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News, analysis and action in support of justice for East Timor

No.51 December 2000

Timorese demand to be heard

The World Bank held its third donors' meeting on East Timor on 5 and 6 December 2000. The meeting, in Brussels, reviewed progress one year after the first pledge of US\$522 million for economic and social reconstruction, humanitarian programmes, and capacity-building in governance and administration. Throughout the year East Timorese have felt marginalised in much of the reconstruction effort by the United Nations and international agencies.

In Brussels, lobbyists representing East Timorese non-governmental organisations (NGOs) and women's organisations, international NGOs, and the Christian churches raised a wide range of concerns.

The East Timorese Catholic and Protestant churches, echoed strongly by other sectors of East Timorese civil society, have called for justice. In a statement, Christian churches internationally backed the East Timorese demand for an international tribunal (see supplement to this issue of *Timor Link*) to try all suspected perpetrators of human rights violations and war crimes, whether Indonesian or East Timorese, regardless of military rank. The churches are also calling for the immediate and safe return of the refugees in West Timor.

East Timorese NGOs also made a clear call for justice to the UN Security Council mission which visited East Timor from 13 to 15 November. In Brussels, they called for:

- more information to be disseminated on laws and UN agencies;
- a long-term approach to capacity building, with easier access to funds for this for local NGOs;
- easier access to, and improved provision for, education, especially for girls;
- more resources to be allocated to rural areas and to support the acquisition of land titles by farmers;



Women in Los Palos wait for aid that has just arrived from Dili, September 1999. Now the emergency is over, development efforts must focus on increasing women's participation in decision-making.

- family planning services and HIV/AIDS awareness programmes;
- programmes which increase women's participation in decision-making.

International NGOs are calling for a comprehensive strategy for reconstruction and development which:

- is developed by a broad spectrum of Timorese society;
- reflects the vital role of women and young people;
- prioritises agriculture and rural development.

The international NGOs are also calling for a proper exit strategy for the UN transitional authority, UNTAET.

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EAST TIMOR: Nation in waiting

East Timor emerged into the 21st century having endured 400 years of colonial rule, followed by nearly a quarter of a century of brutally repressive occupation, and finally a brief but devastating period of violence. Having chosen independence, the people of this tiny country face the multiple tasks that building a political, social and commercial infrastructure out of the ashes of conflict implies.

Timor, which lies 482 km north of Darwin, Australia, was settled by Malay, Melanesian and Polynesian peoples before the arrival of Dutch and Portuguese settlers in the 16th century. The eastern part of the island began what was to be a long and traumatic struggle for independence in 1974, when Portugal began a process of decolonisation.

On 11 August 1975 the Timorese Democratic Union (UDT) staged a coup to pre-empt Indonesia's threat to intervene should the nationalist liberation movement, Fretilin, come to power after Portugal's withdrawal. The ensuing civil war cost the lives of 1,500 people and saw Fretilin take control of most of Portuguese Timor.

Invasion

Worried by the proximity of an independent state with radical policies, in December 1975 Indonesia launched a full-scale invasion of East Timor with the knowledge of the United States and the encouragement of Australia. After a fraudulent 'act of self-determination' (the 'Balibo Declaration'), in May 1976 East

Timor was declared to be Indonesia's 27th Province. The United Nations always regarded the annexation as illegal.

There followed years of determined resistance by the poorly armed Falintil on behalf of the East Timorese. It is estimated that some 200,000 people — a third of the population at the time of the invasion — died from malnutrition, preventable diseases, or at the hands of the occupying forces.

Under the Indonesian dictator Suharto, negotiations between the Indonesian government and Portugal — in international law the administering power — became deadlocked. It was not until 1997-98, with financial crisis sweeping Asia and the final ebbing of international support for Suharto's corrupt regime, that there were real signs of change.

Suharto's successor Jusuf Habibie bowed to international pressure and, in essence, traded East Timor for much-needed support from the International Monetary Fund. Habibie offered the East Timorese autonomy within Indonesia. If they rejected it, Indonesia would 'let East Timor go'. The offer was a pragmatic one, made by a stand-in president, and without wide consultation. Much of the Indonesian military was appalled.

In negotiating the terms under which a ballot on the autonomy package would take place, the United Nations allowed Indonesia to provide the security. This was to prove costly, as it left the way open for those in the military special forces, Kopassus, responsible for the original invasion, to try to influence the result or wreak revenge should they fail.

