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PUTTING THINGS INTO PERSPECTIVE:  
THE REALITIES OF ACCOUNTABILITY  
IN EAST TIMOR, INDONESIA AND  
CAMBODIA

Suzannah Linton

SCHOOL OF LAW  
UNIVERSITY  
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## ***Maryland Series in Contemporary Asian Studies***

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# **PUTTING THINGS INTO PERSPECTIVE: THE REALITIES OF ACCOUNTABILITY IN EAST TIMOR,<sup>1</sup> INDONESIA AND CAMBODIA**

Suzannah Linton\*

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1. Although the official name of the independent State informally known as East Timor is the República Democrática de Timor-Leste (Democratic Republic of East Timor), this article uses the name of 'East Timor' as it can be used consistently throughout and is thus less confusing for the reader.

## I. INTRODUCTION

In Southeast Asia, one of the less politically liberal regions of the world and known for championing the argument that the human rights doctrine is a Western notion imposed on the rest of the world (an offshoot is the 'Asian Values' doctrine),<sup>2</sup> three countries have been dealing in novel ways with the challenges of extremely serious violations of human rights. East Timor, Indonesia and Cambodia have had common experience of mass violence and egregious abuse of power, matched by striking international indifference and failure to respond in times of greatest need. All three nations are haunted by the immensity of those violations; all three are in troubled transition, or are simply in limbo. Governments and citizens alike have faced conflicting pressures on how best to move forward and to prevent such tragedies from ever occurring again. In these countries, efforts to break cycles of violence and impunity through accountability have run headlong into the harsh reality of conflicting institutional, State, international and other agendas and priorities, as well as obstacles that range from lack of experience and realism about what can be achieved and conceptual flaws in design and implementation, to the more mundane but equally serious, such as minimal infrastructure, lack of resources and scarcity of appropriately skilled personnel. Compromise has generally been the only way to keep hopes of accountability alive, but compromise and 'making do' have led to many other problems with potentially long-term destabilising effects.

In December 2005, it will be five years since the first indictment for crimes against humanity was filed at the world's first internationalised domestic tribunal (East Timor's Special Panels for Serious Crimes) in the case known as *Lospalos*.<sup>3</sup> This was South-

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2. For Lee Kuan Yew's arguments about Asian Values, see Fareed Zakaria, "Culture is Destiny: A Conversation with Lee Kuan Yew," *Foreign Affairs*, March/April 1994. Also see Yash Ghai, *Human Rights and Governance: The Asia Debate*, Asia Foundation, Occasional Paper #4. For an overview of the ASEAN attitude to human rights, see Li-ann Thio, "Implementing Human Rights in ASEAN Countries: Promises to keep and miles to go before I sleep," *Yale Human Rights & Development Law Journal*, Vol. 2 (1999), pp. 1- 86.

3. This case concerned the activities of a militia group known as Team Alfa in the eastern most region of East Timor. See *General Prosecutor of UNTAET v. Joni Marques, Manuel da Costa, Joao da Costa alias Lemorai, Paulo da Costa, Amelio da Costa, Hilario da Silva, Gonsalo dos Santos, Alarico Fernandes, Mautersa Monis, Gilberto Fernandes and Syaful Anwar*, Indictment, December 11, 2000. The Special Panels were set up through UNTAET's Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences.

east Asia's first prosecution for crimes against humanity since the Second World War trials<sup>4</sup> and the first case ever prosecuted based on the definition of crimes against humanity in the Statute of the International Criminal Court (hereafter 'ICC').<sup>5</sup> In 2002, Indonesia began prosecuting crimes against humanity that had been committed in East Timor in 1999; it has since prosecuted crimes against humanity in relation to a notorious massacre of civilians at Tanjung Priok in Jakarta in 1984 and is currently doing so in relation to killings in the Eastern province of Papua/West Irian. Cambodia has established the legal framework for prosecuting those most responsible for the horrors of Democratic Kampuchea; at time of writing, the Extraordinary Chambers have yet to begin to function, but final preparations are underway.<sup>6</sup> In fact, since 2000, these three countries have also seen four United Nations commissions of inquiry,<sup>7</sup> several investigations by a human rights commission<sup>8</sup>, the

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4. The first major trial was that of Tomoyuki Yamashita in the Philippines in 1945. Between May 1946 and November 1948, the International Military Tribunal for the Far East established by General MacArthur as Supreme Commander of the Allies, sat in Tokyo, and convicted 25 Japanese Class A detainees accused of crimes against peace, conventional war crimes and crimes against humanity. Those considered lesser criminals were subsequently tried in the respective victim countries in Asia, including Singapore, China, the Philippines and the Dutch East Indies. See generally B.VA Röling and A. Cassese, *The Tokyo Trial and Beyond*, Oxford, 1973.

5. Opened for signature on July 17, 1998, U.N. Doc. A/CONF.183/9 adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on July 17, 1998 and entered into force on July 1, 2002.

