and M Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (1995, Transnational) at 340-41.

⁸⁶ Drawn from: Douglass Cassel, "Accountability for International Crime and Serious Violations of Fundamental Human Rights: Lesson from the Americas - Guidelines for International Response to Amnesties for Atrocities" (1996) 59 *Law and Contemporary Problems* 197; Sadat, above n 78 at 42 of ms.

- whether the amnesty in fact reflects “a negotiated and potentially fragile agreement entered into as part of a transition to democracy,”⁸⁷ or is simply the final act of a lawless regime.

Indonesia has not yet passed a law expressly conferring immunity from prosecution on nationals suspected of committing crimes under international law in East Timor. However, the jurisdictional limitations of the Indonesian Ad Hoc Tribunal, and serious flaws in the preparation and presentation of the prosecutions against selected military figures,⁸⁸ lead to the conclusion that the Indonesian process will not achieve accountability for the crimes of 1999.

2 International Criminal Tribunals

2.1 Behind the demand for an International Criminal Tribunal

Since the end of the Indonesian occupation, there have been persistent calls for the creation of an ad hoc international criminal tribunal for East Timor. The reiteration of this demand has increased in frequency, and has emanated from a variety of sources. During meetings with victims and victims’ groups in East Timor, the desire for an international criminal tribunal was also forcefully articulated. When discussing the reasons underlying this demand, and the perception of how an international criminal tribunal may operate, it soon became apparent that different stakeholders in the justice process had varying rationales for the desirability of an international criminal tribunal. The following section reviews the reasons expressed by East Timorese stakeholders for their support for an international criminal tribunal. The authors here rely upon interviews and meetings with a wide variety of individuals and groups, but believe that a more systematic consultation would be desirable.

(a) *Frustration and Lack of trust in the Serious Crimes Process*

As discussed in Part 1, the United Nations’ managed Serious Crimes process has hitherto been characterised by inadequate resources, poor management and limited accessibility.⁸⁹ Despite many dedicated staff, the process foundered throughout its first two years of operation. Several different factors contributed to the perceived and actual shortcomings of the process, including:

- (i) *Conflicts over resources between the Serious Crimes process and the “ordinary” justice system:* This appeared to be a consequence of both poor management, and an attempt to unite under one administrative framework two very different objectives: capacity building of the ordinary justice system, and efficient prosecution of complex international criminal offences. As one experienced former Serious Crimes staffer commented, “*building a judicial system is quite different from investigating and trying war crimes and crimes against humanity. Each is a gargantuan task.*”

⁸⁷ Sadat, above n 81, at 42.

⁸⁸ See: International Crisis Group, *Indonesia: Implications of the Timor Trials* (8 May 2002).

⁸⁹ See: *Report of the Security Council Mission to East Timor and Indonesia (9-17 November 2000)*, S/2000/1105 at paras 8 and 29; Security Council Resolution 1338 (2001), S/RES/1338 (2001), 31 January 2001 at para 8; *Report of the High Commissioner for Human Rights on the Situation of Human Rights in East Timor*, E/CN.4/2001/37, 6 February 2001 at para 13; *Situation of Human Rights in East Timor: Report of the United Nations High Commissioner for Human Rights*, A/56/337, 6 September 2001 at para 14; Human Rights Watch, *Unfinished Business: Justice for East Timor*, August 2000; Judicial System Monitoring Programme, *Justice in Practice: Human Rights in Court Administration: JSMP Thematic Report 1*, November 2001; Amnesty International, *East Timor: Justice - Past, Present and Future*, 27 July 2001, ASA 57/001/2001.

Trying to do both under one department confuses its mandate and seems to prevent progress on either task.”

- (ii) *Lack of investigative resources and continuity:* Between September 1999 and September 2000, responsibility for investigations was shifted at least four times, and up to six different agencies had overlapping responsibilities. This intensified competition for already scarce resources, and resulted in poor communication and coordination. The absence of a coherent prosecutorial strategy was compounded by rapid turnovers in international staff.
- (iii) *Lack of outreach to the East Timorese community and lack of involvement of the East Timorese:* Despite the proclaimed virtues of a “localised” international justice model, the Serious Crimes process has proven no more responsive and adapted to local community concerns than wholly externalised forms of justice. The process was devised without consultation with the East Timorese, and the level of East Timorese involvement in investigation and prosecution has been minimal.⁹⁰ Serious Crimes staff members interviewed expressed a strong interest in working collaboratively with East Timorese counterparts, but the absence of trained and experienced lawyers in East Timor has made it difficult to commit East Timorese lawyers to the Unit. Moreover, it is doubtful whether the Unit has the resources necessary to train East Timorese lawyers in a way which enables them to fully and effectively participate in its work.

Until relatively recently, no efforts were taken to explain the work of the Serious Crimes Unit, or the nature of Serious Crimes process, to an overwhelmingly rural and illiterate East Timorese society. Communities experienced the process as little more than the appearance of investigators, who took statements and then returned to Dili, with no further feedback concerning the status of cases or what would occur with the evidence taken. Prosecutorial strategy and the basic steps in the legal process were left unexplained, resulting in considerable alienation and anger when, for example, indictees were provisionally released to return to the community, or victims found that cases similar to their own were progressing while their’s was inactive.

Endemic logistical and communication problems with the Special Crimes Panel of the Dili District Court meant that communities would not necessarily know if a case affecting them was coming to trial.

As a result of difficulties such as these, victims and victims’ groups interviewed expressed anger and disappointment with the Serious Crimes process. The level of mistrust and cynicism, perhaps exacerbated by high expectations, is threatening to jeopardise East Timorese cooperation. One victim of the 1999 PolRes massacre in Maliana stated that four different investigators had taken her statement in the last 18 months, but no-one had told her anything about the status of the case; she declared that the next time an investigator came to take her statement, she would not cooperate as it seemed pointless.

⁹⁰ By contrast, East Timorese public defenders seem to bear the burden of ensuring indictees are properly defended, but without any of the resources available to the Prosecutors’ Office.

(b) *Lack of Cooperation from Indonesia*

Indonesia has not cooperated with Serious Crimes process by implementing the Memorandum of Understanding (“April 6 MOU”) between it and UNTAET.⁹¹ The MOU provided for mutual assistance in the enforcement of arrest warrants, and the taking of evidence from witnesses. Victims and victims’ groups interviewed clearly regarded TNI personnel as the principal architects of the 1999 violence, and that justice could not be achieved without holding them individually responsible.

However, Indonesia’s failure to cooperate in the arrest and surrender of TNI personnel indicted by the Special Panel, and its statement that it no longer regards the April 6 MOU as binding, has led to the belief that the Serious Crimes process has no prospects of gaining custody over TNI personnel. An international criminal tribunal is perceived as the only mechanism which has sufficient coercive authority to compel surrender of suspects.

Despite a recent restructure of Serious Crimes that is likely to improve its operations, UN officials acknowledged that the courts were severely under resourced and that the prospects for cooperation from Indonesia were negligible. The funding for Serious Crimes from assessed contributions is guaranteed until late 2003, from which time it may have to rely on voluntary contributions in a context where the competition for bilateral assistance across different sectors will be intense.

One UN official suggested that in the time remaining, the Serious Crimes Units may complete the investigation and trial of ten priority cases. If this estimate is correct, it would leave hundreds of cases uninvestigated and unprosecuted from the 1999 period alone. To this may be added the new cases from earlier periods which may be referred to the Deputy Prosecutor for Serious Crimes by the CRTR.

The small number of cases prosecuted would not, of itself, be a flaw, provided those persons most responsible were tried. However, without Indonesian cooperation in the transfer of suspects to East Timor, no senior military will be extradited.

(c) *Distrust of the Indonesian Criminal Justice Process*

The experience of the Indonesian criminal justice system under occupation has understandably left many East Timorese distrustful of its capacity to adequately prosecute powerful military figures. The aftermath of the Santa Cruz massacre was often referred to, in which 10 low-level members of the security forces directly involved in the massacre received short jail terms and administrative penalties, while several East Timorese accused of organising the peaceful procession prior to the massacre were sentenced to decades or life in prison. A commonly reiterated view was that the Indonesian Ad Hoc Human Rights Court was “just for show,” and that the Indonesian justice system was too corrupt, or too susceptible to military intimidation, to ensure justice.

(d) *Rationales among NGOs*

⁹¹ Memorandum of Understanding Between the Republic of Indonesia and the United Nations Transitional Authority for East Timor Regarding Cooperation in Legal, Judicial and Human Rights Related Matters, 6 April 2000.

Representatives of NGOs working in the justice and human rights fields articulated a variety of reasons for their demand for an international criminal tribunal. Many of the reasons can be seen as common to the demand for judicial accountability *per se*, but the unspoken assumption appeared to be that an international criminal tribunal would be the most effective mechanism to achieve prosecution and trial.

(i) *Individualisation of responsibility*

By prosecuting TNI personnel most responsible for crimes under international law, East Timorese will be less tempted to maintain antipathy towards the Indonesian nation and its people. Further, divisions within East Timorese communities as a consequence of the 1999 violence may be transcended as trials make clear that the crimes committed by East Timorese against East Timorese were orchestrated by the Indonesian military.

(ii) *Preventing continuing harm and promoting democracy in Indonesia*

Persons allegedly responsible for gross human rights violations in East Timor were closely associated with the authoritarian institutions and practices of TNI's dominance of Indonesian politics. These military cliques remain politically and socially powerful, and many of the officers implicated in the 1999 violence in East Timor have been promoted and redeployed in regions experiencing civil conflict and allegations of severe human rights abuses.

Several NGO representatives argued that, in the absence of a credible Indonesian justice system, holding these individuals criminally accountable would prevent them from continuing to commit human rights abuses, and discredit the military factions that seek to maintain a grip on political power.

An international criminal tribunal is regarded as performing a function that the CRTR will not be able to achieve in respect of Indonesia, because the CRTR will not be able to compel testimony or seize documents outside East Timor. Internationally conducted, legitimate trials are considered more likely to expose to the Indonesian nation the role of TNI in East Timor, and force the state to confront the historical reality of the military's conduct. This, it is argued, will help open space for domestic democracy and justice advocates to challenge the continued power and prestige of military factions in Indonesian politics.

(iii) *International Recognition*

A consistent undertone in the demand for an international criminal tribunal was a sense of entitlement to strong international measures to ensure justice, in light of the international community's prolonged indifference to the human rights violations in East Timor under the Indonesian occupation. The "mixed model" presented by the Serious Crimes process, particularly in the aftermath of its failures, was in part perceived as an indication that the international community was not committed to justice for East Timor. There is a consciousness that the international community failed to stop the Indonesian invasion and its

attendant atrocities, and effectively failed to forestall TNI's campaign of violence in 1999. An international criminal tribunal is seen as due recognition of the gravity of the crimes committed and the suffering of the East Timorese over twenty five years.

2.2 The Functioning and History of the ICTY and ICTR

The extent to which the international criminal tribunal model can meet these high expectations will be considered through a review of the operation and history of the ICTY and ICTR.

(a) Purposes of the International Criminal Tribunals and Process of Creation

(i) *Background*

Between 1991 and 1995, the disintegration of the former Federal Republic of Yugoslavia led to the most serious conflict in Europe since 1945. The UN Commission of Experts ("Balkan Commission") appointed by the Security Council in 1992 to examine evidence of violations of international humanitarian law identified 715 prison camps, 187 mass graves containing between 3 and 5,000 bodies, and 2,400 named and unnamed rape victims. It estimated 200-250,000 fatalities, 50,000 cases of torture and 20,000 cases of rape, as well as widespread pillage.⁹² Three million persons were displaced, internally and into other states. It concluded that grave breaches of the Geneva Conventions, crimes against humanity and genocide had been committed.

From 6 April 1994 to 15 July 1994, between 500,000 and 1 million unarmed civilians were murdered in Rwanda. The killing was the result of a methodical and systematic effort to exterminate the Tutsi ethnic group.⁹³ Two million persons were displaced internally and into neighbouring states. The UN Commission of Experts ("Rwanda Commission") appointed by the Security Council found that the killings were carried out in a "concerted, planned, systematic and methodical way and were motivated out of ethnic hatred."⁹⁴ The Rwanda Commission concluded that acts of genocide, crimes against humanity, and criminal breaches of international humanitarian law applicable to non-international armed conflicts had occurred.⁹⁵

The appointment of these Commissions and their reporting work were critical to creating a consensus in the Security Council about the gravity of the crimes and the necessity of an international response. The Balkan Commission spent two years collecting evidence and establishing a factual base for future investigations. Despite being created by a Security Council resolution, the Commission did not receive funding from assessed UN funds, and was obliged to rely on voluntary contributions, raising the question of whether it was ever intended to be so successful in

⁹² *Final Report of the Commission of Experts Established Pursuant to Security Resolution 780 (1992)*, UN Doc S/1994/674 (May 27, 1994) at para 310.

⁹³ *Final Report of the Commission of Experts Established Pursuant to Security Council 935 (1994)*, S/1994/1405 (Annex), 9 December 1994; See generally, Human Rights Watch and the International Federation of Human Rights, *Rwanda: Leave None to Tell the Story* (1998).

⁹⁴ *Ibid* para 58.

⁹⁵ *Ibid* paras 181-184.

demonstrating the need for international action. However, due in no small part to the dedication of its members and the financial support of several states, the Balkan Commission's work was pivotal in generating the momentum to establish the first international criminal court since Nuremberg.

The interim report of the Balkan Commission led the Security Council to consider and adopt resolution 808 (1993) (22 February 1993)⁹⁶, which established an international tribunal for "the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." Between February and May 1993, states and regional organisations submitted proposals for the Statute of the Tribunal to the UN Secretary-General, who produced a report annexing a draft statute.⁹⁷ The statute was adopted by the Security Council as the Statute of the Tribunal in resolution 827 (1993) (25 May 1993)⁹⁸.

The creation of the ICTR was a more streamlined process. The Rwandan Commission was appointed on 1 July 1994⁹⁹ and submitted an interim report to the Security Council on 26 July 1994. On 8 November 1994, the Security Council adopted the Statute of the International Tribunal for Rwanda,¹⁰⁰ based substantially on the model of the ICTY Statute. It is noteworthy that the new Rwandan government, which had initially requested the creation of a Tribunal, ultimately voted against the Statute in its final form. Its views on the content of the Statute were considered by the Security Council, but not adopted, illustrating that the consent of a national government will not be decisive where the Security Council regards it self as acting in the name of the international community as a whole.

(ii) *Purposes for the creation of the International Criminal Tribunals - stated and unstated*

In the record of Security Council deliberations concerning resolutions 808 and 955, the permanent members articulated five principal reasons for the creation of the International Criminal Tribunals:

(A) *Retributive Justice*: prosecuting the guilty was necessary to do justice to the victims and to the international community.¹⁰¹

⁹⁶ S/RES/808 (1993).

⁹⁷ See V Morris and M Scharf, II *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (1995, Transnational) at 1-39, 209-479.

⁹⁸ S/RES/827 (1993).

⁹⁹ S/RES/935 (1 July 1994)

¹⁰⁰ S/RES/955 (8 November 1994).