Popular Consultation

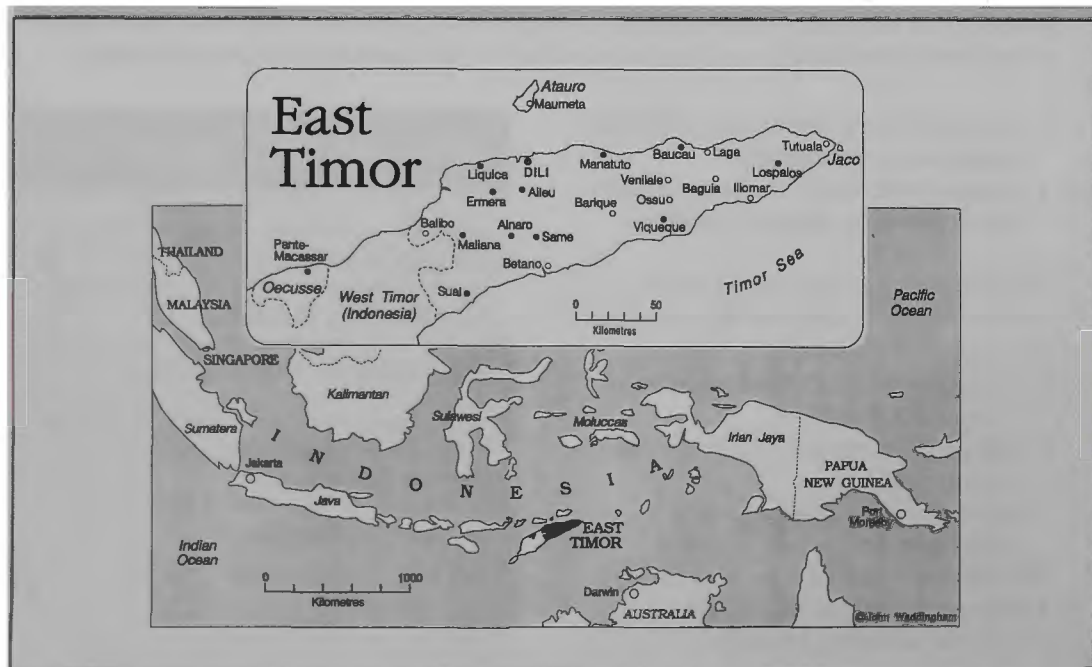
Braving violent intimidation by Indonesian militia, more than 90 per cent of eligible East Timorese voters turned out, and nearly 80 per cent of them voted for independence. The United Nations had assured voters it would stay after the ballot. Although a backlash had been predicted, the severity of the violence that followed the announcement of the results took the world by surprise. As UN personnel fled, the Indonesian military and militias drove nearly 300,000 people over the border into West Timor, while killing, raping and looting, and laying waste to East Timor's long-neglected infrastructure.

Transition

Following an intervention by an armed international force (INTERFET) in September 1999, and with the departure of all Indonesian troops on 31 October, East Timor came under the United Nations Transitional Administration in East Timor (UNTAET) headed by Sergio de Mello. It was expected to take UNTAET two to three years to prepare the territory for full independence. The first six months of freedom were spent responding to a major emergency — feeding the hungry and trying to facilitate the return of the hundreds of thousands of displaced. By December 2000 there were still 100,000 East Timorese in refugee camps in West Timor alone. Some were displaced further afield. Militias were running many of the camps and preventing people from returning to East Timor.

UNTAET inherited a country with a largely unemployed population and an economy in ruins. Key challenges include the search for reconciliation with justice, and supporting the growth of a strong civil society in East Timor. But the East Timorese are now free at last to begin constructing an independent nation.

In the late 1990s, the political scene in East Timor came to be dominated by the National Council for East Timorese Resistance (CNRT), a grouping of old anti-Indonesian parties. The CNRT is led by Xanana Gusmão, the 'Asian Mandela', who spent most of the 1990s in jail in Indonesia for his part in the armed resistance. His popularity among the East Timorese, and the resilience of the people, will be major factors shaping the recovery that needs to take place at every level of society.



In search of justice: An international tribunal for East Timor

PANOS PICTURES/RENE SLEIGHT



Human rights and accountability

Accountability is a key principle in human rights work. Fighting impunity is a way to implement the human rights conventions and declarations that the United Nations has assembled over the years.

Prosecution offers a means to prevent further human rights abuse. In contrast to economic sanctions, which also hurt innocent people, international prosecution targets individual perpetrators, and therefore addresses the problem more precisely.

International prosecution is a relatively new instrument in tackling human rights crimes. In the Nuremberg and Tokyo trials at the end of the Second World War, individuals were prosecuted for crimes against humanity. These tribunals, however, were established by the victorious powers. In 1947 the UN secretariat had drafted a statute for a permanent international criminal court, to be attached to the Genocide Convention. The convention, however, was passed without the statute. In the 1990s *ad hoc* tribunals were set up to deal with war crimes committed in Yugoslavia and Rwanda. In 1992 the UN General Assembly asked the International Law Commission (ILC) to prepare a statute for a permanent International Criminal Court (ICC). In July 1998 a conference of states convened in Rome to adopt the statute of the ICC (known as the 'Rome Statute'). The statute must be ratified by 60 states for the ICC to go into operation. By October 2000 only 22 states had ratified it. Therefore the international court is not yet in operation.

Justice, conflict resolution, reconciliation and peace

Some people claim that justice is a form of revenge and therefore undermines peace and reconciliation efforts. In East Timor, advocates of integration with Indonesia tend to confuse the notion of reconciliation with that of conflict resolution, or even with cease-fire negotiations (with the pro-Indonesian militias). The term 'reconciliation' implies a bilateral process between different societies or social groups (for example, between 'the Germans' and 'the Jews' after the Holocaust). As elsewhere, it will take generations to achieve true reconciliation in East Timor.

Justice is an integral part of this long and painful reconciliation process. Administration of justice is an instrument of conflict resolution that precedes reconciliation. Reconciliation can only proceed once abuses have ceased completely and security has been established.

Many East Timorese organisations, including the churches, the National Council for Timorese Resistance (CNRT) and non-governmental organisations (NGOs) have called for an international criminal tribunal to prosecute those responsible for gross violations of human rights and breaches of international humanitarian law in East Timor. On 31 January 2000 a UN commission of inquiry recommended that an international court be established for this purpose. Journalist Sabine Hammer examines the potential of international prosecution.

UNTAET [the UN Transitional Authority in East Timor]'s mandate stresses the importance of reconciliation. The East Timorese people also seek reconciliation between all sections of their society — but bringing the key perpetrators of war crimes to justice is an essential element of reconciliation. UNTAET is failing to carry out its mandate to 'bring to justice' those responsible for war crimes if it does not provide sufficient resources to the investigation of war crimes. These war crimes took place over a year ago and the longer the investigations are delayed the less likely it is that there will ever be successful prosecutions.