6. For the most recent consideration of the legal issues arising from efforts to hold the Khmer Rouge accountable, see the symposia in the *Journal of International Criminal Justice*, Volume 4(2) 2006 (forthcoming).

7. Three eminent lawyers were appointed by the United Nations Secretary-General to investigate the issue of justice for the crimes of the Khmer Rouge - see the *Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135*, transmitted by the Secretary-General along with his own report, U.N. Doc. A/53/850, S/199/231 (hereafter 'Cambodia Group of Experts Report'). They recommended the establishment of an ad hoc tribunal for Cambodia. Three United Nations investigations into East Timor have been conducted. After the post-ballot devastation in East Timor in 1999, the International Commission of Inquiry on East Timor was established by the Secretary-General to gather and compile information on possible violations of human rights and acts which might constitute breaches of international humanitarian law committed in East Timor since January 1999. Reporting on January 31, 2000, it recommended the establishment of an international tribunal for East Timor (see *Report of the International Commission of Inquiry on East Timor to the Secretary-General*, U.N. Doc. A/54/726, S/2000/59). The Special Rapporteurs on Torture, Extrajudicial, Summary or Arbitrary Executions and Violence against Women also conducted a special field investigation and recommended that unless the Indone-

establishment of three truth commissions including the world's first ever bilateral 'friendship commission'<sup>9</sup>, civilian-military courts<sup>10</sup> and formalised use of traditional justice mechanisms<sup>11</sup>. There has

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sian government "in a matter of months" brings those responsible to justice, then the Security Council should consider the establishment of an international tribunal (see *Report submitted by the Secretary-General to the General Assembly on the Situation on Human Rights in East Timor*, U.N. Doc. A/54/660). The third commission of inquiry for East Timor was mandated to assess the progress made in bringing to justice those responsible for serious violations of international humanitarian law and human rights in East Timor in 1999, to determine whether full accountability has been achieved, and to recommend future actions as may be required to achieve accountability and promote reconciliation. The Commission reported on May 26, 2005, see Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999, U.N. Doc. S/2005/458, February 24, 2005 (hereafter 'East Timor Commission of Experts Report').

8. Komnas HAM (*Komisi Nasional untuk Hak Asasi Manusia*), was established by President Soeharto through Presidential Decree Number 50 of 1993.

9. There are truth commissions in East Timor and in Indonesia, and one that has been jointly created by both nations.

10. In Indonesia, crimes conducted by associations of persons from both military and civilian backgrounds are in principle to be dealt with by the civilian courts by mixed military-civilian panels (*Peradilan Koneksitas*), although the Chief Justice of the Supreme Court may determine that the case be tried by a purely military tribunal (Art. 40, Law 35 of 1999). But they do not technically have jurisdiction over any acts characterised as 'gross violations of human rights'. One such trial was held in Aceh in 2000, and concerned a 1996 armed attack on a religious school run by Teungku Bantaqiah leading to 56 civilian fatalities. These courts are greatly criticized by the NGO community for lacking independence and working against accountability.

11. Traditional justice mechanisms for lesser crimes have been at the heart of the reconciliation work of East Timor's Truth Commission. This aspect of the Commission's work has been championed by the President of East Timor, who describes the process in the following terms. "*Tetum speakers have a word for reconciliation: "Nahe Biti" - literally meaning "stretching the mat" - this stretching of the traditional grass mat and opening it out makes space for others to sit on the mat and so tell their sides of the story too. A special feature of the CAVR is its grassroots focus on reconciliation, in what it calls community reconciliation procedures. This is rooted in the culture of the "nahe biti." These are hearings held at the village level, where perpetrators of less serious crimes come forward voluntarily to admit what they have done and seek to reconcile with victims and the whole community. These hearings link the formal justice system with the customs of each local area. They are legitimate both in the eyes of jurists and rural communities who respect both the modern law and the ancient traditions of our land.*" HE President Kay Rala Xanana Gusmão, Chancellor's Human Rights Lecture, "Challenges for Peace and Stability," University of Melbourne, April 7, 2003. Also see <<http://easttimor-reconciliation.org/Updates.htm>> for the Commission for Reception Truth and Reconciliation in East Timor's progress report October - November 2002, which contains a detailed account of an actual process at Suco Lela-Ufe, Nitibe, Oecussi on November 22, 2002. In essence what happens is the following: the perpetrator sends a request to the commission. If appropriate, local leaders and the regional commissioner summon a public meeting to which the perpetrator and victim[s] are invited. Victim[s], the perpe-

even been class action litigation before Indonesian courts - one pending case involves a lawsuit against 5 present and past Presidents.<sup>12</sup> Of the three countries, Cambodia and East Timor are party to the Statute of the ICC.