¹⁰¹ Provisional Verbatim Record of the Three Thousand One Hundred and Seventy Fifth Meeting, Held at Headquarters, New York, on Monday, 22 February, 1993, at 11 am, reprinted in Morris & Scharf, above n 100, at 163-64 (France); 167 (United Kingdom); 166 (United States); Provisional Verbatim Record of the Security Council, Forty-Ninth Year, 3453rd Meeting, Tuesday, 8 November 1994, 3.35 pm, New York, reprinted in : V Morris and M Scharf, II *The International Criminal Tribunal for Rwanda* (1998, Transnational) at 268 (Russia); 299 (France)

- (B) *Deterrence*: prosecuting the guilty will send a clear message that persons committing such acts will be held accountable for their crimes.¹⁰²
- (C) *Maintaining and restoring peace and security*: prosecuting the guilty will allow the United Nations and the Security Council to fulfil its role in maintaining international and regional peace and security.¹⁰³ The crimes committed were so serious that they constituted a threat to international peace and security.¹⁰⁴
- (D) *Contributing to multiethnic democracy*: in her remarks to both sessions, the US Representative (Madeleine Albright) emphasised the contribution that the international tribunals could make to the restoration of multiethnic democracies, by demonstrating that eradicating minorities will not be tolerated.¹⁰⁵
- (E) *Recording and preserving historical truth about the conflict*: in remarks to the session discussing resolution 827, the US Representative stated that “*truth is the cornerstone of the rule of law, and it will point towards individuals, not peoples, as perpetrators of war crimes. And it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process.*”¹⁰⁶

The rationales offered briefly in the Security Council debate have been further expanded upon in the vast literature on the establishment and functioning of the international criminal tribunals. Together, they form a “cornucopia of objectives”¹⁰⁷ which include:

- deterrence and prevention of future crimes;
- restoration of a rule of law and ending a cycle of impunity;
- judicial retribution as an alternative to self-help;
- individualised, rather than collective, guilt;
- moral education in the norms of human rights;
- restorative justice and reconciliation;
- articulating a body of international criminal law.

¹⁰² *Ibid* (Res 808) at 163 (France); 169 (Russia)

¹⁰³ *Ibid* (Res 808) at 163 (France); *Ibid* (Res 955) at 299 (Russia), 299 (France). See S/RES/808 (1993), preambular para 9; S/RES/827, preambular paras 6 and 7; S/RES/955, preambular paras 7 and 8.

¹⁰⁴ *Ibid* (Res 955) at 299 (France).

¹⁰⁵ *Ibid* (Res 808) at 166; (Res 955) at 310.

¹⁰⁶ Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting, Held at Headquarters, New York, on Tuesday, 25 May 1993, at 9 pm, reprinted in Morris and Scharf, above n 100, at 185.

¹⁰⁷ Developments in the Law, “International Criminal Law: The Promises of International Prosecution” (2001) 114 *Harvard Law Review* 1957 at 1961.

Whether any judicial institution can fulfil this dazzling array of purposes remains to be seen, and the effectiveness of the international criminal tribunals will be considered below. However, an objective background factor which underlay the perceived necessity of an *international* (rather than national) justice mechanism was the unwillingness or inability of local courts in the Balkan states and Rwanda to try persons most responsible for international crimes.

In the Balkans, the political and social power of persons suspected of authorising or committing crimes, the fact that several different states' nationals were implicated, and a view that national courts were ineffectual in restraining abuses, all contributed to the perception that only an international court with jurisdiction over the entire territory of the former Yugoslavia could ensure a consistent approach to trying those responsible for violations of international humanitarian law.

In Rwanda, the genocide had decimated the limited legal and judicial personnel, and the surviving structures were overwhelmed with thousands of ground-level *genocidaires* detained in the immediate aftermath of the killings.¹⁰⁸ High level officials in the previous regime had fled Rwanda to other countries in the wake of the genocide, and were unlikely to be extradited to a state which could not guarantee a fair trial.

The unarticulated reasons for which the international community, and more specifically the permanent members of the Security Council, chose to establish international criminal tribunals in 1993 and 1994 can only be guessed at. Sceptical observers, including former judges, suggest that the tribunals were created as acts of "hope, desperation and cynicism by an international community lacking a coherent policy" to respond to the unfolding carnage.¹⁰⁹ The former Ambassador of Bosnia-Herzegovina to the United Nations regarded the ICTY as "in reality, as an alternative to real immediate measures to confront the crime or the criminals."¹¹⁰ The creation of a Tribunal in the context of an ongoing (or recently ended) crisis, may provide "*a relatively safe symbolic avenue for international power brokers to prove to political constituencies that they are engaged in remedying humanitarian depredations, without needing to muster resources more suitable to the task at hand.*"¹¹¹

The view of the Tribunals as "symbolic" acts seemed justified in the first two years after their creation, when each chronically lacked staff, funding, facilities and administrative support.¹¹² Nations that publicly supported

¹⁰⁸ Madeleine Morris, "The Trials of Concurrent Jurisdiction: The Case of Rwanda" (1997) 7 *Duke Journal of Comparative and International Law* 349.

¹⁰⁹ Gabrielle Kirk McDonald, "Reflections on the Contributions of the International Criminal Tribunal for the Former Yugoslavia" (2001) 24 *Hastings International and Comparative Law Review* 155, 161. McDonald was President of the ICTY from 1996 to 1999.

¹¹⁰ *No Peace Without Justice, International Campaign for the Establishment of the International Criminal Court* 54 (1997).

¹¹¹ Developments in the Law, above n 110, 1977

¹¹² Richard Goldstone, *For Humanity: Reflections of a War Crimes Investigator* (2000, Yale) at 74-90. Goldstone notes that soon after his appointment as the ICTY's first Prosecutor, the British Ambassador to South Africa asked him "Why did you accept such a ridiculous job?" (at 74).

the tribunals undermined or were indifferent to their actual operation in diplomatic channels.¹¹³

(iii) *Legal Mechanism for the Creation of the International Criminal Tribunals*

Both international criminal tribunals were created by Security Council resolutions passed by the Council acting under Chapter VII of the *UN Charter*. Chapter VII confers upon the Security Council exclusive authority to:

*“determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”*¹¹⁴

Where the Security Council has determined that a threat to international peace and security exists, Article 41 permits it to

*“decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and may call upon the Members of the United Nations to apply such measures. ...”*¹¹⁵

Article 41 stipulates a non-exhaustive list of measures that the Security Council can require Member states to implement, such as sanctions regimes.¹¹⁶ Article 29 of the Charter permits the Security Council to establish *“such subsidiary organs as it deems necessary for the performance of its functions.”*

In resolutions 808 and 827, the Security Council acting under Chapter VII determined that the *“continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia...”* constituted a *“threat to international peace and security.”* In resolution 955, the Security Council determined that *“genocide and other systematic, widespread and flagrant violations of international humanitarian law ... committed in Rwanda”* constituted a *“threat to international peace and security.”*

Thus, the offences committed were deemed a threat to international peace and security *“[b]ecause of their particular seriousness”*¹¹⁷ and triggered the Security Council’s Chapter VII powers. Pursuant to Article 41, the Security Council created the Tribunals as “subsidiary organs” within the meaning of Article 29, and required *“all states to cooperate fully with the International Tribunal and its organs in accordance with the current resolution and the Statute of the International Tribunal.”* The Tribunals’

¹¹³ David Forsythe, “International Criminal Courts: A Political View” (1997) 15 *Netherlands Quarterly of Human Rights* 5.

¹¹⁴ UN Charter, art 39.

¹¹⁵ UN Charter, art 41.

¹¹⁶ Article 48 of the Charter obliges all states to *“carry out decisions of the Security Council for the maintenance of international peace and security.”*

¹¹⁷ Provisional Verbatim Record of the Security Council, Forty-Ninth Year, 3453rd Meeting, Tuesday, 8 November 1994, 3.35 pm, New York, reprinted in Morris and Scharf, above n 104, 299 (France).

statutes are thereby given the force of a Chapter VII resolution, which is binding on all member states and takes priority over any other treaty or customary law obligations (with the exception of *jus cogens* norms).¹¹⁸

In its *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*,¹¹⁹ the Appeals Chamber of the ICTY considered a defendant's challenge to the legal validity of the Security Council's creation of the Court. The Appeals Chamber held that the Security Council had a wide discretion in determining what amounted to a threat to international peace and security, and had a similarly broad discretion in deciding what measures could be taken under Article 41 of the Charter to respond to such a threat. The measures listed in Article 41 were only indicative of the steps the Security Council could require states to take, and did not preclude the establishment of a judicial body as a subsidiary organ.

Interestingly, the Appeals Chamber focussed on the armed conflict in the former Yugoslavia as constituting the relevant "threat to peace and security" at the time, rather than the nature of the crimes. Both Tribunals were created in the context of an ongoing armed conflict (Yugoslavia), or in the immediate aftermath of massive killing (Rwanda). It is unclear whether the Security Council would be willing to characterise impunity for serious violations of international humanitarian law *per se* as a threat to peace and security, in the absence of these surrounding circumstances.¹²⁰

The statutes of the Tribunals provide that they will be funded from assessed funds of the United Nations' Organization. The precise mix of funding is determined and authorized by the General Assembly's Advisory Committee on Administrative and Budgetary Questions (ACABQ) and the Fifth (Administrative and Budgetary) Committee. Each Tribunal is able to accept voluntary contributions from donor states. With the exception of posts funded by voluntary contributions, all recruitment must occur in accordance with United Nations regulations, and contracts are not usually for more than a year.

(b) Jurisdiction: Subject Matter, Territorial, Temporal and Personal

- (i) *Subject Matter Jurisdiction*: the statutes of each Tribunal determine their subject matter jurisdiction. Articles 2, 3, 4 and 5 of the ICTY Statute confer it with jurisdiction over grave breaches of the Geneva Conventions, violations of common article 3 of the Geneva Conventions, genocide and crimes against humanity. The crimes against humanity definition requires that the acts listed be committed "in an armed conflict."

Articles 2, 3, and 4 of the ICTR Statute provide it with jurisdiction to prosecute genocide, crimes against humanity and violations of common

¹¹⁸ See Art 103, UN Charter: The Charter takes precedence over all other treaty obligations to the extent of inconsistency.

¹¹⁹ *Prosecutor v Tadic*, Case No. IT-94-1-AR72, 2 October 1995 at 14.

¹²⁰ cf Group of Experts for Cambodia, above n 8, at 41: "The Group believes that arguments can be made that the continued impunity of the Khmer Rouge in the face of popular demands for justice constitutes a threat to the peace of the region ..."

article 3 of the Geneva Conventions and of the Second Protocol Additional to the Geneva Conventions. The definition of crimes against humanity in article 3 of the Statute does not require a nexus with armed conflict, but does require that the acts specified were committed as “*part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.*”

- (ii) *Territorial and Temporal Jurisdiction:* Each Tribunal’s jurisdiction is limited to crimes committed within a specified territory and time frame. The ICTY has jurisdiction only in respect of serious violations of international humanitarian law “committed in the territory of the former Yugoslavia since 1991...” (art 1). The ICTY sits in The Hague, in the Netherlands.

The ICTR’s jurisdiction is limited to violations committed “in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994...” (art 1). The ICTR sits in Arusha, Tanzania.

- (iii) *Personal Jurisdiction:* the ICTY and ICTR have jurisdiction over natural persons, who will be held individually responsible if they have “*planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime.*” The principles of command responsibility set out in section 1.3(f) above apply, and official position or due obedience are no defence.
- (iv) *Primacy over National Courts:* both Tribunals have primacy over national courts. National courts are not precluded from exercising jurisdiction over persons in respect of whom the Tribunals also have jurisdiction, but at any stage of national proceedings the Tribunal may request national courts to defer to its competence and transfer the accused to its custody.

Once tried before the Tribunal, an accused may not be tried again in a national court. Where an accused has already been tried in a national court, the Tribunal may only proceed to try her or him if: (a) the act for which she or her was tried was characterised an ordinary crime, or (b) the national proceedings were not impartial, not conducted with due diligence, or intended to shield the accused from international criminal responsibility.

(c) **Organization of the Tribunals**

The Tribunals consist of three organs: Chambers, the Registry and the Office of the Prosecutor.

- (i) *Chambers*

Chambers are the judicial organs of the Tribunals. They consist of a number of Trial Chambers and an Appeals Chambers. The ICTY and ICTR currently have three Trial Chambers each, and a joint Appeals Chamber. Each Trial Chamber consists of three judges, and a sitting of the Appeals Chamber is comprised of five judges. The Security Council recently approved a proposal for the creation of a pool of 27 *ad litem*

judges, who are appointed on an “as needed” basis to deal with the Tribunals’ expanding case load.

Judges are elected for four-year terms by the General Assembly, which chooses from a short list prepared by the Security Council in consultation with the Secretary-General. The judges nominated must be qualified for appointment to the highest judicial office in their respective countries. No two judges of the same nationality may be elected. Judges are eligible for re-election. Relatively few judges have a background in international law, although some have criminal law experience. Not all judges appointed have a history of practice or experience in the practicalities of adjudication.

Judges elect a President of the Tribunal from among their number, who has an important supervisory role over the operation of the Tribunals. The duties of the President judicial, administrative and diplomatic, and include appointing Trial Chambers, reporting to the Security Council, sitting on a variety of internal management committees, fundraising and meeting with diplomatic personages.

Trial Chambers make findings of fact and law, and determine the guilt and innocence of the accused. They control the trial of the accused, and are responsible for ensuring a fair trial in accordance with law. Single Trial Chamber judges will also supervise certain pre-trial steps, such as confirmation of the indictment and presentation of the accused when she or he is taken into custody. Each Trial Chamber is supported by 5 Legal and 4 non-legal staff.

Appeals may be brought on questions of law, or an error of fact that has occasioned a miscarriage of justice. Appeal Chamber judgments ensure uniformity with regard to matters of law, and provide decisive guidance to Trial Chambers on substantive and procedural matters. The joint Appeals Chamber for both the ICTR and ICTY was created to maintain cohesion in the interpretation and application of international criminal law across both Tribunals. Appeals Chambers are supported by 7 legal and 4 non-legal staff.

As at 14 September 2001, the ICTR had completed 8 trials involving 9 accused. Those convicted thus far have been mostly regional officials who planned and instigated the Genocide, but have included the former Prime Minister. A further 6 trials involving 15 accused had commenced. 24 out of the 48 persons in custody had been tried or were being tried. 12 new indictments were confirmed and six new arrests and transfers to the ICTR were effected.¹²¹

As at 6 February 2002, the ICTY had completed trials of 31 accused and had commenced the trial of 10 accused. Persons so far convicted have ranged from relatively low-level prison commandants to key military and civilian officials who planned and executed the Srebrenica massacre. A

¹²¹ *Sixth Annual report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, A/56/351, S/2001/863, 14 September 2001, at para 1.*

further 19 accused were in the pre-trial stage. 15 accused are currently pursuing appeals. 44 persons are in the pre-trial custody of the Tribunal, and 30 public indictments are outstanding.