The NGO Forum calls on the Security Council to require UNTAET to immediately reallocate substantial resources to the investigation of war crimes. Until the NGO Forum sees war crimes being appropriately investigated it does not accept that UNTAET is fulfilling its mandate to bring those responsible for war crimes to justice. Without bringing those responsible for war crimes to justice there cannot be reconciliation among the East Timorese people. If there is no transparent and workable system of justice established in East Timor, there will be no incentive to return for those militia leaders in West Timor seeking the protection of justice.

Statement to the UN Security Council Mission to East Timor by the East Timor NGO Forum (FONGTIL), 13 November 2000.

Human rights abuses are continuing and even basic security is not fully established in East Timor, let alone West Timor. Victims can only begin to think about reconciliation if they no longer feel threatened

Delivering justice by ascertaining guilt or innocence in a court of law can help to mark the transition from the phase of conflict resolution to that of peacemaking and reconciliation. Establishing accountability is therefore crucial to conflict resolution, particularly in a severe and complex case such as that of East Timor.

Principles of international criminal prosecution

International criminal prosecution of serious crimes

1. **establishes individual guilt.** The concept of collective culpability will only trigger the next conflict. Guilt must be individualised.
2. **aims to prevent future crimes** on both
 - (a) an individual basis: imprisonment removes persistent offenders from potential victims. For example, Indonesians suspected of serious humanitarian crimes in East Timor are believed to be perpetrating similar crimes in various parts of Indonesia, including West Timor; the perpetrators also continue to threaten security in East Timor;
 - (b) a structural basis: impunity encourages crime and violence. For example, the Indonesian armed forces (the TNI) are believed to instigate violent conflicts to advance their claim to political power. The security situation in East (and West) Timor will remain volatile as long as TNI continues to foster conflicts for political gain.
3. **helps to establish rule of law.** Impunity, or the lack of impartial prosecution, may provoke people to take justice into their own hands. It may also encourage petty crime: why should it be a crime to steal, if mass murder goes unpunished?
4. **Arrests help the victims** to feel safe again. Victims of severe abuse, such as rape, tend to blame themselves for the assaults. Public judgement of the offender can help to reduce the psychological burden and help the victims to regain their self-esteem.¹ Society may start to acknowledge that the victim was indeed victimised. The dignity of the victim comes first. Research on the Holocaust has shown that such traumas do not remain confined to the actual victim but can be passed down through generations.

¹ Anecdotal evidence from Burma, Thailand and Cambodia strongly suggests that rape victims are at risk of further abuse, by being forced into prostitution.

Truth commissions and compensation

National truth commissions can supplement but not replace the judicial determination of guilt or innocence. It is only through judicial proceedings that sentences can be passed and compensation addressed.

Compensation is also an instrument for reconciliation. Rather than abstractly punishing the offender Jewish law, for example, as reflected in the Bible, required a thief to pay reparations to the victim. Reparations had to exceed the damage caused by three or four times, making the victim into a winner and thus fostering the will for forgiveness and reconciliation. The concept of compensating victims of crime and their families as a means to resolve conflict and encourage reconciliation is also popular today in South East Asia and the Pacific.² Such models could be incorporated into a tribunal on East Timor. The UN Commission of Inquiry on East Timor stressed in its report that compensation is of paramount importance.

Types of crime eligible for international prosecution

Genocide

The Genocide Convention provides for prosecution and punishment of acts of genocide, conspiracy, incitement and attempt to commit genocide, and even complicity in genocide. Public officials and government representatives may be indicted. But offenders need not be employees or agents of the state: private individuals may also be prosecuted. In the case of East Timor, this would mean that militia leaders could be indicted without the need to prove chain-of-command connections with state or military authorities.³

Genocide is defined as an attempt to destroy in whole or part a national, ethnic, racial or religious group by any of the following acts:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;⁴
- (e) forcibly transferring children of the group to another group.⁵

There is no statement about a minimum number of killings which might constitute genocide. Judges in the International Criminal Tribunal on Yugoslavia (ICTY) considered that deeds could be referred to as genocide when an offender killed or harmed⁶ a considerable number of members of the group in a community or region.

East Timor solidarity groups are not discussing genocide as grounds for an international tribunal, although it could be proved for 1999, and also from 1975-99 (the period of Indonesian occupation). However, an Indonesian inquiry commission concluded in February 2000 that it had no evidence of genocide. It has therefore been clear for months now that any Indonesian prosecution will not deal with the issue. The international community must establish an international court to ensure accountability for genocide. Highlighting the fact of genocide could strengthen the case for an international tribunal.

Crimes against humanity

These are punishable under Article 6(c) of the statute of the Nuremberg International Military Tribunal and Article 5(c) of the Tokyo Charter. The basis for establishing such crimes has been considerably expanded in the tribunals on Yugoslavia and Rwanda. The ICC statute spells them out: murder, extinction, elements of torture (even if the offender is not related to state or military institutions), certain forms of imprisonment, rape, sexual slavery (including forced prostitution, forced pregnancies) or any severe form of sexual violence, deportation or violent transfer of population, persecution of identifiable groups for political, racial, national, ethnic, cultural, religious or gender-specific reasons, forced disappearances⁷, apartheid or similar acts 'intentionally causing great suffering, or serious injury to body or to mental or physical health'.

To qualify as crimes against humanity, these acts must have been widespread and systematic, and directed against the civilian population. Crimes against humanity can be perpetrated by governments or individuals. For East Timor, as in the case of genocide, there is no need to prove a link between the TNI and the militias.⁸

² It was also recently revived in German criminal law. In certain conditions, offender-victim-accommodation 'Täter-Opfer-Ausgleich' can offer incentives for reconciliation and may help to reduce prison terms.

³ It has been claimed that the relationship between the militia and TNI must be proved before an international tribunal can be established. This is a myth.

⁴ This is the only part of the definition that is not relevant in the case of East Timor.

⁵ Abductions of East Timorese children to Indonesia were frequent.

⁶ As defined above in points (b)-(e).

⁷ Includes kidnapping 'with the authorisation, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.' This may apply to a considerable number of the East Timorese 'refugees'. Advocacy should give special attention to personal and territorial jurisdiction (see below) because only crimes committed in East Timor, and not in West Timor, were considered by the UN inquiry commission.

⁸ This was an issue in the military tribunals at the end of the Second World War, but arguments about governmental involvement in such crimes is no longer relevant today. Neither the ILC draft Code of Crimes against Peace and Security of Mankind nor the ICTY (see proceedings against Tadic, IT-94-1) demands involvement of the state. But, again in contrast with the Nuremberg tribunal, the ICC and the statute of the Rwanda Tribunal state that the crime must be part of a widespread or systematic attack. There is no need to establish the existence of an armed conflict.

War crimes

Human Rights Watch has argued that one could not talk about war crimes in East Timor because there was no war.⁹ This is open to interpretation. Nobel Peace Laureate José Ramos-Horta has repeatedly called for an international 'war crimes tribunal' to be established. Recently the Rome statute stressed the importance of prosecuting war crimes 'when committed as part of a plan or policy or as part of a large-scale commission of such crimes'.

International humanitarian law distinguishes international armed conflicts from internal ones.

War crimes in international conflicts

These include:

1. Grave breaches of the Geneva Conventions of 1949 and their protocols of 1977:
 - wilful killing, torture or inhuman treatment of protected persons;¹⁰
 - wilfully causing great suffering or serious injury to body or health;
 - the destruction of property if not justified by military necessity and carried out unlawfully and wantonly;
 - hostage-taking;
 - unlawful deportation;
 - making the civilian population or individual civilians the object of attack;
 - launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
 - making non-defended localities and demilitarised zones the object of attack;
 - the transfer by the occupying power of parts of its own civilian population into the territory it occupies.¹¹
2. Other serious violations of international humanitarian law:
 - attacking undefended targets such as homes and buildings, by whatever means;
 - using a civilian or protected person to make certain locations immune from military operations;¹²
 - making improper use of the flag of, among others, the United Nations (and causing death or injury thereby);¹³
 - intentional attacks against buildings dedicated to religion;¹⁴
 - destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
 - pillaging;
 - committing outrages upon personal dignity, in particular humiliating and degrading treatment.
3. Other severe violations of the laws and customs of war.
4. Attacks on personnel, infrastructure, material and vehicles used for humanitarian missions or peace-keeping operations under the UN charter¹⁵ are now considered to be war crimes.
5. Also newly defined as a war crime is severe collateral damage to the environment.
6. Sexual violence is now defined as a separate category of war crime.¹⁶

War crimes in non-international conflicts

Indonesia might argue that the conflict in East Timor was not international, and that the events of 1999 were 'internal disturbances' rather than a military conflict. The following crimes in East Timor would still constitute war crimes:

1. sexual violence;
2. attacks on personnel and infrastructure for humanitarian missions or peace-keeping operations.

The International Criminal Tribunal on Rwanda (ICTR) offers a model for prosecution of war crimes in an internal conflict. It has the power to prosecute,

⁹ Referring to the period from 30 August to 30 September 1999.

¹⁰ Sick or wounded combatants, prisoners of war and civilians.

¹¹ This provision from Additional Protocol I could apply to Indonesia's policy of *transmigrasi*, in the case of East Timor.

¹² This could apply to the evacuation by Brimob (the Indonesian riot police) of international observers from the International Federation for East Timor on 5 September 1999.

¹³ In the East Timor case, this may apply to crimes committed from stolen UN vehicles marked with the UN insignia.

¹⁴ Examples of this in East Timor would be the attack on Bishop Belo's house, and on churches and church compounds in Suai and Liquiça, and the massacre at Santa Cruz Cemetery in Dili in 1991.

¹⁵ This might apply to the attacks on humanitarian aid suppliers in Liquiça and Atambua.

¹⁶ The ICTY subsumed this as violation of the Geneva Conventions; in the cases of *Gagovic et alii* (IT-96-23) and *Delalic et alii* (IT-96-21). The indictment regarded rape as a form of torture, and Indonesia has ratified the UN convention against torture. Crimes of sexual violence committed in East Timor must be dealt with. There is an urgent need to boost the dignity of women and to promote healing.

not only for genocide and crimes against humanity, but also for serious violations of Article 3 common to the Geneva Conventions, and of Additional Protocol II. The ICTR statute describes these serious violations as including, but not limited to:

- violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- collective punishments;
- taking of hostages;
- acts of terrorism;
- outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- pillage;
- the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples;
- threats to commit any of the foregoing acts.

Temporal jurisdiction: Crimes since 1975 or 1999?

The UN Commission of Inquiry into East Timor was mandated to look into crimes committed only after January 1999.¹⁷ Consequently it could only recommend the establishment of a court to try crimes after that date. The limited time frame reduces the scope for compensation¹⁸ and keeps Suharto out of range. In practical terms, it is more likely that an international *ad hoc* court would deal with crimes since 1999. However, a lobbying strategy of calling for a complete investigation from 1975 would not go amiss: it could lead to a compromise on the January 1999 starting point.¹⁹

Territorial and personal jurisdiction: Crimes against East Timorese outside East Timor?