At the current rate of trials and level of resources, the ICTR will complete all trials of current detainees by 2007. The Prosecutor has indicated that she intends to indict a further 136 individuals. Even if all these individuals are promptly arrested, the ICTR will not complete their trials until 2023, or, at the earliest, 2011.¹²² In 2000, the President of the ICTY projected that current and future cases would be completed in 2007.¹²³ The Prosecutor has announced that she plans to open 36 new investigations, covering 150 suspects. If all these persons were indicted and arrested, the ICTY could not on current resources complete its work until 2016.¹²⁴

(ii) *Registry*

The Registry has three functions: it directly assists Chambers in their judicial work; it performs a number of court-related functions (such as maintaining detention facilities, registers of defence counsel and witness protection), and; it performs the administrative functions of the Tribunals. Its considerable responsibilities mean that the Registry consumes between 70 and 75 percent of each Tribunal's budget.

Direct judicial assistance includes scheduling cases and courtrooms, providing translations, transcripts, official versions of judgments and orders, and research and drafting assistance.

Both Tribunals have established sophisticated victim and witness protection programs, operated out of the Registry. The Victims and Witnesses Unit of the Tribunals are responsible for transportation of witnesses to and from the Tribunals, assisting with family and work related issues arising from being called to testify (such as child care or loss of earnings), and providing pre- and post-trial psychological support. Witnesses have come from as many as 30 different countries to the ICTY, and 15 different countries to the ICTR. The Units also enable witness relocation to third states where witnesses cannot return to their country of origin after testifying. In 1999-2000, the ICTY's unit assisted 430 witnesses,¹²⁵ while in 2000-2001 the ICTR's units assisted 112 witnesses.

(iii) *Office of The Prosecutor*

The Office of the Prosecutor (OTP) is the investigative and prosecutorial organ of the Tribunals. One Prosecutor is responsible for both Tribunals, with a Deputy Prosecutor permanently based in each location. Entrusting a single individual with responsibility for both Tribunals was intended to promote uniformity in prosecutorial approach, allow the ICTR to benefit from the experience of the ICTY, and promote cost-effectiveness.

¹²² *Ibid* para 45.

¹²³ A/55/382, S/2000/865

¹²⁴ *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, A/55/273, S/2000/777* at paras 335-6.

¹²⁵ *Ibid* para 224.

In 1999, the OTP in The Hague had a staff of 346, divided between the Investigations Division and the Prosecutions Division. The Investigations Division consists of 10 teams of 8-10 personnel, under the supervision of a Commander. Investigative teams are assisted by a Forensics Unit, Military Analysis Team, Leadership Research Team and a Fugitive Intelligence and Sensitive Services Unit. The Prosecutorial Division consists of a Trial Section with 8 Senior Trial Attorneys, 8 Legal Officers, 8 trial support assistants and 8 case managers. 16 Co-Counsel assist Trial Attorneys, as do a Legal Advisory section of 23 lawyers. A trial teams usually consists of one Senior Trial Attorney, two Co-Counsel, One Legal Officer, a trial support assistant and a Case Manager.

The Information and Evidence Unit consists of about 60 staff who assist both the Investigations and Prosecutions Division with the processing and storage of evidence, documents and other information.

The structure of the OTP in Arusha is largely the same, although the total number of posts in 1999 was 190. There are 117 posts in the Investigations Division, and approximately 50 posts in the Prosecution Division.

(iv) *Overall budget and personnel*

In 2000-2001, the annual budget approved by the General Assembly for the ICTY was US\$ 96,443,900. The ICTY received an additional \$32 million in voluntary contributions. Its approved staff was 968.

In 2000-2001, the annual budget for the ICTR was \$86,154,900, with 810 authorised posts. The combined budget of the two Tribunals approximates 10 percent of the annual expenditure authorised by the General Assembly. Assuming that the Tribunals will both operate for another 10 years, and that their budgets remain at approximately US\$ 100 million each, they will cost another US\$2 billion to complete their work.

(d) **An Outline of Tribunal Procedure and Functioning**

(i) *Investigation and Indictment*¹²⁶

Proper investigation and careful drawing of an indictment are crucial to a successful prosecution. Prosecutions in both Tribunals have sought to focus on the most egregious cases of crimes under international law, and leadership figures who instigated, authorised or oversaw them. Proving facts necessary to establish the mental elements of international crimes and command responsibility requires large volumes of evidence taken from many different locations and sources.

Investigations are therefore lengthy and resource intensive, requiring numerous trips to areas within the former Yugoslavia, Rwanda and third countries. Internal reviews of investigations are conducted on a six monthly basis. An analysis of investigative work underlying selected

¹²⁶ The most detailed account of the investigation process is found in report of the Expert Group which reviewed the functioning of the Tribunals, from which this account is drawn: *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, A/54/634*, 22 November 1999 at 45 ("Experts' Report").

ICTY and ICTR indictments indicates that many involve more than one hundred witness interviews, 40 or 50 field visits and travel to four or more countries. The volume of documentation gathered in evidence has overwhelmed the Information and Evidence section of the ICTY, which in 1999 had a backlog of over 570,000 pages to be entered into its database. Both Tribunals have confronted a shortage of interpreters and translators.

The Statutes of both Tribunals¹²⁷ provide the Prosecutor with the power to question suspects, victims and witnesses, collect physical and documentary evidence and conduct on site investigations. Rules of Evidence and Procedure for each Tribunal enumerate these powers in greater detail.¹²⁸

The Prosecutor is authorised under the Statutes to request states' cooperation in the collection of evidence on their territories, and states are (in principle) required to respond to such requests without undue delay, in accordance with their general obligation to cooperate with the Tribunals. Once an indictment has been filed and confirmed, the Prosecutor may seek a judicial order from a judge or the Trial Chamber in order to identify or locate persons, take testimony or produce documents.¹²⁹

In practice, the Prosecutor's investigative powers cannot be meaningfully exercised without cooperation from the national authorities of the state in question. The ICTR has achieved a high degree of state cooperation, both from Rwanda, and in the region. The ICTY's experience is less positive, due to the political situation in the Balkans. The Group of Experts summarised the situation in 1999:

“Access to crime sites in Bosnia and Herzegovina and Kosovo is no longer a major problem. But such is not the case with respect to other areas of the former Yugoslavia. Thus in Republika Srpska, all investigative missions are undertaken only with SFOR protection because perpetrators still control areas in which crimes were committed ... Access to witnesses is not a major problem in most areas except in the Federal Republic of Yugoslavia, where there is no access at all ... Other parties, also, are unwilling to part with important documents ... But search warrants are of no avail in Croatia or the Federal Republic of Yugoslavia, where there is no NATO force to provide security for the execution of a warrant.”¹³⁰

Where there is sufficient evidence to establish a prima facie case against a suspect, the Prosecutor will prepare an indictment and forward it to the Registrar with supporting material. The indictment and supporting

¹²⁷ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, arts 16-18; Statute of the International Criminal Tribunal for Rwanda, arts 15-18.

¹²⁸ See: Rules of Evidence and Procedure for the International Criminal Tribunal for Rwanda, <www.ictj.org/wwwroot/ENGLISH/rules/310501/index.htm>; and Rules of Evidence and Procedure for the International Criminal Tribunal for the Former Yugoslavia, <http://www.un.org/icty/basic/rpe/IT32_rev22con.htm>.

¹²⁹ Rules of Evidence and Procedure (Rwanda), rules 39-43, 47-65; Rules of Evidence and Procedure (Yugoslavia), rules 39-43, 47-61.

¹³⁰ Experts' Report, above n 129 at 52.

material must be reviewed and confirmed by a judge before they can be issued.¹³¹ Indictments are generally made public, but in certain circumstances the Prosecutor can request that the indictment be sealed to facilitate the apprehension of the accused.¹³² Upon issuance of the indictment, the suspect is formally charged with a crime and becomes susceptible to arrest and detention.

In order to detect suspects, each Tribunal has a Fugitive Tracking Unit, or equivalent, which liaises closely with national police and intelligence agencies of other states to determine the whereabouts (and in some cases, the new identities) of accused persons. In 2000-2001, the ICTR's Tracking Team located and arrested four persons wanted by the Tribunal.

(ii) *Arrest and Detention*

A judge may issue an arrest warrant for the accused upon confirming the indictment. The warrant and indictment are then transmitted to INTERPOL and the national authorities of the state in which the accused is believed to presently reside. The Tribunal can, in certain circumstances, request the provisional arrest and detention of persons against whom an indictment is pending.

Once a request for arrest or provisional arrest has been received, a state is bound to act promptly and with due diligence to locate, arrest and transfer the accused.¹³³ The obligation derives from specific articles of the Statutes, and their status as enforcement measures under Chapter VII of the UN Charter, and takes precedence over any internal law or extradition treaty. The transfer of indictees does not amount to extradition but *surrender*, and so does not require the state to conclude a treaty or extradition arrangement with the Tribunal: at international law, the Chapter VII mandate constitutes sufficient basis for the transfer of the indictee to the Tribunal's custody.

Where a state fails to execute an arrest warrant, the President of the Tribunal may report a state's non-compliance to the Security Council.¹³⁴ The Security Council is not obliged to act on this report, but may issue a condemnation of the non-cooperating state, or take stronger measures such as the imposition of sanctions.

In the event of non-cooperation, the Prosecutor may also seek an order under Rule 61 of the Rules of Evidence and Procedure. Where the Prosecutor has been unable to effect personal service of an indictment, but has taken reasonable measures to do so and has tried to inform the accused of the charge against her or him by advertising the indictment, a judge can order a state or states to freeze the assets of an accused and issue an international arrest warrant to be transmitted to all states. The judge can only make such an order if she or he is satisfied that there are reasonable grounds for believing that the accused committed a crime

¹³¹ *Statute (Rwanda)*, art 18; *Statute (Yugoslavia)*, art 19.

¹³² *Rules of Evidence and Procedure (Rwanda)*, rule 53; *Rules of Evidence and Procedure (Yugoslavia)*, rule 53.

¹³³ *Statute (Rwanda)*, art 28; *Statute (Yugoslavia)*, art 29; *Rules of Evidence and Procedure (Rwanda)*, rule 56; *Rules of Evidence and Procedure (Yugoslavia)*, rule 56.

¹³⁴ *Rules of Evidence and Procedure (Rwanda)*, rule 59; *Rules of Evidence and Procedure (Yugoslavia)*, rule 59.

charged in the indictment. If the judge is satisfied that the reason why the accused has not yet been arrested is the non-cooperation of a state, he or she can certify that finding, and the President of the Tribunal may report it to the Security Council.

Indictees have the right to be informed of the charges against them; to be assisted by counsel; to have counsel appointed if indigent; to have a free interpreter; to remain silent, and be cautioned that anything they say may be used in evidence.¹³⁵

(iii) *Appointment of Defence Counsel*

An accused has the right to defence counsel, who may be appointed by the accused, or assigned by the court where the interests of justice require or where the accused has insufficient means to retain counsel. Assignment of counsel to indigent accused is administered by the Registrar, in accordance with the Rules of Evidence and Procedure and Presidential Directives. Accused to whom defence counsel are assigned may choose from a register of names maintained by the Registrar.

Defence counsel are paid at an hourly rate which is intended to reflect the assumption that those capable of running complex and lengthy defence proceedings will be senior practitioners. For senior lawyers from developed states, the amount paid may not be adequate compensation for income foregone by taking leave from their own professional practices; on the other hand, for professionals from some developing states, the remuneration is far in excess of what they would earn in their countries of residence.

The danger in either case is that counsel will invest less or more time than is appropriate in the preparation of the case.¹³⁶ There have also been allegations of defence counsel giving a portion of fees to the accused or his family, in exchange for which the accused continues to retain that counsel.¹³⁷ Supervision of the fees charged by defence counsel is a significant administrative responsibility for the Registry.

In 1999, it was estimated that each defence team cost between US\$22,000 and US\$ 25,000 per month. The 1999 ICTY budget for defence counsel was US\$14 million (15 percent of annual budget), and the ICTR's estimate for 2000 for this purpose was US\$10,195,000 (10 percent of total expenditures).

Defence counsel are bound by a Code of Professional Conduct promulgated by the Registry, and individual counsel have been fined for contempt of the Tribunal. The 1999 Expert Group's review of the operation of the Tribunals noted some concern about the quality of some defence counsel. Moreover, the fact that most defence counsel came from civil law systems (while prosecutors were predominantly from common law systems) placed defence counsel at a relative disadvantage in the

¹³⁵ *Rules of Evidence and Procedure (Rwanda)*, rule 42; *Rules of Evidence and Procedure (Yugoslavia)*, rule 42.

¹³⁶ *Experts' Report*, above n 129 at 31.

¹³⁷ *Ibid.*

predominantly adversarial trial procedure of the ICTY, due to their unfamiliarity with adversarial techniques.¹³⁸

(iv) *Trial*

The time elapsing between transfer to the Tribunal and completion of trial is generally between 18 and 36 months. There are several causes of this lengthy delay. Pre-trial procedures and motions, in which either side (usually the defence) challenges the regularity of conduct in the lead up to the trial or disputes requests for disclosure by the other side, can consume many months. For example, jurisdictional and interlocutory challenges in the *Kanyabashi* and *Nsengiyumva* (ICTR) cases delayed proceedings for 9 months.

Until relatively recently, both Tribunals lacked sufficient courtrooms to run all three trial chambers simultaneously, and before appointment of *ad litem* judges in 2001, no more than three Trial Chambers and one Appeal Chamber could hear cases at any one time. Once trials commence, their length, complexity and resource intensiveness makes it difficult for a Trial Chamber to hear more than one trial at a time.

In order to obtain a conviction, the Prosecutor must establish each element of the relevant crime beyond reasonable doubt. Establishing guilt under international criminal law is complex, because of the scale of the crimes and the multiple elements that must be established (such as the existence of an international armed conflict). The amount of evidence that must be adduced is therefore far in excess of ordinary criminal trials. In ICTY proceedings in 1997 and 1998, 699 witnesses testified and their testimony filled 90,000 pages of transcript.¹³⁹ It is not unusual for joint trials of several defendants - each charged with multiple offences - to run for more than one hundred trials days. The length of proceedings and volume of evidence in turn increases the time required for judgments to be produced, and for appeal hearings to run their course.

The trial procedure is governed by the Rules of Evidence and Procedure, which are intended to be a hybrid of common law and civil law criminal process. The format of the hearing is closer to the adversarial system, but with certain judicial powers more usually found in civil systems (such as judges' power to call witnesses of their own motion). Judges have greater powers than in a common law adversarial trial to control the direction of proceedings, although do not exercise them often.¹⁴⁰

The rules of evidence are relaxed to allow probative evidence to be admitted (subject only to the judges' assessment of weight), and there is an increased reliance of affidavit evidence to reduce the number of witnesses called.¹⁴¹ Judges have the power to make extensive orders to

¹³⁸ Judge P Wald, "The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court" (2001) 5 *Washington University Journal of Law and Policy* 87.

¹³⁹ *Experts' Report*, above n 129 at 26.

¹⁴⁰ *Ibid* at 29.

¹⁴¹ Judge Patricia M Wald, "To 'Establish Incredible Events by Credible Evidence': the Use of Affidavit Testimony in Yugoslavia War Crimes Tribunals Proceedings" (2001) 42 *Harvard International Law Journal* 535; R May and M Wierda, "Evidence before the ICTY" in R May, D Tolbert, J Hocking, K Roberts, B B Jia, D Mundis and

protect witnesses, including orders requiring the identity of witnesses to be withheld from the defence. Some of these measures tread a fine line between protecting witnesses and prejudicing the accused's right to meet the case against him.