The UN inquiry commission investigated 'possible violations of human rights and acts which may constitute breaches of international humanitarian law committed in East Timor', that is, all human rights-related crimes committed in the territory. The commission, therefore, could give no recommendation on crimes committed in West Timor, at sea or on Indonesian territory — for example, several well-documented cases of sexual crimes in West Timor, as well as the murder, in September 2000, in the town of Atambua in West Timor, of three foreign staff of the UN High Commissioner for Refugees.

The UN commission confined the jurisdiction of its recommended tribunal to 'serious violations of fundamental human rights and international humanitarian law which took place in East Timor [...] regardless of the nationality of the individual or where that person was when the violations were committed'. The last words were an attempt to ensure that suspects who remained outside East Timor, for example certain generals, would qualify as suspects.²⁰

With regard to the events of 1999, and those at the end of the year in particular, as well as throughout 2000, lobbyists should consider expanding the territorial limits of the court to, for example, 'crimes committed against East Timorese in East Timor or in Indonesia or at sea'.²¹

Responsibility for prosecution

Indonesia

Indonesia claims the right to deal at a national level with serious human rights violations committed in East Timor. However, it has a duty to try crimes of genocide and crimes under international humanitarian law, and has also ratified the UN convention against torture, so it must try crimes under this.

¹⁷ Resolution 1999/S-4/1.

¹⁸ There were 24 years of destruction.

¹⁹ For comparison:
ICTY: crimes from 1 January 1991.
International Criminal Tribunal for Rwanda (ICTR): crimes from 1 January to 31 December 1994.
ICC: crimes after the statute comes into force; the date will depend on states' eagerness to sign.

²⁰ For comparison:
ICTY: crimes committed on the territory of former Yugoslavia.
ICTR: crimes committed on the territory of Rwanda and committed by Rwandan nationals in neighbouring states.

²¹ Alternative formulations could be: 'crimes committed against East Timorese by Indonesian nationals', or 'against East Timorese eligible voters and their children'. A limitation to East Timorese or East Timor is essential to avoid expanding the tribunal's jurisdiction to Aceh, West Papua, the Moluccas or other territories, since this would probably deter certain members of the UN Security Council from approving a tribunal. It would be helpful to seek legal specialists' advice on the precise language.

As long as the Indonesian government has no intention of punishing criminals itself under Indonesian law, the international tribunal is necessary to judge those who have committed crimes against humanity. And Indonesian domestic law is not enough to judge these people, including Indonesian soldiers.

Bishop Carlos Belo, *Yomiuri Shimbun*, 16 September 2000.

Observers and the UN inquiry commission were sceptical about Indonesia's ability to deliver a fair and impartial prosecution.²²

In fact TNI officers remain sacrosanct. Recently proposed legislation reflects this. A bill to establish a human rights court²³ falls short of international standards and challenges valid UN human rights agreements. Separation of powers is compromised; the judiciary is not independent of political interference. Responsibilities under the chain of command are explicitly excluded. Deadlines for investigation are very short. It appears that investigations relating to East Timor are being carried out in accordance with these provisions. Indonesia's attorney-general failed to honour the last deadline, which expired on 17 October.

Even if the investigations continue, in the hope of avoiding the establishment of an international tribunal, the validity of any indictments produced are likely to be challenged by the defendants. Moreover, a Constitutional Amendment passed on 18 August 2000 enshrines the principle of non-retroactivity for all laws including human rights laws.²⁴ This means that the human rights court bill could only apply to crimes committed after it was passed, therefore excluding the events in East Timor.

The suspects' lawyers have already declared that they would use this non-retroactivity clause to protect their clients, on the principle that constitutional provisions hold primacy over other laws. But human rights violations cannot be treated as ordinary crimes.

Although Indonesian attorney-general Marzuki Darusman is widely admired overseas, he was deputy chairman of Golkar, the ruling party under Suharto. Munir, an outstanding Indonesian lawyer and human rights defender, and a member of Indonesia's national investigation commission on East Timor, is convinced that the attorney-general is continuing to bow to pressure from the military. Munir therefore recently called for an international tribunal on East Timor.

Establishment of an international tribunal, however, does not relieve Indonesia of its responsibilities. An international court will address only the most serious cases, while many other serious crimes, including complicity inside Indonesia's administration, need to be prosecuted. An international tribunal is therefore an indispensable supplement to Indonesian national trials, as José Ramos-Horta and Xanana Gusmão have said.

East Timor

East Timor will eventually also have obligations to prosecute serious breaches of humanitarian law committed on its territory or against its population.²⁵

East Timor is not yet a sovereign state and as long as it remains under UN administration, an international tribunal on the models of the ICTY and the ICTR is the only option. As in the case of Indonesia, East Timor's judiciary system needs improvement, as it has to deal with many major crimes.²⁶ This is an enormous task. The UN Transitional Authority in East Timor (UNTAET) Serious Crimes Investigation Unit has reduced the number of cases under investigation to four: the mass killings at Liquiça, Maliana, and Los Palos, and at the house of former governor Manuel Carrascalao.²⁷ Other, equally serious incidents, such as the massacres at Suai and Oecussi, are not being investigated.²⁸

Without a UN Security Council mandate under Chapter VII of the charter, similar to those for Yugoslavia and Rwanda, a tribunal situated in East Timor would remain toothless. As Indonesia has failed to honour the extradition treaty struck in April 2000, any prosecutions other than mock trials *in absentia* seem to

²² Training of Indonesian judges and inquiry staff is inadequate. Corruption, nepotism and political interference are common. Decisions about who is charged, convicted or acquitted may depend on privileges, political advantages and loyalties rather than on evidence. The army clings to the legitimising myth that it is the parental leader of the nation, and acts from a position of power detached from common norms of social behaviour. It sees itself as a ruler who stands above the law, whose actions are not bound to moral principles and whose prime duty is to guarantee cosmic harmony. The latter concept is in practice reduced to stability: simple maintenance of the current power arrangement. If that is the purpose, impunity is natural — even necessary. Rendering justice therefore amounts to revolution and aims at the very heart of the military claim on power. It will therefore be met with fierce resistance.