Where an accused is found guilty, the Trial Chamber may hold a separate hearing on penalty to consider the individual circumstances of the accused and any aggravating or mitigating factors which could affect the sentence.¹⁴² The death penalty or any other punishment inconsistent with international human rights law cannot be imposed. Multiple sentences can be served consecutively or concurrently, and can take into consideration the length of time served in pre-trial detention. Terms of imprisonment are served in the national prison facilities of states who have concluded agreements with the Tribunals to accept convicted prisoners. The Tribunals may also order the convicted person to restore property or proceeds from property taken from victims,¹⁴³ but neither Tribunal can make orders for compensation.

(e) State Cooperation

Article 28 of the ICTR Statute and Article 29 of the ICTY Statute provide that states "shall cooperate" with the Tribunals in the investigation and prosecution of persons accused of serious violations of international humanitarian law. States must "comply without undue delay" with any request or order issued by a Trial Chamber. As noted above, the terms of the Statute are binding on states as Security Council enforcement measures pursuant to Chapter VII of the UN Charter and take precedence over any other international legal obligations other than those of a *jus cogens* nature. Thus, in point of legal principle, the Tribunals are armed with the strongest possible mandate to require compliance. However, as discussed below, the Tribunals have few *practical* methods to compel states to comply with their legal obligations; the legal powers of the Tribunal are in effect another bargaining chip in international relations.

2.3 Important Considerations in the Operational History of the Tribunals

The first President of the ICTY once described it as an

*"armless and legless giant that needs artificial limbs to act and move. These limbs are the state authorities ... the national prosecutors, judges and police officials. If state authorities fail to carry out their responsibilities, the giant is paralysed, no matter how determined its efforts."*¹⁴⁴

A constant theme in all reviews of the Tribunals' operation is their practical impotence in the face of non-cooperation. Almost every stage of the Tribunals' work, from investigation to arrest and trial, depends on state cooperation with its requests and orders.

G Oosthuizen, *Essays on ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald* (2000, Kluwer) at 447-261.

¹⁴² *Statute (Rwanda)*, art 23; *Statute (Yugoslavia)*, art 24.

¹⁴³ *Statute (Rwanda)*, art 23.3; *Statute (Yugoslavia)*, art 24.

¹⁴⁴ Statement of Antonio Cassese, President of the International Criminal Tribunal for the Former Yugoslavia, to the Parliamentary Assembly of the Council of Europe, *Dayton Four Months On: The Parties' Cooperation with the International Criminal Tribunal for the Former Yugoslavia (ICTY) under the Dayton Peace Agreement* (Apr. 25, 1996)

Non-cooperation can take the form of outright defiance by states antagonistic to the existence of the Tribunals and their work, to the more subtle approach of outwardly supporting the institutions while failing to accord priority to their objectives, if they conflict with the diplomatic imperatives of the state concerned. Both trends are evident when one examines two features of the operational history of the courts: the time taken to become functioning institutions, and; the waxing and waning of diplomatic support for the Tribunals.

(a) *Time taken to become functioning courts*

In its first three years, the ICTY was chronically under funded and understaffed. It was 15 months before a full-time Prosecutor was appointed, and he recalls that when he arrived in The Hague there was neither basic equipment nor the funding to purchase it.¹⁴⁵ Protracted and at times mystifying bureaucratic processes had to be engaged in appoint staff necessary to commence the Prosecutor's work, and to secure funding for their activities.

The shortage of money was initially so serious that the trial of the Tribunal's first accused in custody had to be delayed by 6 months because there was no provision for payment to defence counsel.¹⁴⁶ The second year's budget of US\$32 million barely covered the costs of premises and personnel, and left less than 2 percent for the "*critical work of tracking down witnesses, obtaining and translating their accounts, exhuming mass graves and conducting post-mortems, [sic] and providing medical and forensic expertise.*"¹⁴⁷ Goldstone eventually stated in frustration, "*If these restrictions continue, they will ... render unconscious the Yugoslav tribunal ... The criminal justice system cannot conduct itself if resources are turned on and off.*"¹⁴⁸ It is unsurprising that in 1995, parties to the Yugoslav conflict regarded the ICTY as "little more than a public relations device."¹⁴⁹

The beginnings of the ICTR were even more faltering. Two and a half years after its creation it had not commenced a single trial, and was plagued by reports of mismanagement, underqualified legal staff and indifference at UN Headquarters in New York. An audit conducted by the Office of Internal Oversight Services in early 1997 concluded that:¹⁵⁰

"not a single administrative area functioned effectively ...

"Functions were hampered by lack of experienced staff as well as lack of vehicles, computers and other office equipment ...

"The effective establishment of the Tribunal had been affected by the short-term funding arrangement ...

¹⁴⁵ Goldstone, above n 115.

¹⁴⁶ Prepared Testimony of Thomas S. Warrick, Special Counsel, Coalition for International Justice Before the House Committee On International Operations and Human Rights, Re: United Nations Support For the Yugoslavia and Rwanda War Crimes Tribunal, Federal News Service, Oct. 26, 1995

¹⁴⁷ "Prosecute Bosnia's War Criminals", N.Y. Times, Jan. 4, 1995, at A18

¹⁴⁸ Raymond Bonner, "U.N. Fiscal Woes Are Said to Threaten War Crime Tribunals", N.Y. Times, Oct. 4, 1995, at A8.

¹⁴⁹ Richard Holbrooke, *To End A War* (1999, Modern Library) 190.

¹⁵⁰ *Report of the Office of Internal Oversight Services on the Audit and Investigation of the International Criminal Tribunal for Rwanda, A/51/789*, <www.un.org/Depts/oios/reports/a51789/ictrtit.htm> .

“The Secretariat also failed to provide adequate short-term support ... during the critical start up phase...”

“Senior personnel in the Department of Administration and Management and in the Office of Legal Affairs advised OIOS that they did not bear responsibility for the effectiveness or functionality of the Tribunal beyond very limited specifically assigned tasks. ...”

These failings perhaps reflect the unavoidable consequences of delegating a complex and difficult task such as the creation of a functioning criminal court to the United Nations, an organization the structure and membership of which predisposes it to inertia, recurrent failures of institutional learning and an incapacity to see beyond the next budget cycle.

Compounding these structural limitations was the novelty of the enterprise of establishing an international criminal tribunal and prosecuting international crimes. With no comparable experiment since Nuremberg, even the most qualified and committed personnel were adapting existing skills to an unprecedented institution, and investigating events in countries about which they probably had little understanding. It is unsurprising that a prosecutorial strategy adapted to the specific context of the crime base took sometime to develop.

As seems to be the pattern with so much UN decision-making, it was not until the Tribunals were close to complete failure did the sense of crisis provoke a serious effort to prevent their collapse.

The Tribunals' change in fortune after 1997 is also partly attributable to a temporary reprieve in the UN's fiscal crisis, and the willingness of key figures such as the President and the Prosecutor to use their considerable diplomatic and public relations talents to secure support for the institutions. Nevertheless, it would be another two years before the ICTR and ICTY began to function as fully fledged criminal courts, begging the question of whether they succeeded because of, or in spite of, the influence of the international community.

(b) *Vicissitudes of the Diplomatic Agenda*

The extent to which the Tribunals' effective functioning depends upon shifting diplomatic priorities among sponsor states is best illustrated by the experience of the ICTY, where non-cooperation from Balkan states was commonly encountered. Despite an armed peace keeping force (IFOR, later to become SFOR) deployed in Bosnia Herzegovina which was authorised to arrest persons indicted by the Tribunal, NATO showed little interest in apprehending suspects that were easily locatable. Former Prosecutor Justice Louise Arbour observed that *“it was obvious that a political direction had been given not to be proactive in supporting the Tribunal.”*¹⁵¹

This policy of “monitor but don't touch” did not change until late 1997, when it became clear that the impunity enjoyed by local militia leaders, many of whom were indictees, was encouraging them to obstruct IFOR's work.¹⁵² Even then,

¹⁵¹ Jennifer Llewellyn and Sandra Kaponi, “The Protection of Human Rights through International Criminal Law: A Conversation with Madam Justice Louise Arbour, Chief Prosecutor for the International Criminal Tribunals for the Former Yugoslavia and Rwanda” (1999) 57 *University of Toronto Faculty of Law Review* 83, 85.

¹⁵² Michael P. Scharf, “The Tools For Enforcing International Criminal Justice In The New Millennium: Lessons From The Yugoslavia Tribunal” (2000) 49 *De Paul Law Review* 925, 962

NATO's arrest policy proceeded on a "case-by-case" policy, which tended to seek out less significant indictees rather than high profile leaders likely Karadzic and Mladic. Nevertheless, the new policy caused the number of indictees in custody to jump from 8 to 22 in one year, with arrests supplemented by voluntary surrenders - perhaps prompted by the fact that "it is pretty scary to be arrested by an international military force."¹⁵³

Where indictees were not susceptible to capture by NATO forces, such as those in the territory of Croatia and the Federal Republic of Yugoslavia, the only recourse of the Tribunal has been the denunciation of non-cooperation to the Security Council under Rule 59 or Rule 61. In 1996, then-President of the Tribunal, Antonio Cassese, twice notified the Security Council of the Federal Republic of Yugoslavia's failure to comply with arrest warrants.¹⁵⁴ The Security Council duly noted the correspondence and issued a statement "deploring" the lack of cooperation, but took no further steps.

The Tribunal still relies, in effect, on pressure from states with bilateral relations with the non-cooperating state. If the balance of diplomatic interest is tilted in favour of demanding compliance, Tribunal orders can produce remarkable results, such as Croatia's surrender of Kordic and nine other suspects under a US threat to veto a crucial International Monetary Fund (IMF) loan, and the FRY's surrender of Milosevic to be eligible for massive reconstruction aid. The Milosevic transfer also illustrates another limitation on the Tribunal's ability to secure cooperation: even with full backing from the donor community, it was not until a change of regime in Belgrade that the FRY would be susceptible to pressure to surrender Milosevic.

The politics of custody exemplify the extent to which an international criminal tribunal's coercive authority depends on whether its sponsor states see, at a particular point in time, sufficient coincidence between their own interests and the effectiveness of the Tribunal. The recent rapid increase in the number of persons in custody in The Hague is thus the product of factors largely outside the ICTY's control, such as changes in the political leadership in Croatia and the FRY, and a crescendo in US and EU support in the aftermath of NATO's use of force in Kosovo (predicated as it was on NATO's proclaimed intention to prevent and punish grave human rights abuses).

In the absence of these factors, it is doubtful whether the net effect of an ICTY arrest warrant or order would be more than to confine the accused to residence in and movement between countries that refuse to cooperate; if one of the countries is the accused's home, then the inconvenience to him or her will not be overwhelming.

Writing in 1995, one of the intellectual architects of the ad hoc international criminal tribunals, M. Cherif Bassiouni, enumerated 8 factors upon which the effectiveness of the Tribunals would depend.¹⁵⁵ In hindsight, the list is prescient, and provides a useful summary of the key issues relevant to the prospects of success for an international criminal tribunal:

¹⁵³ Louise Arbour, above n 154, 85.

¹⁵⁴ S/1996/316 (1996) (24 April) and S/1996/364 (1996) (22 May).

¹⁵⁵ M. Cherif Bassiouni, "Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal" (1995) 18 *Fordham International Law Journal* 1191.

- (A) A capable, committed Prosecutor with diplomatic skills;
- (B) Sufficient resources, human and material;
- (C) Ability to secure evidence;
- (D) Ensuring the safety of victims and witnesses;
- (E) Effective and capable management;
- (F) Adequate funding by the General Assembly;
- (G) Political support from major governments;
- (H) Legal cooperation with the tribunal by all states holding suspects or evidence.

As the ICTY observed in its Fifth Annual Report, “*the potential benefits of the Tribunal's work can not be realized until the international community demonstrates the same commitment to empower the Tribunal as it had shown when it established it.*”¹⁵⁶

(c) *Have the ICTR and ICTY achieved their Objectives?*

- (i) *Retributive Justice*: the achievement of this goal is contingent on the Tribunals’ ability to gain custody over indictees. If the initial slowness in arresting key figures had persisted, then it would not have been plausible for the Tribunals to claim that they had done justice to the victims. However, the rapid increase in the number of persons in custody, and changed political fortunes, mean that the Tribunals have been able to try, or are trying, major figures from both the former Yugoslavia and Rwanda. The limited survey material available indicates that victims in the former Yugoslavia do perceive the ICTY as capable of trying suspects fairly, and of handing down just decisions against perpetrators.¹⁵⁷
- (ii) *Deterrence*: it is difficult to assess the deterrence effect of the Tribunals except in the long term. Certainly, if the credible threat of arrest and punishment is low, then the deterrence effects are likely to be negligible. The convictions and indictments of the ICTY appeared to do little to deter human rights abuses in Kosovo in 1999, while the existence of the ICTR did not seem to give the marauding armed groups of Sierra Leone pause for reflection. Even proponents of the deterrent thesis concede that Tribunals are at best a “modest and incremental, rather than dramatic and transformative”¹⁵⁸ deterrent against future abuses.
- (iii) *Preserving memory and a historical account*: A former judge on the ICTY, Patricia Wald of the United States, has queried whether courts are

¹⁵⁶ *Fifth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of the International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, S/1998/737 (1998) at para 276.

¹⁵⁷ Sanja Kutnjak Ivkovic, “Justice By the International Criminal Tribunal for the Former Yugoslavia” (2001) 37 *Stanford Journal of International Law* 255.

¹⁵⁸ Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?” (2001) 95 *American Journal of International Law* 7, 31.

appropriate mechanisms to establish an accurate historical record. The adjudication of historical causes of a conflict in the context of criminal proceedings necessarily concerned with establishing elements of crimes often produces “inadequate history”.¹⁵⁹ Facts and opinions irrelevant to proving or disproving a particular charge may be overlooked. Further, judges’ expertise is to define and apply rules, which is rarely conducive to nuanced history. Indeed, it may result in a “perpetrator driven” historical account that polarises understanding of the conflict. A joint study of legal professionals in Bosnia Herzegovina (“Bosnian judges’ study”) suggests that the ICTY’s judgments have not helped create a rational consensus on the causes and nature of the war.¹⁶⁰

- (iv) *Reconciliation and Social Reconstruction*: the Bosnian judges’ study referred to above concluded that “*the widely held belief that war crimes trials - which individualise accountability - contribute to social reconstruction may reflect more of an aspiration than a reality.*”¹⁶¹ The hope that individualising guilt would both dispel collective blame and encourage reconciliation between ethnic or national groups remains elusive. The Bosnian judges’ study found instead that communities tended to view tribunal activities through the polarised lenses of ethnic affiliation, leading to a reconfirmation of entrenched positions. Its comment on these findings is insightful:

“[Reconciliation] may not occur where people are faced with judicial decisions that do not correspond to their perceptions of what happened. Evidence sufficient to bring about a guilty verdict may not be enough to override solidified national group perspectives ...

“Diplomats, world leaders, ICTY officials and human rights proponents may be advocating that the ICTY achieve an objective for which there is no broad-based acceptance among participants.”¹⁶²

The indeterminate impact of the Tribunals on national reconciliation may also reflect organisational limits of the institutions themselves. Available material indicates that, after five years of operation, the ICTY remained alien and poorly understood within the national communities most affected by its work. Apart from a lack of information about the Tribunal, its operations and current activities, the Bosnian judges’ study revealed that legal professionals in Bosnia Herzegovina found international personnel’s attitude towards them condescending and uncommunicative. No consistent effort was made to engage them with the Tribunal’s work, and even those who wanted to understand more had difficulty in accessing information. This lack of information allowed political leaders antagonistic to the ICTY to easily distort and misrepresent its work.

¹⁵⁹ Wald, above n 141, at 117.

¹⁶⁰ Human Rights Center, University of California at Berkeley and Center for Human Rights, University of Sarajevo, “Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors” (2000) 18 *Berkeley Journal of International Law* 102.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

Since late 1999, the ICTY has been proactive in endeavouring to rectify this situation, creating an Outreach programme and establishing information offices in regional capitals.¹⁶³ The ICTR has also commenced Outreach activities. These efforts reflect a sincere commitment to closing the gap between the Tribunals and the societies in which they operate.

2.4 Issues for the East Timorese

The most consistently reiterated rationale in favour of an international criminal tribunal encountered in East Timor was the perception that such a court would necessarily, or was more likely to, gain custody over high level suspects now in Indonesia. It is clear from the experience of the ICTY that, despite a strong legal mandate, international politics dominates the possibilities of gaining custody over an indictee, and that the factors which enabled the ICTY and ICTR to obtain custody were often beyond the control of the institutions themselves.

Even where the Presidency of the Tribunal used its direct channel to the Security Council to denounce non-cooperation, results were not guaranteed. It should be noted, however, that this action by the Presidency did ensure an immediate airing of grievances in a multilateral forum, which is arguably faster and more direct than normal processes of bilateral diplomacy. Nevertheless, in the last instance, it is the bilateral pressure that appears most effective.

Enormous political will and momentum must be generated not only to establish an international criminal tribunal, but to ensure that it does not languish without resources and assistance. This is a considerable investment of energy and time, which must be accepted and carried forward by the new East Timorese government in bilateral and multilateral diplomatic channels.

Currently, the East Timorese Government has failed to make justice for serious violations of international humanitarian law an issue in international fora. Indeed, UN sources suggest that donors have received the impression that justice is not a priority. Sources within Fretilin state that there has yet to be a full debate within and between political parties about the future of the Serious Crimes process, and what approach should be taken on justice demands. The result is that there is no coherent or consistent view being presented internationally or nationally on ways to advance prosecutions.

It seems unlikely that the East Timorese Government will make the considerable political and diplomatic effort necessary to generate support for a Tribunal unless it is galvanised to do so by popular pressure. In the absence of a clear position on the part of the new government, international justice will not become a priority among the many pressing issues for which it will have to seek international assistance.

Were an international criminal tribunal for East Timor to be created, the experience of previous tribunals suggests that it would take up to three years to become functional and commence trials, which will delay justice further. There is no guarantee that a new international criminal tribunal would not suffer the same management, personnel and resource difficulties that have incapacitated the Special Panel, or that hampered the ICTY and ICTR in its first three years. It is possible that such a tribunal would be even more

¹⁶³ Jon Cina and Lal C Vohrah, "The Outreach Programme" in R May, D Tolbert, J Hocking, K Roberts, B B Jia, D Mundis and G Oosthuizen, *Essays on ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald* (2000, Kluwer) at 551

removed from East Timorese society than the Serious Crimes process, for a number of reasons:

- (A) International criminal tribunals are established as instruments of the international community, not of the post-conflict state. As the ICTY and ICTR's experience indicates, they are under no obligation to respect the wishes of the post-conflict society, and frequently do not. It is to be recalled that the Security Council passed the Statute for the ICTR in a form objected to by Rwanda, indicating that the views of the state concerned are not paramount.
- (B) Public outreach has not been a consistent feature of the Tribunals until very recently.
- (C) "Capacity-building" is not, and has never been, a function of international criminal tribunals which, by definition, are regarded as "extraordinary" courts intended to perform a function that national courts are unable or unwilling to perform. Moreover, a "pure" international court would be unwilling to align itself with the judicial system of any one state, as this may be perceived as compromising its neutrality and impartiality as an organ of the international community. Indeed, it is unlikely to be based in either East Timor or Indonesia, because of a lack of infrastructure in the former and security considerations in the latter. To this extent, the current process is in principle better suited to "capacity building," although it has failed to achieve this aim.

Consideration therefore needs to be given to whether the resources required to generate the political will to create and operate an international criminal tribunal might not be more effectively devoted to either: creating pressure from the Security Council on Indonesia to cooperate with investigations and transfer suspects indicted by the Serious Crimes Unit to the Special Panel, or; securing passage of a Security Council resolution which requires Indonesia to cooperate in all relevant respects with the Serious Crimes process in the new mission, superseding the now-defunct MOU between UNTAET and Indonesia.

These limited demands may have much the same practical effect as an arrest warrant issued by an international criminal tribunal to a non-cooperating state, but they are more palatable to Security Council members and Indonesia's donors. If such steps are taken, and Indonesia still refuses to comply, the perceived necessity for an international criminal tribunal may be greater among Security Council members.

An unresolved issue is the status of the Serious Crimes process after late 2003. Section 163 of the Constitution of the Democratic Republic of East Timor preserves the Special Panel, but limits its temporal jurisdiction to cases of "crimes against humanity" committed between 1 January and 25 October 1999. The Special Panel has no place in the court structure envisaged by the new Constitution, and will continue to exist only as long as "deemed strictly necessary" to "conclude the cases under investigation." It is uncertain which government organ or official is responsible for deciding the meaning of "strictly necessary," or which cases are included in the phrase "the cases under investigation."

In any event, it appears that the Serious Crimes process will lose its guaranteed funding from assessed contributions after December 2003, and will be reliant thereafter on bilateral voluntary contributions. This will jeopardise the financial viability of the

process. Voluntary contributions are limited at the best of times, and will not be sufficient to maintain even the current, meagre level of resources unless the new East Timorese Government takes a firm position on continuing the work of the Serious Crimes process.

2.5 Prospects for an International Criminal Tribunal for East Timor

If an international criminal tribunal continues to be demanded, the following considerations are relevant to the chances of establishing one:

(a) *Tribunal Fatigue*

The cost, indefinite life span and administrative needs of the two international tribunals has caused some in diplomatic circles to talk of “Tribunal fatigue”.¹⁶⁴ The process of establishing and operating the tribunals has proved not only time consuming, but politically exhausting. Permanent members of the Security Council have publicly and privately questioned the desirability of engaging in the exercise again.

The reluctance to allow the UN to be financially responsible for another international criminal tribunal is illustrated by the Security Council’s steadfast and unanimous rejection of funding the proposed Sierra Leone tribunal from assessed funds, despite several warnings from the Secretary-General that the tribunal cannot function solely on voluntary contributions. Indeed, the United States and France objected to the continuing use of assessed funds to support the Serious Crimes process in East Timor after the withdrawal of UNTAET, but were persuaded to waive their objections for one year. The Bush Administration has indicated its general opposition to international criminal courts, and is reported to be concerned that the ICTY is now “distorting” its agenda with post-Milosevic Yugoslavia.¹⁶⁵ In January 2002, it temporarily blocked the Fifth Committee’s approval of the Tribunals’ annual budgets, and has stated its desire to fix a time limit for courts’ work.

(b) *Geopolitics of Indonesia*

The East Timorese need no lessons in the *realpolitik* of the major powers’ relationship with Indonesia. Several developments in the last year suggest that the window of support for stronger accountability measures against Indonesia has narrowed.

Notwithstanding some US Congressional support for criminal accountability for Indonesian military personnel (as evidenced by the renewal of the Leahy restrictions in late 2001), there is a renewed push from the US Department of Defence to strengthen military ties. Since early 2001, there has been concerted activity to create a policy justification for “re-engagement” with TNI.¹⁶⁶ The basic argument is encapsulated in a 2001 RAND Corporation report:

¹⁶⁴ Telephone interview with Professor Steven Ratner, University of Texas. Professor Ratner was a member of the Group of Experts for Cambodia.

¹⁶⁵ Jonathon Steele, “US Seeks Cut Off Date for Trials”, *The Age*, 13 February 2002.

¹⁶⁶ See F Berrigan, “Indonesia at the Crossroads: US Weapons Sales and Military Training”, World Policy Institute of the New School University, October 2001; Council on Foreign Relations, *The United States and Southeast Asia: A Policy Agenda for the New Administration* (2001); RAND Corporation, *Indonesia’s Transformation and the Stability of Southeast Asia* (2001).

“The stakes for the United States in Indonesia are enormous ... An unstable or disintegrating Indonesia would make the regional security environment unpredictable, create opportunities for forces seeking to subvert the regional status quo, and generate greater demands on the United States and the U.S. military. Indonesia’s geopolitical weight makes it the bedrock of Southeast Asia...

“... Under these circumstances, a return to a more authoritarian form of government but with better governance, legitimisation through elections, and the prospect of future democratic evolution may be the most practical formula for restoring stability and regional security.”¹⁶⁷

Viewed through this lens, the continued prestige and operational capability of TNI are instrumental to the maintenance of Indonesia’s “stability,” even if the consequence is a “more authoritarian form of government.” Australia has recently shown desperation to recover a “special relationship” with Indonesia in order to develop cooperation to prevent asylum seekers arriving by boat, and has used the promise of renewed military ties as a means of smoothing out the wrinkles in current relations. Indeed, it was revealed recently that Australia has lobbied the United States’ government to restore US military cooperation with Indonesia.¹⁶⁸

Dovetailing with these trends is the “war on terror,” and the now indefinite territorial reach of the US military intervention, particularly in South East Asia. The events of September 2001 have strengthened the hand of those demanding a new “special relationship” with TNI. Admiral Dennis Blair, head of Pacific Command, stated in late January 2002 that it would be “easier to fight terrorists in Indonesia if the US resumed normal military ties with the country.”¹⁶⁹ On 7 January 2002, US Deputy Secretary of Defence Paul Wolfowitz stated his belief that

“when it comes to trying to prevent Christian/Muslim violence in Sulawesi we’re talking about something where [the] Indonesian military could be very positive. Positive in the counter-terrorism sense, positive in the human rights sense and positive for the stability [of Indonesia].”¹⁷⁰

In such an environment, it is highly unlikely that the United States or regional powers like Australia would support an initiative that would severely erode the prestige of TNI. In fact, there is a real prospect that token advances in accountability for the 1999 violence (such as a handful of convictions by the Ad Hoc Human Rights Court) will be seized upon to provide an excuse to normalise relations.

The United Kingdom and France are perhaps less preoccupied with strategic interests in South East Asia, but are likely to follow the US’ lead if the US were to discourage the introduction of a Security Council resolution to create an international criminal tribunal. The European Union’s recent Security Council statements, and statements from individual Nordic countries, suggests that accountability remains a greater source of real concern for them. Efforts should

¹⁶⁷ Rand Corporation, above n 169, at 99.

¹⁶⁸ Peter Hartcher, “PM Urges Closer US-Indonesia ties”, *Australian Financial Review*, 6 February 2002.

¹⁶⁹ “US Admiral: Easier to Fight Terror in Indonesia if Military Ties Resumed”, AP Newsfeed, 29 January 2002.

¹⁷⁰ US Department of Defence, transcript of news briefing, 7 January 2002.

thus be made to keep the issue alive in the diplomatic consciousness of these states, through bilateral representations and representations to regional bodies such as the European Parliament. Mobilising networks of East Timor support groups in these states will also contribute to maintaining a profile for justice demands. The northern European states retain some moral suasion in international circles, and could be willing to introduce a resolution in appropriate circumstances.

China's longstanding disapproval for the project of international criminal tribunals is unlikely to change. The ICTR and ICTY were perhaps too far removed from China's sphere of influence to be considered a threat, but a proposal for an international criminal tribunal in Asia would not meet the same indifference, as indicated by China's threat to veto any resolution creating a Tribunal for Cambodia. It is noteworthy that in September 1999, the Chinese considered vetoing a Security Council resolution authorising a peacekeeping force in East Timor unless Indonesia consented.¹⁷¹ In the absence of Indonesian consent to a tribunal, China may exercise its veto.

The Government of Indonesia has already indicated its strong rejection of an international criminal tribunal, and of the International Commission of Inquiry Report of January 2000.¹⁷² In the Commission on Human Rights, Indonesia diplomats successfully mobilised Asian states to oppose the resolution creating the International Commission of Inquiry. That success was partly attributable to the perception among many Asian states that the Special Session was called in a procedurally unsatisfactory manner, however the diplomatic influence of Indonesia in the region cannot be underestimated.

Windows of opportunity to create the momentum necessary to establish an international tribunal are thus narrow. Consideration should be given to developing a strategy which, while keeping the issue of accountability on the agenda of the Security Council, also takes advantage of moments of heightened international awareness concerning crimes committed in East Timor.

Parallel measures in the General Assembly and Commission on Human Rights should be also explored. These could include: bringing about the appointment of a Special Rapporteur by the Commission - or the appointment of a Special Representative of the Secretary-General - to monitor the progress of Indonesian trials and report on the progress of accountability measures. This information could then be brought to the attention of the Security Council through reports by the Secretary-General. Alternatively, following the process used in Cambodia, the East Timorese Government could request the Secretary-General and the General Assembly to appoint a Group of Experts to study means of bringing to justice persons suspected of serious violations of international humanitarian law in East Timor (although, once again, Indonesia's opposition would be significant).

(c) *Other Mechanisms of Establishment*

Apart from a Security Council resolution under Chapter VII of the Charter, a Tribunal could be created by a two thirds majority of the General Assembly under

¹⁷¹ ABC Radio National, "UN Peace-keeping team a 'miracle'" (interviewing Peter van Walsum, UN Security Council President in September 1999), 5 February 2002.

¹⁷² See letter from Alwi Shihab to Kofi Annan: Letter dated 26 January 2000 from the Minister of Foreign Affairs of Indonesia to the Secretary-General, A/54/727, S/2000/65, Annex.

the “Uniting for Peace” procedure. This procedure was pioneered by the United States to authorise (US-led) troop deployments in the Korean War, when the Security Council was immobilised by the USSR’s veto.¹⁷³ The powers of the General Assembly allow it to recommend measures for the maintenance of international peace and security, which could encompass the creation of a tribunal as a subsidiary organ of the Assembly¹⁷⁴. However, any such resolution would not have the binding effect of a Chapter VII enforcement measure, and an Assembly-created court would rely exclusively upon voluntary compliance of states.¹⁷⁵ Moreover, in all its resolutions to date, the Security Council has indicated its intention to “remain seized” of issues relating to East Timor.¹⁷⁶ Under Article 12(2) of the UN Charter, the Assembly may not exercise recommendatory powers with regard to a situation in respect of which the Security Council remains seized.

2.6 Mixed Tribunals

The experience of so-called “mixed” tribunals will be considered only briefly. The singular operating example of a mixed tribunal is East Timor’s Special Panel for Serious Crimes, the functioning of which has been reviewed in Part 2 of this report. The two other proposed mixed tribunals - Sierra Leone’s “Special Court” and Cambodia’s “Extraordinary Chambers” - are not yet functional. On 8 February 2002, the UN announced its withdrawal from negotiations with the Cambodian government concerning the establishment of an internationalised court within Cambodia.