²³ The bill was approved by the House of Representatives on 6 November 2000.

²⁴ The principle of *nullum crimen sine lege* — no crime without a law — does not apply if international law has statutes that a state chooses to ignore to allow impunity.

²⁵ Provided it signs up to the UN conventions, as the CNRT leadership has indicated it would do.

²⁶ East Timor's judicial structure is still very weak and human rights monitors have voiced reservations about the rule of law inside its institutions. The UN administration in East Timor has opted to validate Indonesian legislation, but this sometimes contradicts international human rights standards.

²⁷ At least 25 people were killed when pro-Indonesian militia attacked the church in Liquiça on 6 April 1999. Twelve were killed at the Carrascalao house on 17 April. Up to 47 people died in a militia attack on 8 September in Maliana. Another militia group killed nine people in Los Palos on 25 September; two of the victims were nuns returning from delivering food to refugees.

²⁸ Hundreds of people, mainly women and children, were killed at Suai on 6 September 1999. UNTAET estimates that 75 people from the Oecussi enclave were killed on 9 September, after being abducted from their villages; their mass graves were discovered by Australian soldiers in December 1999.

be most unlikely. Besides, it is doubtful if a national tribunal, whether in Indonesia or East Timor, could be sufficiently impartial for fair trials and the delivery of justice.

The international community

International law requires action. If nothing results from national prosecutions and impunity prevails, then — according to the current interpretation of international law — there is an explicit obligation on the international community to establish an *ad hoc* international criminal tribunal.²⁹ Statutes would most likely be modelled on those of the ICTY, the ICTR or the ICC.

National and international prosecution: Is there a compromise solution?

National and international prosecutions in such cases as East Timor should, in principle, be complementary. However a different model is currently being tested in Cambodia: international components³⁰ are being introduced into a national tribunal. So far, the outcome is unsatisfactory and offers no real alternative to an international tribunal. Indonesia had suggested a 'mixed' tribunal similar to Cambodia's after the Atambua attack, when calls for an international tribunal became louder.³¹

Establishing an international tribunal

In the absence of a permanent International Criminal Court, *ad hoc* tribunals are indeed the only option for international criminal prosecution. The existing tribunals (the ICTY and the ICTR) were established by the Security Council acting under Chapter VII of the UN Charter.³² Chapter VII requires states to cooperate with international tribunals, for instance to conduct investigations — on site if necessary — prosecutions and extraditions. In the past this has had little practical effect. However, war criminals from the former Yugoslavia have been captured by international forces. Therefore those wishing to promote an international tribunal on East Timor should lobby for a court to be established by the UN Security Council under Chapter VII of the UN Charter.

The UN inquiry commission was tasked with providing secretary-general Kofi Annan 'with its conclusions with a view to enabling him to make recommendations on future actions'. Surprisingly, the commission recommended that the secretary-general establish a court — which his office had not expected. Annan published the recommendations without adopting or rejecting them, but stated that he felt 'encouraged by the commitment shown by [Indonesian] President Abdurrahman Wahid to uphold the law and to fully support the investigation and prosecution of the perpetrators through the national investigation' in Indonesia. Through diplomatic channels, Annan signalled that he was observing a three-month moratorium to evaluate Indonesian efforts to bring the culprits to justice. This moratorium ended by May 2000, but the secretary-general has made no official statement yet.

While the international community, setting aside the recommendations of United Nations Special Rapporteurs and the United Nations Commission of Inquiry, has waited for the Indonesian government to try perpetrators, the defenceless victims of these mostly pre-meditated actions, are struggling to come to terms with huge physical and emotional loss. No healing process can start in the knowledge that perpetrators are at large, and will go unpunished. Without healing, East Timor's unique chance of founding a nation based on higher principles rooted in freedom and equity, will be still-born. Justice is vital not only to East Timor's future, but also to the future of Indonesia, which is also struggling to found a democratic state based on the rule of law.

Christian Churches call for justice and peace in East Timor, statement signed by Christian organisations and churches internationally,
3 December 2000

²⁹ If national courts are unable or unwilling to institute proceedings against suspects (and the planners of the crimes, in particular) with governmental or military command authority. See ILC report 1996 and the principles of the Rome Statute.

³⁰ In the form of prosecutors and judges.

³¹ Initially, the states promoting a permanent International Criminal Court, the European governments in particular, had planned to establish the ICC quickly, to enable a solely international prosecution of members of the Khmer Rouge. This was fiercely resisted by the United States, which has opposed the ICC and has not signed up to it — probably because of its war crimes in Vietnam, and many other conflicts. The convenient death of Pol Pot just days before a preparatory meeting for the Rome conference in June 1998, defused the discussion. In an attempt to reduce US opposition to the treaty, it was agreed that the ICC would be able to prosecute only those crimes committed after it came into existence. The United States prefers to sponsor *ad hoc* tribunals, to reduce public pressure to hasten the establishment of the ICC.

³² The ICC statute vests certain powers in the Security Council (see §16, delaying veto for the Security Council).

This year's chairman's statement on East Timor from the UN Commission on Human Rights was very weak but, even so, Indonesia has failed to meet its requirements. This, together with Indonesia's refusal to honour the extradition agreement struck with East Timor, accentuates the need for firm international action.