A “mixed tribunal” or “internationalised court” refers to a locally situated court staffed by national and international personnel, and applying a combination of national and international law. Put broadly, the theoretical virtues of a mixed tribunal are:

- (A) Closer proximity to the post-conflict society, its victims and perpetrators;
- (B) Greater opportunity for members of the post-conflict society to directly be involved in the design, operation and monitoring of the tribunal;
- (C) Greater opportunity for the tribunal to contribute to reconstruction in the post-conflict society through capacity-building;
- (D) Greater relevance to local institutions and social practices.

As the experience of East Timor’s Special Panel demonstrates, the claimed advantages of a mixed tribunal will not be realised where there is poor management, inadequate resourcing and half-hearted implementation. There is nothing in the “mixed tribunal” model *per se* that will guarantee better outcomes if the necessary support is not forthcoming. Further, the utility of the mixed tribunal model in contexts where the perpetrators are non-nationals, who can seek shelter in their state of nationality, is less than in cases such as Sierra Leone or Cambodia, where victims and perpetrators are nationals of the same state and suspects remain within the territory.

¹⁷³ GA Res 1000, 10 GAOR, 1st ESS, Supp No 1 at 3, UN Doc. A/3354.

¹⁷⁴ UN Charter, Arts 11, 13.

¹⁷⁵ Group of Experts for Cambodia, above n 8 at 42.

¹⁷⁶ See, eg, SC Res 1392 (2002), 31 January 2002, operative para 3.

(a) *Special Court for Sierra Leone*

After a decade of unrelenting civil conflict, characterised by several coup d'état and grave human rights violations committed by all parties, an uneasy peace was concluded in Sierra Leone in 1999. The peace accord collapsed in May 2000, and was restored only after decisive military action against rebel groups by United Kingdom forces. On June 12, 2000, President Kabbah of Sierra Leone sent a letter to the Secretary-General requesting assistance from the UN to establish an international criminal tribunal for Sierra Leone.¹⁷⁷

In August 2000, the Security Council passed resolution 1315,¹⁷⁸ mandating the Secretary-General to negotiate a treaty with the Government of Sierra Leone for the establishment of a Special Court to try international crimes, and requesting him to prepare a report on the implementation of the resolution. Resolution 1315 was not passed under Chapter VII, but the sixth and thirteenth preambular paragraphs proclaimed that the Security Council was:

“Reaffirming the importance of compliance with international humanitarian law, and reaffirming further that persons who commit or authorise serious violations of international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law,

“...[and]...”

“Reiterating that the situation in Sierra Leone continues to constitute a threat to international peace and security in the region...”

The Secretary-General presented his report to the Security Council on October 4, 2000. A draft agreement between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, and the proposed Statute for the Special Court, were annexed to the report.¹⁷⁹

The Court is to be established by treaty, and so does not have a Chapter VII mandate or any legal entitlement to demand compliance from other states.¹⁸⁰ It will not be a subsidiary organ of the UN, but a “*sui generis* court of mixed jurisdiction and composition.”¹⁸¹ Within Sierra Leone, the Court will have primacy over local courts, which must defer to it when so requested.

Its subject matter jurisdiction covers crimes against humanity, breaches of common article 3 to the Geneva Conventions and violations of the Second Protocol Additional to the Geneva Conventions. Genocide and grave breaches of the Geneva Conventions are not included, reflecting a predetermination by the drafters that these crimes were not committed in Sierra Leone. It is unclear

¹⁷⁷ S/2000/786, annex.

¹⁷⁸ S/RES/1315 (2000)

¹⁷⁹ *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, S/2000/915 (“Secretary-General’s Report”).*

¹⁸⁰ *Ibid* para 10.

¹⁸¹ *Ibid* para 9.

whether the Government of Sierra Leone or other civil society groups were consulted about the exclusion of these crimes from the Statute.

Alongside crimes under international law, the Statute includes selected offences from Sierra Leone criminal law, namely, offences relating to the abuse of girls under the Prevention of Cruelty to Children Act of 1926, and relating to the wanton destruction of property under the Malicious Damage Act of 1861. The Secretary-General justified the inclusion of these offences on the grounds that certain conduct was better regulated by domestic Sierra Leonean law.¹⁸² However, the domestic offences (perhaps due to their venerability) are arcanelly defined, and interpretation will be further complicated by the fact that reporting of Sierra Leone court decisions ceased in the 1970s.

The temporal jurisdiction of the Court commences from November 30, 1996. This start-date was chosen to avoid overburdening the Court,¹⁸³ and to ensure that the most serious crimes fell within its mandate. The nominated start date has been criticised by the Sierra Leone government as not representing the true scope of the conflict, and observers have noted a perception in Sierra Leone that it unjustly favours Freetown over the provinces, “as the November 1996 date corresponds to the time when the capital first became a target of attack.”¹⁸⁴

The Court’s organizational structure is based on the model of the international criminal tribunals, with two Trial Chambers of three judges each and a single Appeal Chamber of five judges. One Sierra Leonean judge will sit in each Trial Chamber, and two Sierra Leonean judges will sit in the Appeal Chamber. The balance of the judges will be international judicial officers appointed by the Secretary-General.¹⁸⁵ The Office of the Prosecutor will be headed by an international Prosecutor, to whom a Sierra Leonean will act as Deputy Prosecutor.¹⁸⁶ It is envisaged that the ICTY and ICTR will share advice and expertise with the Court, and provide training to the Special Court’s prosecutors, investigators and administrative support staff.¹⁸⁷ The Court’s seat will be in Sierra Leone, unless security considerations require it to relocate.

Apart from the absence of a Chapter VII mandate, the greatest challenge the Court will face is the Security Council’s insistence that it rely entirely upon voluntary funding contributed by states. As a treaty based court, the Special Court has no entitlement to assessed funds, and the Security Council has been adamant that it will not authorise funding from the UN budget. In his report to the Security Council, the Secretary General questioned the wisdom of relying on voluntary funds:

“A financial mechanism based entirely on voluntary contributions will not provide the assured and continuous source of funding which would be required ... The risks associated with the establishment of an operation of this kind with insufficient funds ... are very high, in terms of both moral

¹⁸² *Ibid* para 19.

¹⁸³ *Ibid* para 26-7.

¹⁸⁴ Nicole Fritz and Alison Smith, “Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone” (forthcoming) *Fordham Law Review*. I am indebted to Ms Fritz for providing a manuscript of this paper.

¹⁸⁵ *Draft Statute of the Special Court for Sierra Leone*, annexed to the *Secretary-General’s Report*, arts 12 and 13.

¹⁸⁶ *Ibid* art 15.

¹⁸⁷ *Secretary-General’s Report*, above n 182 at 64.

responsibility and loss of credibility of the Organization ... In my view, the only realistic solution is financing through assessed contributions."¹⁸⁸

Despite this strongly worded caution, the Security Council insisted that the Special Court be funded only from voluntary contributions.¹⁸⁹

The report of the Secretary-General estimated that the Special Court's first year of operation (including start up costs) would require US\$22 million in funds.¹⁹⁰ On 23 March 2001, the Secretary-General launched an appeal to all states to make contributions to the Special Court, based on a cost estimate of US\$30 million dollars for the first year, and US\$84 million dollars for the following 24 months. After 60 days of consultations, the contributions offered for the start-up phase were between \$15 million and \$18 million.¹⁹¹ The Secretariat then revised the Special Court's budget downwards to require only \$16.8 million for the first year, and \$40.2 million for the following 24 months. A renewed appeal was launched on 18 June 2001 on the basis of the new estimates. As at 6 July 2001, the Special Court faced a funding shortfall of approximately \$1.8 million for its first year, and \$19.6 million for its second and third years.¹⁹² "Very limited" contributions of personnel have been offered, and one state has offered to contribute furniture.

On 16 January 2002, the Government of Sierra Leone and the UN signed the Agreement establishing the Special Court. The Statute takes effect from that day. The UN has dispatched a planning mission, but the Court cannot commence operation until the Secretary-General has sufficient contributions to finance the Court for 12 months, plus pledges equal to anticipated expenses for the following 24 months.¹⁹³

Should all the funds sought in the revised appeal of June 2001 be pledged, the Special Court's budget will nevertheless be so diminished that its viability is in doubt.¹⁹⁴ Trying to operate a sophisticated judicial mechanism on an inadequate budget, in perhaps the least developed country in the world, threatens to betray the high expectations of the people of Sierra Leone. Fritz and Smith pessimistically predict that the experiment will "fail spectacularly"¹⁹⁵ in its formative stages, and will further damage the credibility of the UN's efforts in post-conflict situations:

*"[T]ribunal's of Sierra Leone's type - under funded, ill-equipped, and disorganized from the time of its inception - constitute the most artificial, apathetic attempts to address conflict..."*¹⁹⁶

(b) *Cambodia's "Extraordinary Chambers"*

¹⁸⁸ *Ibid* at paras 70-71.

¹⁸⁹ Letter dated 22 December from the President of the Security Council addressed to the Secretary-General, S/2000/1234 at para 2.

¹⁹⁰ *Secretary-General's Report*, above n 182, at 58.

¹⁹¹ Letter dated 12 July 2001 from the Secretary-General addressed to the President of the Security Council, S/2001/693, 13 July 2001.

¹⁹² *Ibid*.

¹⁹³ *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, 16 January 2002, <www.specialcourt.org/documents/Agreement.htm>, Art 6.

¹⁹⁴ Fritz and Smith, above n 187.

¹⁹⁵ *Ibid*

¹⁹⁶ *Ibid*.

On 12 June 1997, the joint Prime Ministers of Cambodia wrote to the Secretary General seeking the UN's assistance in bringing to trial leaders of the former Khmer Rouge regime, many of whom had resumed normal lives in the post-war Cambodia. In December 1997, the General Assembly authorised the Secretary General to create a Group of Experts to explore options for bringing to justice the Khmer Rouge leadership. The Group of Experts was convened in July 1998, and reported in February 1999,¹⁹⁷ recommending an international tribunal be created under Chapter VII of the Charter. The Expert Group considered the possibility of a mixed tribunal for Cambodia, but rejected it on the grounds that the national judiciary lacked the necessary independence and capacity to conduct such sensitive trials.

The Cambodian government rejected the recommendations of the Expert Group, insisting on its right to try its own nationals, and China indicated that it would veto any resolution creating an international criminal tribunal for Cambodia.

The UN commenced negotiations towards establishing a mixed tribunal, and reached in principle agreement with the Government of Cambodia in July 2000. An MOU on the proposed court and the modalities of UN operation was signed in September 2000¹⁹⁸ On 15 January 2001, the Cambodian Senate passed the *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*.¹⁹⁹ The law was not consistent with the MOU of September 2000.²⁰⁰

The law established a three-tier court with jurisdiction over genocide, crimes against humanity, grave breaches of the Geneva Conventions, destruction of cultural property and crimes against internationally protected persons. It also included jurisdiction over domestic law offences of murder, torture and religious persecution. All judges and prosecutors are selected by Cambodia's Supreme Council of the Magistracy, including international personnel. The latter were to be "recommended" by the Secretary-General, but the Supreme Council of the Magistracy is empowered to choose its own international judges and prosecutors if it does not accept the Secretary-General's recommendation.

Three Cambodian and two international judges sit in the Trial Chambers, with findings of guilt requiring a qualified majority of 4 votes. Thus, to convict a defendant, at least one international judge must agree even if the Cambodian judges are unanimous. A Cambodian and an international lawyer will be appointed as "co-prosecutors" to jointly prepare and issue indictments, while a national and international "co-investigating judges" will jointly supervise pre-trial preparations. International law rules relevant to criminal procedure are not binding, but may be looked to for "guidance".

The role of "investigating" judge is novel and untested in Cambodian criminal procedure, and there is a duplication of functions between co-prosecutors and co-investigating judges. Disagreements between co-prosecutors or co-investigating judges may polarise office relations. Existing Cambodian criminal procedure is

¹⁹⁷ Sir Ninian Stephen, Rajsoomer Lallah and Steven Ratner, see report above n 8.

¹⁹⁸ "UN and Cambodia complete discussions on War Crimes Tribunal", (2000) 16 (9) *International Law Enforcement Reporter*.

¹⁹⁹ www.derechos.org/human-rights/seasia/doc/krlaw.html. The following account of law depends heavily on the analysis in Suzannah Linton, "Cambodia, East Timor and Sierra Leone: Experiments in International Justice" (2001) 12 *Criminal Law Forum* 185.

²⁰⁰ *Ibid.*

not uniform and may not sufficiently protect the rights of the accused. Moreover, the domestic court system on to which the Extraordinary Chambers are grafted remains weak.

The Extraordinary Chambers were to be funded by the Cambodian government and voluntary contributions through the UN. However, the UN and the Government of Cambodia were unable to conclude an agreement on the modalities of UN cooperation, and on 8 February 2002, the UN terminated negotiations on the grounds that “*the proceedings of the Extraordinary Chambers would not guarantee the international standards of justice required for the United Nations to continue to work towards their establishment.*”²⁰¹ The Cambodian authorities have declared their intention to proceed with the trials,²⁰² but, in the absence of a UN imprimatur, international assistance will be minimal. In effect, it may operate as a domestic court applying international law, and its independence from governmental influence is doubtful.²⁰³

3 Universal Jurisdiction

3.1 What is Universal Jurisdiction?

Universal jurisdiction refers to states’ entitlement (and in certain situations, obligation) to exercise criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the offender, the nationality of the victim, or any other connection to the state exercising such jurisdiction.²⁰⁴ The practical consequence of the exercise of universal jurisdiction is that prosecutors or investigating judges may open investigations and or prosecute persons for crimes committed outside the state’s territory which are not linked to that state by the nationality of the suspect or of the victim, or by harm to the state’s own national interests.²⁰⁵

The international law authority for a state to exercise universal jurisdiction may arise in one of two ways:

- (i) Under a treaty obligation which requires all States Parties to criminalize certain conduct in their domestic law, whether the conduct has occurred within their own territory or within the territory of another party to the treaty. Persons suspected of such conduct found within the territory of a State Party (or otherwise susceptible to its enforcement powers) must either be prosecuted or extradited to another State Party that is willing to prosecute; or²⁰⁶
- (ii) Where a person is suspected of a crime under international law which is regarded as so serious as to threaten the international order, entitling any

²⁰¹ Statement by UN Legal Counsel, Hans Corell, New York, 8 February 2002.

²⁰² Seth Mydans, “Khmer Rouge Trials Won’t Be Fair, Critics Say”, N.Y. Times, 9 February 2002.

²⁰³ The Expert Group concluded that corruption in the Cambodian legal system was pervasive and debilitating: above n 8, at 39.

²⁰⁴ *Princeton Principles on Universal Jurisdiction*, August 2001, Principle 1; International Law Association, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences* (2000); Redress Trust, *Universal Jurisdiction in Europe: Criminal Prosecutions in Europe since 1990 for War Crimes, Crimes against Humanity, Torture and Genocide* (1999).

²⁰⁵ Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Enforce Legislation* (2001), introduction at 1.

²⁰⁶ See, for example, the Convention Against Torture, Art 5, and the grave breaches provisions of the Geneva Conventions.

state to investigate or prosecute that person should she or he come within reach of its judicial organs. Crimes recognised as falling within this category, and conferring permissive universal jurisdiction on any state willing and able to prosecute, include genocide, grave breaches of the Geneva Conventions, piracy, slavery, crimes against peace and torture.²⁰⁷

States electing to exercise universal jurisdiction generally do so through enabling domestic legislation permitting national courts to investigate and try crimes committed outside the state. Approximately 120 states have enacted legislation that appears to permit their courts to exercise some form of universal jurisdiction.²⁰⁸ However, the terms upon which states choose to empower their courts to exercise universal jurisdiction vary greatly from state to state. There are four commonly used methods:

- (i) authorisation to exercise universal jurisdiction over crimes where international treaties to which the state is a party require it;
- (ii) authorisation to exercise universal jurisdiction over crimes under international law, as defined in international customary law or treaty;
- (iii) authorisation to exercise universal jurisdiction over crimes under international law, as defined in the national legislation, and;
- (iv) national constitutions or legislation which provide that principles of international law binding on the state concerned are directly applicable in national law, but without express reference to jurisdiction or specific crimes.

In practice, universal jurisdiction conferred by any of these methods may be unutilised due to legal technicalities, or institutional limitations of the individual state. To assess the utility of invoking universal jurisdiction, it is helpful to consider the practice in selected European states, where universal jurisdiction principles have hitherto been implemented and applied more frequently than other regions.

3.2 Universal Jurisdiction in Practice

The last decade has seen a rapid expansion in the number of criminal proceedings brought under the principle of universal jurisdiction, the majority of which have arisen in western Europe. The dramatic arrest of Augusto Pinochet in London in 1998,²⁰⁹ the Belgian trial and conviction of four Rwandans for war crimes in June 2001,²¹⁰ and the extradition of an Argentinean military officer from Mexico to Spain on torture charges in February 2001,²¹¹ illustrate the potential to use universal jurisdiction to pursue criminal accountability where neither the state of nationality, nor the international community as a whole, are willing to act. Cases such as the Pinochet prosecution have also disturbed the culture of impunity within Chile and other Latin American countries, shifting the limits of the possible as

²⁰⁷ *Princeton Principles on Universal Jurisdiction*, above n 207, Principle 2.1; *Case Concerning the Arrest Warrant of 11 April (Congo v Belgium)*, International Court of Justice, 14 February 2002, separate opinion of Judge Koroma at para 9; joint separate opinion of Judges Higgins, Kooijmans and Buergenthal at paras 61-64; dissenting opinion of Judge Van Wyngaert, paras 40-62; dissenting opinion of Judge Al-Khasawneh at para 7.

²⁰⁸ Amnesty International, *Universal Jurisdiction*, above n 208, Chapter 4A at 4.

²⁰⁹ See generally Nehal Bhuta, "Justice Without Borders? Prosecuting General Pinochet" (1999) 22 *Melbourne University Law Review* 499.

²¹⁰ *Cour d'Assises de l'Arrondissement Administratif de Bruxelles-Capital, Arrêt du 8 juin 2001*.

²¹¹ Amnesty International Press Release, *Extradition decision raises hopes in the struggle for impunity*, 5 February 2001.

perceived within these societies and encouraging a large number of domestic prosecutions.²¹² The Latin American experience suggests that transnational prosecutions under universal jurisdiction can be a catalyst for change in the post-conflict society by strengthening the hand of anti-impunity movements.

European states with civil law systems have been the favoured fora for prosecutions under universal jurisdiction. The implementation and application of universal jurisdiction principles within these states falls into two broad categories:

- (i) States which require the accused to be present in their territory and or that there be some kind of link between the case and the forum state (such as the nationality of the victim) before an investigating judge can be seized of the case. France,²¹³ Germany,²¹⁴ the Netherlands²¹⁵ and Switzerland²¹⁶ fall into this category.
- (ii) States that allow an investigating judge to be seized of the case even if the accused is not present in the territory, and are willing to seek extradition of the accused. The legislation of Belgium and Spain are examples, but even in these states, there seems to be a preference for a connection between the forum state and the case (such as that the victim is a national).

It is beyond the scope of this report to provide detailed advice on the criminal law and procedure of relevant European states. For summaries of the relevant information, the reader is referred to chapters 4 to 10 of Amnesty International's Memorandum on *Universal Jurisdiction: The Duty of States to Enact and Enforce Legislation* (October 2001, available at: http://web.amnesty.org/web/web.nsf/pages/legal_memorandum). However, a review of recent European cases allows us to identify key factors which should be considered when contemplating the commencement of a prosecution in a third state under universal jurisdiction principles.

(a) *Choice of Forum*

The forum in which a complaint is lodged will decisively affect its prospects for success. The relevant considerations are:

- the substantive law applicable in that state;
- procedural law that permits victim-initiated prosecution and in which an independent investigating judge has carriage of the case;
- the existence of an independent judiciary with resources to pursue the case;

²¹² Naomi Roht-Arriaza, "The Pinochet Prosecution and Universal Jurisdiction" (2001) 35 *New England Law Review* 311 at 315; Jose Miguel Vivanco, "Ready for Justice", N.Y. Times, 14 October 1999; AP Newsfeed, 24 September 1999; Clifford Kraus, "Chilean Military Faces Reckoning for Its Dark Past", Washington Post, October 2, 1999.

²¹³ See *In re Javor*, French Cour de Cassation, Criminal Chamber, March 26, 1996, denying jurisdiction to open an investigation into crimes committed in Bosnia because the accused was not on French territory: (1999) 93 *American Journal of International Law* 525.

²¹⁴ See *Bundesgerichtshof*, Urteil vom. 30 April 1999, 3 StR 215/98, cited in M.Cherif Bassiouni, "Universal Jurisdiction in Historical Perspective" in *Princeton Papers on Universal Jurisdiction*, above n 1.

²¹⁵ See *Hoge Raad*, 18 September 2001, *Bouterse*, para 8.5 (Dutch Supreme Court).

²¹⁶ See *In re G*, Military Tribunal Division 1, Lausanne, April 18, 1997, reported in (1998) 92 *American Journal of International Law* 78.

- the existence of extradition and mutual assistance arrangements with other states in which the accused may be present;
- the forum state's relationship with the accused's state of nationality.

(i) *Substantive Law*

States which have directly and expressly incorporated international crimes through domestic legislation, and whose courts have shown a willingness to exercise the jurisdiction so conferred, are to be preferred. Belgian and Spanish courts are currently the most active, and investigating judges have demonstrated a practical and flexible approach to applying universal jurisdiction for crimes under international law.

Both states have incorporated internationally accepted definitions of genocide, war crimes and crimes against humanity into their penal codes.²¹⁷ Investigating judges have held that offences committed before the introduction of the applicable domestic laws could be prosecuted where the conduct in question was criminal under international law at the time of commission.²¹⁸

Judges have also interpreted the laws as authorising courts to request the extradition of accused persons residing in other states; requests which the appropriate national authorities in Belgium and Spain have duly issued to Interpol and countries in which the accused is believed to reside. Courts in these two states have thus been willing to act as instruments of international law, accepting a role in the maintenance of an international legal order. Such an approach is essential if the considerable practical and legal hurdles in the path of a prosecution under universal jurisdiction are to be overcome.

(ii) *Procedural Law*

Recent cases that have tested the frontiers of universal jurisdiction have usually been victim-initiated prosecutions, where competence has been accepted by an independent investigating judge. Many civil law systems in Europe permit victims to initiate prosecutions and appear separately represented at trial. In inquisitorial systems, such as those of Spain and Belgium, a *juge d'instruction* (investigating magistrate) has active control over the investigation of a complaint, and may proceed even where the state prosecutor declines to prosecute (see Box 1, "Spanish Proceedings Against Augusto Pinochet"). The investigating magistrate may invoke the coercive powers of the state to seize documents or compel evidence, conduct rogatory commissions in other states (subject to mutual assistance treaties), issue national and international arrest warrants, and seek the extradition of accused persons.

²¹⁷ Organic Law of the Judicial Power, Art 23 (Spain) and Act Concerning the Punishment of Grave Breaches of International Humanitarian Law (Belgium).

²¹⁸ International Decision: Belgian Trial of First Instance of Brussels, November 8, 1998, (1999) 93 *American Journal of International Law* 700; see also *travaux préparatoires* to the Belgian law, cited by Agent for the Democratic Republic of the Congo, Verbatim Record, *Congo v Belgium*, CR 2000/34, Wednesday 22 November 2000 (translation from French).

By contrast, prosecutions in common law systems are entirely within the discretion of the prosecutorial authorities, whose decision not to prosecute in a given case is generally not reviewable.²¹⁹ Further, common law judges have a distinct reluctance to applying international law in domestic contexts, particularly where criminal liability may ensue.²²⁰

(iii) *Independent Judiciary*

Controversial prosecutions of this kind will not proceed unless judicial authorities are fiercely independent of political influence, and where there is sufficient respect for the rule of law to ensure that other organs of the state (such as the police and Justice Ministry) respect judicial demands. The difficulties of conducting a prosecution of a powerful individual where legal processes were susceptible to political inference were illustrated in the abortive attempt to prosecute Chadian dictator Hissen Habre in Senegal.²²¹

The case against Habre ground to a halt in March 2000, after the new President of Senegal demoted the magistrate who had advanced the investigation, and promoted the President of the Appellate Court of Dakar while Habre's challenge to jurisdiction was before his Court. The Appellate Court subsequently dismissed the criminal complaint on the grounds of lack of jurisdiction, and the state prosecutor reversed his position and withdrew support for the prosecution.²²²

Courts in a forum state will be reluctant to accept jurisdiction, and less likely to conduct an adequate investigation, if they do not have sufficient resources or are overburdened with cases. Courts which have shown a willingness and ability to pursue complaints thoroughly and in accordance with due process should be selected when filing proceedings.

(iv) *Extradition and Mutual Assistance Arrangements*

If the accused is not present in the territory of the state in which the prosecution is brought, the indictment will be largely symbolic unless the forum state has sufficiently developed mutual assistance and extradition arrangements to collect evidence against the accused, and pursue her or his extradition. An advantage of bringing such a prosecution in industrialised states is that they usually have an extensive network of bilateral and multilateral extradition arrangements, which increase the chance of gaining custody over accused persons should they leave their country of nationality. Ideally, a forum state should have an extradition arrangement with the accused's country of residence or nationality, but

²¹⁹ For example, in 1997 Scottish prosecutors chose not to pursue charges of torture against a Sudanese doctor resident in Scotland, while English prosecutors did not investigate allegations of torture against Augusto Pinochet during his many visits to London between 1993 and 1998. General Pinochet's arrest in November 1998 was effected pursuant to a Spanish extradition request, with which English prosecutors were obliged to comply by treaty.

²²⁰ Justice Michael Kirby, "Universal Jurisdiction and Judicial Reluctance: A New 'Fourteen Points'" in *Princeton Papers on Universal Jurisdiction*, above n 81.

²²¹ Stephen P Marks, "The Hissen Habre Case: The Law and Politics of Universal Jurisdiction" in *Princeton Papers on Universal Jurisdiction*, above n 81.

²²² *Ibid.*

the use of the Interpol Red Notice system combined with other extradition treaties may prevent the accused from travelling far.

(v) *Forum State's relationship with the Accused's State of Nationality*

Prosecuting in a state which has a close relationship with the accused's state of nationality increases the risk that political factors will intrude on the legal process. Even where an independent judiciary exists, there may be stages in the proceeding in which the next step relies upon discretionary powers exercised by Executive authorities, who may be tempted to end the legal process to avoid jeopardising relations with another state. Thus, the final decision to extradite Augusto Pinochet from the United Kingdom to face trial in Spain lay with the then-UK Home Secretary, Jack Straw. Mr Straw denied extradition on the grounds of Pinochet's ill health, it is also widely speculated that neither Spain nor the United Kingdom wanted the trial to proceed.

(b) *Choice of Case, Accused and Victim*

Careful consideration must be given to which case against which accused should be proceeded with. Cases against currently serving officials entitled to diplomatic immunity will most likely fail, as such persons are protected from criminal proceedings in other states while they hold office.²²³ Retired state officials, or persons without diplomatic status (such as military figures) are more suitable objects of prosecution. If the accused is not, or unlikely to ever be, physically present in the forum state of his own will, recourse can only be had to states which permit the exercise of universal jurisdiction *in absentia* (such as Spain and Belgium).

The case brought should be one for which there is a clear *prima facie* case of a crime under international law, based on credible witness evidence and physical evidence, such that an investigating magistrate will have grounds to open an investigation. The number of crimes alleged should not be so high as to overburden the investigative resources of the court, or otherwise discourage the court from accepting jurisdiction. It must be evident that, as a matter of fact (eg, corruption) or law (eg, amnesty), the accused cannot be tried in her or his state of nationality. The preparation of detailed documents pleading the available evidence will be necessary. Ideally, there should be a minimal need to rely on documentary evidence or witnesses located in Indonesia, as domestic courts of another state cannot compel the production of evidence nor guarantee the security of witnesses.

The victims making the complaint should be willing and able to participate in what may be a protracted legal process in another country, including the giving of oral evidence. Victims who have a connection with the forum state (such as citizenship or residence) are to be preferred, as this will encourage a court to assume jurisdiction.

The author does not recommend bringing prosecutions in third states as purely "symbolic" or denunciatory exercises, unless satisfied that there is no real chance of apprehension and conviction. Such "symbolic" proceedings will be

²²³ *Case Concerning the Arrest Warrant of 11 April (Congo v Belgium)*, International Court of Justice, 14 February 2002, judgment of the Court.

counterproductive in the forum state where the judiciary may come to regard them as an abuse of process.

(c) *Legal Representation*

Cases such as the prosecution of Augusto Pinochet were prepared and lodged by dedicated lawyers acting pro bono or with limited resources. It is imperative that the lawyers engaged to mount a prosecution have the necessary knowledge of international law, and of the law governing the exercise of universal jurisdiction in the forum state. While committed lawyers may be able to offer their services pro bono or for a heavily discounted fee, funds will be necessary to meet disbursements (photocopying, filing fees, international phone calls, translation and so forth) and the basic travel and incidental expenses of witnesses, advocates and advisers. Proceedings of this kind will be lengthy. International human rights NGOs, such as Human Rights Watch and Amnesty International, have in the past provided technical expertise and assistance in the preparation of prosecutions under universal jurisdiction (such as the Habre case).

(d) *Confidentiality and Intelligence*

Where there is a real chance of apprehending a suspect likely to leave the protection of his state of nationality, preparations for prosecution should proceed with the utmost confidentiality so as not to alert possible indictees. Gathering intelligence on the whereabouts and future movements of suspects is a priority, and consideration should be given to utilising links with Indonesian human rights organisations to monitor the international travel plans of key military figures. The window of opportunity to detain suspects will be narrow, often limited to situations where they visit or reside temporarily in states that have extradition arrangements with the forum state. It was Amnesty International's advance notification, in late September 1998, of Pinochet's arrival in London that enabled the Spanish investigating magistrate to obtain his provisional arrest on 13 October.