Political considerations

The CNRT has recently renewed its demand for international prosecutions, urging the UN Security Council to establish an international *ad hoc* tribunal. While the demand gained more support, in the United States in particular, after the Atambua attack, the Security Council is not enthusiastic about the request. This is not only because individual members fear for their bilateral relations with Indonesia. A tribunal is expensive. Russia and China might block it for political reasons.³³ It seems to be crucial that the lobby for an international tribunal clearly limits the scope of prosecution (temporal and territorial jurisdiction) to East Timor, as any move beyond that will most probably not be acceptable to the Security Council.

In the New Year Ireland and Norway will become non-permanent members of the Security Council, and they are likely to support an *ad hoc* tribunal. The presidency of the European Union will move from France to Sweden — with a policy co-ordinator already identified, who is known to take courageous positions on human rights and accountability.³⁴

The next East Timor donors' meeting is due on 5 and 6 December in Brussels, and offers an opportunity to lobby the European Union.

Further information

The full texts of the Geneva Conventions and their Protocols, and the Statutes of the ICC, ICTY and ICTR can be found in the International Humanitarian Law database, on the website of the International Committee of the Red Cross:

www.icrc.org

For information about the ICTY, see:

www.un.org/icty

For information about the ICTR, see:

www.icttr.org

Updates on the progress of ratification of the ICC Statute, and documents from the ICC Preparatory Commission, are available on the website of the non-governmental Coalition for an International Criminal Court:

www.iccnw.org

For texts of the UN human rights conventions, see:

www.untreaty.org

For articles by journalists, lawyers and scholars about armed conflicts and other international issues in the light of international humanitarian law, see the website of the Crimes of War project:

www.crimesofwar.org

³³ It remains to be seen if China's interest in gaining future East Timor's acceptance of the One-China policy might outweigh its reservations about international criminal prosecution. Russia is negotiating arms sales to Indonesia.

³⁴ The permanent representative of the Union's Common Foreign and Security Policy, Javier Solana, the so-called EU Foreign Minister, is not given to stressing human rights. At the meeting of the Consultative Group on Indonesia, on 17-18 October 2000 in Tokyo, he did not even insist that Indonesia solve the refugee problem in West Timor as a precondition for aid.

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The Christian churches

Confronting instability

East Timor is going through an important and sensitive phase as it prepares for complete independence. Manuel Abrantes of the Dili Diocesan Justice and Peace Commission discusses the mission, priorities and concerns of the Catholic Church during the transition.

East Timor is politically, socially and economically fragile. It is in dire need of housing, jobs, security, law and order, and humanitarian assistance. East Timorese nationalism is thriving, but tensions remain in the process of establishing constitutional democracy and the rule of law. Twenty-four years of occupation have bred a culture of violence, intolerance, resentment, hatred and revenge.

The Catholic Church is an integral part of East Timorese society. Its role has been, is and always will be spiritual, pastoral, charitable, humanitarian and social, working with the communities at the base — the parishes, villages and hamlets. A living sign of the presence of God is the social apostolate, which incorporates the tasks of teaching and education, humanity and charity, and social justice. The Church will continue to promote social justice and education.

A special preoccupation is the concern for peace: spreading the culture of non-violence and ending hostilities and wars. Peace is not simply the absence of war, but also the establishing of calm in the souls of all Timorese. Peace requires mutual acceptance of all Timorese and the

recognition that for divine forgiveness, the ability to forgive our neighbours, and even our enemies, is crucial.

A country in crisis

'The Church is particularly concerned for East Timor's political and economic stability. The subsistence and survival economy endured by East Timorese during decades of Indonesian occupation, followed by the destruction of almost all basic infrastructure in September 1999, has degenerated into crisis. This could provoke insurrection and political instability in East Timor.

Those responsible for law and order are failing to enforce the law, and it is proving difficult to establish a functioning and competent judicial system to apply laws and regulate social life. This, too, carries a threat of anarchy.

There are constant incursions, infiltrations and sporadic attacks on the East Timorese border by militias and Indonesian soldiers based in West Timor. Together with social intolerance and radical posturing by some politicians, they threaten the peace and stability of East Timor and the national unity pact agreed at the CNRT national congress in August 2000.

Priorities

Because of the havoc wreaked by the



Ermera's parish priest on the road with some of his parishioners.

militias last year, a considerable amount of church infrastructure must now be rebuilt. The Church agrees with the priorities for national reconstruction set by the recent congress of the National Council of Timorese Resistance (CNRT), as well as those set by the CNRT/UN transitional government. But its immediate concerns include evangelisation and the following social and pastoral priorities:

- reconciliation for peace achieved in a holistic and participatory fashion at the grassroots and between all religious confessions
- the eradication of poverty in the villages
- sustained economic rehabilitation for the rural areas
- peace education and positive cultural values
- basic education, elementary and higher training
- advocacy for human rights and social justice.

New beginnings

The East Timorese Protestant Church seeks new members and a new role. Feije Duim reports.

In the course of last year's conflict, the Gereja Kristen Timor Timur (GKTT — Christian Church of East Timor) lost many members and staff. Many of these were from the Indonesian archipelago, and returned to their places of origin or went elsewhere as it became clear that East Timor would become independent. A small minority of members (including some pastors) belonged to the pro-autonomy factions, or even the militias. They are now afraid to return.

The Protestant Church has lost its main financial base: the city congregations whose members — civil servants, police officers, military — had large salaries. Most were of Indonesian origin and have now gone. The Church must therefore look for a financial base in the rural communities. It now has about 20,000 members, mainly in the villages, down from some 25,000-30,000 members before the independence ballot of August 1999. Most of its 13 pastors are young. They are led by the Rev Francisco Vasconcelos.

Cooperation

The pastors want to reorganise the church and to take an active role in society, promoting justice and reconciliation, as a continuation of their efforts during the

Indonesian period. To achieve this, they cooperate with East Timorese NGOs and human rights groups such as Yayasan Hak, FOKUPERS, and Forum Solidaritas Mahasiswa. The church also wants to develop self-help groups for young people who have experienced trauma and lack skills.

YASONA, a community development foundation started by the Protestant Church, has worked with refugees and returnees in the aftermath of the ballot, with support from Action of Churches Together (ACT) International. It is now shifting its focus to community development. Much remains to be done for returnees and the population of the border area (especially in the South) and in the Oekussi enclave.

New Publications

CIIR's Catherine Scott reviews recent books about East Timor's struggle for independence.

The East Timor Question: The struggle for independence from Indonesia, by Paul Hainsworth and Stephen McCloskey (eds), IB Tauris Publishers, London & New York, 222 pages, 2000.

This anthology, compiled by two individuals with a strong history of support and solidarity for East Timor, has a distinct Irish flavour. It is a reminder of Ireland's consistent support for the East Timorese cause, spurred by a determined and committed solidarity campaign on both sides of the border. But the editors, both from the North of Ireland, also address the role of the British government.

The chapters, contributed by a range of academics and activists, provide history, analysis and case studies of successful civil solidarity action. Particularly moving is Maureen Tolfree's account of the cover-up of the killing of five television journalists during Indonesia's invasion of East Timor in 1975. Tolfree, sister of Brian Peters, one of the victims, shows how readily government officials brush aside the feelings of ordinary families for the sake of wider policy and political concerns.

Paul Hainsworth's assessment of the current British government's performance on East Timor is timely and finely balanced. He concludes that Labour has made a very creditable contribution on the diplomatic front but, with a legacy of arms contracts of the previous government, proved unable to reconcile the demands of the British arms industry with ethical standards. This is a rather generous view. Parliamentary investigation by four select committees indicates that Labour could perhaps have revoked the sale of Hawk aircraft to Indonesia.

The book's focus throughout is on the role of the international community, international politics and policy, geopolitical change in Indonesia, and lessons from other countries such as South Africa. In this respect, it assembles a useful collection of material which is up to date, informative, analytical and digestible.

Its weakness lies in the scant attention paid to the efforts of the East Timorese themselves to secure independence, and their ultimate success, albeit after terrible loss of life. The East Timorese, through their courage, determination and tenacity, liberated themselves — with a little help from their friends. The part played by East Timorese women in their liberation struggle is entirely missing from the book. For a well-balanced record of East Timor's history, politics, international relations, developmental challenges and needs, this is a serious omission.

East Timor: The Price of Freedom, by John G Taylor, Zed Books, 248pp, 1999

This is a welcome reprint and update of John Taylor's excellent history of East Timor, first published in 1990 as *Indonesia's Forgotten War*. The original text remains, the chronology has been updated, and a new chapter charts developments from the beginning of the 1990s.

In the new chapter, Taylor explains how the catastrophe of September 1999 came about. He starts with an earlier tragedy, the Santa Cruz massacre of 1991, which brought two notable changes: greater international awareness of the appalling repression, and increased violence in East Timor as the elite special forces, Kopassus, took control of security operations.

The author covers the subsequent turning points. The fall of Indonesia's President Suharto in the wake of the Asian financial crisis opened up some democratic space in both Indonesia and East Timor. Under his successor, BJ Habibie, new political possibilities appeared.

Here, Taylor puts the fundamental question: why did Habibie risk his political neck by offering a referendum in East Timor? Taylor believes that Habibie was attempting to establish his credentials, differentiate himself from Suharto and improve his electoral prospects on the strength of international acclaim. But he underestimated the opposition. With democratic elections approaching, candidates such as Megawati Sukarnoputri used East Timor to stir up Indonesian nationalism. The army, too had other ideas: it prepared a covert operation, Global Clean-Sweep, as a final solution for East Timor. Meanwhile, active and retired armed forces commanders systematically undermined progress at the diplomatic level. Many had a long history of involvement in East Timor, dating back to the invasion in 1975, and this only served to bolster their determination. The militias were their pawns in a cynical and violent exercise conducted in defiance of the entire world.

For Taylor, the turning point for international policy came when the militias overstepped the mark by invading the ultimate place of sanctuary, Bishop Belo's house, killing 39 people. Thereafter, pressure on the US state department increased dramatically. The United States, backed by the World Bank and the International Monetary Fund, threatened economic sanctions. The catastrophic implications for the Jakarta elite forced Indonesia to accept foreign military intervention. Taylor's account moves between international developments and the brutality on the streets of East Timor, showing how they influenced each other.

The author concludes that Kopassus and the generals miscalculated the chances of getting away with a repetition

of their previous behaviour. The degree of international concern, translated into real action, came as a shock. But it did not prevent them from using the East Timor issue in the run-up to the October 1999 presidential elections in Indonesia. East Timor, even as an independent nation, could remain subject to continuing economic and political destabilisation. Its story is not yet over.

East Timor — From Bullet to Ballot

Report of the CIIR observer delegations to the Popular Consultation in East Timor, 1999

One of the few organisations active on East Timor since the Indonesian invasion, CIIR sent a mission to the territory in 1999 to monitor the UN-supervised vote on independence. This report summarises the mission's findings, highlighting the inadequate security arrangements. In doing so, it pays tribute to the courage and determination of ordinary East Timorese people to assert their wish for independence, despite extreme intimidation.

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