SPANISH PROCEEDINGS AGAINST AUGUSTO PINOCHET

More than 300 Spanish citizens were killed in Argentina and Chile during the military rule and counterinsurgency terror. Legal action was initiated in Spain by Chilean and Spanish victims of Pinochet's regime. Based upon the work of former Allende adviser Juan Garcés, the *acción popular* was lodged in April 1996 by the Salvador Allende Foundation, Izquierda Unida and thousands of Chilean citizens. It was joined with a complaint filed a month earlier by the Union of Progressive Prosecutors, alleging that members of the Argentine and Chilean military (including Pinochet) were responsible for the torture and murder of Spanish citizens, and for genocide, terrorism and crimes against humanity. Jurisdiction was accepted by Judge Manuel García-Castellón in July 1996. During 1998, the Spanish Public Prosecutor attempted to close the case, arguing that the court lacked jurisdiction. In September 1998, Castellón held that he had jurisdiction to hear the case, and later ordered that the cases against Argentine and Chilean citizens be consolidated under the supervision of Judge Baltazar Garzón, who until then had been investigating charges of terrorism and genocide against only Argentine military personnel.

The Spanish Public Prosecutor appealed the finding of jurisdiction, and the question was considered by the Spanish National Audience sitting *en banc*. The Court held on 30 October 1998, that Spanish courts had jurisdiction in respect of both Argentine and Chilean military personnel accused of genocide, torture and terrorism. Article 23(4) of Spain's *Organic Law of Judicial Power* gives Spanish courts criminal jurisdiction in respect of genocide, terrorism and any other crime that 'according to international treaties or agreements must be prosecuted in Spain'. The crime of genocide was incorporated into the Spanish *Penal Code* in 1971, and was interpreted by the Court as including an intent to destroy a 'distinct human group characterised by something, segregated into a larger community'. Accordingly, attempts to destroy a group of people deemed not to fit in with the project of 'national reorganisation' conducted by the Argentine and Chilean dictatorships constituted an attempt to destroy a 'national group', even if that group included Spanish citizens.

The Court also found that acts allegedly committed in pursuance of Operation Condor were within the meaning of 'terrorism', and although not aimed at the subversion of Spain's political order, could be tried in Spain as international crimes. Finally, the Court held that claims of torture were a constituent of the larger crime of genocide, and thus were within its jurisdiction. In an earlier decision, Judge Castellón had reasoned that the *Torture Convention* provided that a state has jurisdiction when the victim is a national of that state.

Pinochet arrived in England on 22 September 1998 and checked into a London hospital for an emergency operation on a herniated disc on 9 October 1998. The General was particularly fond of Britain, where he would visit Madam Tussaud's, shop at Burberry's and take tea with Baroness Thatcher, who remains grateful for Chile's support during the Falklands War. The United Kingdom was also one of the few countries in Europe which had not barred his entry. In late September, however, Amnesty International became aware of the General's presence in London and informed Spanish lawyers at the Salvador Allende Foundation in Madrid, who in turn alerted the investigating magistrates. On 13 October 1998, Judge Garzón issued a provisional international arrest warrant, requesting Scotland Yard to detain Pinochet pending a formal extradition request. At 6.00pm on 16 October 1998, Pinochet was arrested at his hospital bed as he recovered from surgery.

extract from: Nehal Bhuta, "Justice Without Borders? Prosecuting General Pinochet" (1999) 23 Melbourne University Law Review 499 (footnotes omitted)

BOX 2 - BELGIAN PROCEEDINGS AGAINST AUGUSTO PINOCHET

November 1, 1998, six Chilean exiles living in Belgium filed a criminal complaint (*plainte avec constitution de partie civile*) with an investigating magistrate (*juge d'instruction*) against Mr. Pinochet, who was then under arrest in Britain pending the outcome of a Spanish extradition request. Plaintiffs alleged that Pinochet, during his presidency, had committed, in Chile, crimes under international law (*crimes de droit international*) as defined in the Belgian statute implementing the Geneva Conventions and Additional Protocols.

The magistrate observed that the Belgian statute implementing the Geneva Conventions and Additional Protocols endows the Belgian judicial authorities with universal jurisdiction and that it was the legislator's unambiguous intent that the law should apply even when the alleged perpetrator is not present on Belgian territory. The crimes were allegedly committed, however, before the Belgian statute was enacted on June 16, 1993. Determining that rules of judicial competence, like any other procedural rules, apply immediately, the magistrate concluded that they might be applied retroactively to offences committed before their entry into force, if this would not violate the principle of legality:

...to the extent that the acts defined in the law of June 15, 1993 were already punishable in the Belgian legal order as common crimes such as murder, manslaughter, assault, hostage-taking, torture... the legality principle as embodied in article 2 of the Belgian penal code does not seem to oppose the initiation of criminal proceedings regarding such acts as crimes under international law, as long as the sanctions are those which are applicable to the underlying common offense at the time of commission, or possibly the milder current sanctions (the principles of legality of sanctions and of retroactivity of the more lenient criminal law).

Referring to the statutes and jurisprudence of the Nuremberg, former Yugoslavia and Rwanda tribunals, and to municipal statutes and judicial decisions, he found *prima facie* evidence that the alleged facts constituted crimes against humanity as defined by customary international law.

...the notion of crime against humanity, as defined by international law, directly applicable in our domestic legal order?

...though our law does not contain the concept of crime against humanity, certain acts within the definition of crime against humanity are covered by our common criminal law (for instance murder, manslaughter, assault, battery, confinement with torture, hostage taking...).

*...we find that, before being codified in a treaty or statute, the prohibition on crimes against humanity was part of customary international law and of international jus cogens, and this norm imposes itself imperatively and *erga omnes* on our domestic legal order.*

...customary international law is equivalent to conventional international law and is directly applicable in the Belgian legal order.

*...a general principle of international law *aut dedere aut judicare* (the obligation to extradite or try) imports the necessity of combating impunity of crimes under international law and the responsibility of state authorities to ensure punishment of such crimes irrespective of the place of commission.*

...in the latter case, all states and all humankind have a legal interest in the punishment of such crimes. Hence, it follows that even in the absence of a treaty, national authorities have the right – and in some circumstances the obligation – to prosecute the perpetrators independently of where they hide.

...National authorities have, at least, the right to take such measures as are necessary for the prosecution and punishment of crimes against humanity.

...for these reasons we find that, as a matter of customary international law, or even more strongly as a matter of jus cogens, universal jurisdiction over crimes against humanity exists, authorizing national judicial authorities to prosecute and punish the perpetrators in all circumstances.

Extracted from Luc Reydam, "International Decision: Belgian Tribunal of First Instance of Brussels, November 8, 1998, (1999) 93 *American Journal of International Law* 700)

4 Mutual Assistance and Extradition

It remains uncertain whether the Democratic Republic of East Timor will maintain courts with the jurisdiction - and the human and material resources - to try crimes under international law in the post-independence period. On the assumption that such courts will function, the government of East Timor may wish to give consideration to entering into mutual assistance and extradition arrangements with regional states, to facilitate the arrest and transfer of suspects to East Timorese courts. On a day-to-day basis, most transnational law enforcement cooperation in respect of ordinary crimes is achieved through mutual assistance and extradition mechanisms. These mechanisms are based on the consent of the states concerned, and must proceed with due regard to the sovereignty of the other state.

Indonesia's consistent refusal to cooperate with the existing mutual assistance and extradition agreement, concluded with UNTAET in April 2000,²²⁴ suggests that the prospects for gaining custody of indictees in Indonesia remain poor. A further legal basis upon which Indonesia could legitimately deny an extradition request in respect of its own nationals is clause 35.5 of the Constitution of the Democratic Republic of East Timor, which prohibits the extradition of East Timorese nationals from East Timorese territory to other states. Because extradition arrangements are based fundamentally on the principle of reciprocity, Indonesia can refuse to extradite its own nationals to East Timor on the grounds that East Timorese authorities are constitutionally prohibited from extraditing East Timorese nationals to Indonesia.

4.1 Mutual Assistance

There are two elements to mutual assistance: police to police cooperation, and the provision of formal assistance through judicial organs. The former usually proceeds on the basis of a Memorandum of Understanding or informal inter-agency links, and is used to locate suspects in other jurisdictions. The latter occurs pursuant to a Mutual Assistance treaty between the states concerned, and is used where there is a need to exercise judicial powers in another state (such as the execution of a search warrant or seizure of evidence).

(a) *Police to police cooperation*

Where investigators want to obtain information about persons in a foreign country, but do not require the exercise of compulsory powers to obtain it, they may request police agencies in that state to assist them. Police agencies may either enter into bilateral arrangements²²⁵ with equivalents in specific states (and post liaison officers in those states or regions), or become a member of the International Criminal Police Organization (Interpol). Interpol provides a framework for police forces to exchange information, share intelligence and cooperate at an international level. A new state wishing to join Interpol must contact its Secretariat General in Lyon.²²⁶

²²⁴ See, eg, Yogita Tahilramani, "Indonesia says no extradition as East Timor indicts 17 men" *Jakarta Post*, February 19, 2002

²²⁵ Interpol has formulated a Model Bilateral Police Co-operation Agreement, for use between Interpol members: see <http://www.interpol.int/Public/ICPO/LegalMaterials/cooperation/Model.asp>

²²⁶ Federal Agent Paul Weller, Australian Federal Police, correspondence to author dated 28 December 2001.

Interpol operates a notice system to facilitate the exchange of information between law enforcement agencies on missing persons, unidentified corpses, and persons wanted for serious crimes.

- *Red Notices* are used to seek arrest and extradition of persons and are based on an arrest warrant issued by the competent national authorities.
- *Blue Notices* are used to trace and locate offenders when the decision to extradite has not yet been made.
- *Green Notices* are used to provide warnings and criminal intelligence about persons who have committed offences and are likely to reoffend.
- *Yellow Notices* are used to locate missing persons.
- *Black Notices* are used to seek the true identity of deceased persons.

Each member state of Interpol establishes a National Central Bureau (NCB), which is the liaison point for communications with other NCBs and the Secretariat General. Requests to issue notices are made by NCBs to the Secretariat General, which issues the notice where the requirements are met. Interpol also issues Red Notices on behalf of the ICTR and ICTY, and has published more than 60 notices at their request.

The legal basis for a Red Notice is the arrest warrant or court order issued by judicial authorities in the requesting country. The Red Notice must contain comprehensive identity particulars (such as photographs and fingerprints where available), details of the offence, charge and penalty, any information that may assist in locating the subject, and an undertaking that extradition will be requested if the subject is arrested.

A Red Notice does not oblige national authorities in another state to arrest the subject. In Australia, for example, upon receipt of a Red Notice concerning a person believed to be in Australia, the Australian Federal Police (AFP) will notify Interpol of the whereabouts of the subject and then require that formal documents requesting provisional arrest be sent in accordance with the relevant extradition treaty.²²⁷ However, a survey by Interpol indicated that 65 member countries regarded a Red Notice as sufficient basis to effect provisional arrest of the subject under their laws.²²⁸ Interpol is recognised as the official channel for transmitting requests for provisional arrest in a number of bilateral and multilateral extradition treaties, including the European Convention on Extradition and the United Nations Model Treaty on Extradition. The number of Red Notices issued in recent years has risen rapidly from 953 in 1997 to 1740 in 2001.

(b) *Mutual Assistance Treaties*

Where assistance request requires the exercise of compulsory powers, mutual assistance treaty arrangements must generally be relied upon. The Mutual Assistance regime is built on a network of treaties, both bilateral and multilateral.²²⁹ The underlying principle is reciprocity. A state will not normally

²²⁷ *Ibid.*

²²⁸ ICPO-Interpol General Secretariat, "Interpol Red Notices" (1998) No 468 *International Criminal Police Review* .

²²⁹ The General Assembly has drafted a Model Treaty on Mutual Assistance in Criminal Matters, A/RES/45/117, 14 December 1990.

provide assistance to another state unless that country will provide assistance to it in a similar case.

A treaty creates a window through which one country can seek assistance from another, but it is only of use if supported by domestic laws in the requested country. It is a feature of such laws that they do not generally go beyond what would be available to local police conducting a domestic investigation. Further, these agreements typically allow the requested state considerable discretion in deciding whether or not to cooperate.

For example, in Australia, incoming mutual assistance requests are processed by the Central Office for Mutual Assistance in International Branch of the Attorney General's Department. The Central Office will determine whether or not the request should be accepted, and seek the Ministerial approval that may be required to proceed with the request. Only then will it refer the request to the appropriate police or prosecuting agency for action.

The processing of mutual assistance requests can be slow, particularly where several levels of approval are required in the requested state. It is unusual to get a response to a mutual assistance request in less than two or three months. Few police and prosecuting agencies have separate units to deal with incoming requests, and so the work required must take its place among the general duties of the agency, in accordance with its internal priorities. Because any exercise of compulsory powers in the requested state must occur under its domestic laws, the request cannot be fulfilled any faster than those laws allow.

(c) *Extradition*

Extradition procedures are governed by treaties between states, which must be negotiated and concluded before a request for arrest and surrender can be made. The key features of most extradition arrangements are:

(i) *Double criminality*: the offence for which the accused is sought must have been an offence in the requested state at the time of commission. This may be a difficulty where suspects are wanted for crimes under international law, as many states have not incorporated such offences into domestic law. Consideration should be given to ensuring that all extradition treaties negotiated by East Timor include a clause waiving the double criminality requirement in cases of crimes under international law.

(ii) *Evidence Requirements*

Treaties require that the requesting state support its extradition request by evidentiary material. Some states require that a "prima facie case" against the accused be shown, while increasing numbers of states are proceeding on the faster "non-evidence" basis. In a non-evidence extradition proceeding, the requesting state need only submit a statement of facts alleged against the accused by investigating authorities.

(iii) *Political Offence Objections and Requirements of A Fair Trial*: Most extradition treaties allow the requested state to refuse extradition where the accused is charged with "political offence". This exception is generally accepted as not applicable to crimes under international law,

although the “state-sponsored” character of the crimes may tempt local courts in the requested state to characterise them as “political offences.”

A state may also refuse extradition where it is not satisfied that the accused will receive a fair trial in the requesting state, or if the accused may be exposed to violations of fundamental civil and political rights. If measures are not taken to ensure the integrity of East Timorese judicial system, the accused may have grounds for a successful extradition objection.

(iv) *Rule of Speciality*

Once surrendered to a requesting state, the accused cannot be charged with offences not contained in the extradition request.

(v) *Executive Discretion*

Historically, extradition was a personal discretion of the sovereign. This discretion is retained in many modern extradition arrangements, where a Minister must make the final decision to surrender a suspect in respect of whose extradition all other legal requirements are met. The ability to challenge the Executive’s discretion is limited, and it may, at this final stage, refuse to extradite (as occurred in the case of Augusto Pinochet, who was returned to Chile).

The resolution of the above issues in an extradition proceeding usually occurs in the courts of the requested state. Thus, it depends heavily on the independence, integrity and efficiency of that judicial system. The requesting state often bears the costs of extradition proceedings, which can be very lengthy. Proceedings to extradite Augusto Pinochet to Spain continued for twenty months, only to conclude with UK Home Secretary Jack Straw’s decision to refuse extradition on the grounds of Pinochet’s ill health. Nevertheless, negotiating extradition treaties with other states will be an essential component of East Timor’s efforts to pursue persons responsible for crimes under international law, and consideration should be given to the different models available. One such model is the UN Model Treaty on Extradition, drafted by the General Assembly.²³⁰

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²³⁰ Model Treaty on Extradition, A/RES/45/116, 14 December 1990.

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