International norms and domestic politics do not operate in isolation from each other and it seems that quite a lot of unusually propitious constellations have taken place in Southeast Asia to enable all of this.<sup>13</sup> Their neighbours may be watching with concern, but have held to the fundamental principles guiding the Association of Southeast Asian Nations (hereafter 'ASEAN') and not sought to intervene in the remarkable goings-on in all three nations.<sup>14</sup> In the meantime, their civil societies have begun to look within their own region for innovative ideas and to learn from the tribulations of others. For example, one Cambodian non-governmental organisation (NGO) has published trial observations of the Ad Hoc Court for East Timor in Jakarta in the Khmer language.<sup>15</sup> The same or-

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trator and community members speak and listen to each other. They discuss the crimes and propose an agreement whereby the perpetrator makes amends, by example through community work, repayment, public apology or undertakes an act of reconciliation including traditional resolution.

12. Under Article 1365 of the Indonesian Civil Code, every act that violates the law and causes loss to others shall obligate those responsible to compensate for such loss; there is also the right of compensation as part of criminal proceedings under Articles 98-101 of the KUHAP (*Kitab Undang-Undang Acara Pidana*, or Criminal Procedure Code). A class action case based on Indonesia's Civil Code was filed against five Indonesian Presidents on December 17, 2004 by the Jakarta Legal Aid Institute acting on behalf of seven groups of victims of an anti-Communist backlash following an alleged attempted coup in Jakarta in 1965 by the Indonesian Communist Party. See TAPOL, "Class Action against Five Presidents by Victims of 1965," April 20, 2005. There was an earlier class action attempt in the Abepura case (based on Articles 98-101 of the KUHAP and Supreme Court Regulation 1/2002) before the Human Rights Court in Makassar, which was rejected. See *Tempo Interaktif*, "Hakim Peradilan HAM Abepura Tolak Class Action," June 7, 2004.

13. The phrase is borrowed from Gerry Simpson, "War Crimes: A Critical Introduction," in Timothy L. H. McCormack and Gerry J. Simpson eds., *The Law of War Crimes: National and International Approaches*, The Hague: Kluwer Law International, 1997, p. 28.

14. The Treaty of Amity and Cooperation in Southeast Asia, signed at the First ASEAN Summit on February 24, 1976, declared that in their relations with one another, the High Contracting Parties should be guided by six fundamental principles, most relevant being those of mutual respect for the independence, sovereignty, equality, territorial integrity, and national identity of all nations; the right of every State to lead its national existence free from external interference, subversion or coercion; and non-interference in the internal affairs of one another.

15. *Searching for the Truth* is published by the Documentation Center of Cambodia. It has published an article from the *Leiden Journal of International Law* entitled

ganisation has also followed developments in East Timor and published perspectives on lessons that could be learned for Cambodia from the East Timor experience.<sup>16</sup> In 2004, a group of Cambodians visited East Timor to examine at first hand NGO monitoring of the Serious Crimes trials before the Special Panel; in late 2004, a judge from the Special Panel in East Timor was invited to Cambodia to share his experiences and advice with NGOs, government officials and the diplomatic community. The irony is sharp, for in 2000, it was the Cambodian model of the internationalised domestic court comprised of international and local personnel that inspired the establishment of the model in East Timor that has come to be known as the Special Panel for Serious Crimes.<sup>17</sup> And, while the East Timor enterprise closed down on May 20, 2005 after five years,<sup>18</sup> Cambodia's is just getting started.

What has happened to trigger this explosion of activity on accountability for gross violations of human rights in the three South-east Asian nations? One obvious factor has been regime change. I

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"Unravelling the First Three Trials at Jakarta's Ad Hoc Court for Human Rights." According to the Director of the Documentation Center of Cambodia, he published this because "*It is important for the survivors to know that they are not the only survivors*"; this knowledge that they are not alone "*will help, I hope, to ease the feeling of revenge*": Youk Chhang, Email correspondence with the author, April 19, 2005.

16. Searching for the Truth Magazine, Issues 25-29 contained an article on East Timor's Special Panel(s) for Serious Crimes and what Cambodia could learn from it.

17. This was apparently done from Dili without full consultation of the UN's legal advisors in New York, who were not enthusiastic about the Cambodian model. Shraga describes the legislation as paying "*little regard to their relevance in the realities of East Timor, or their customary or conventional international law nature*." Furthermore, while "*the terms of the UN mandate and the choice of the constitutive instrument is ultimately a political choice, it remains the Secretariat's preference that a UN-assisted mixed jurisdiction be established as a treaty based organ, whose applicable law and Rules of Procedure and Evidence are primarily international, whose organizational structure is a simple two-tiered court, and its international component is substantial with a majority of international judges, an international Prosecutor, and a Registrar. Should a national law containing the same international features be chosen as the mixed-tribunal founding instrument, it should be annexed to the Agreement and made an integral part thereof to ensure that it is not unilaterally amended by the government*." Daphna Shraga, "Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions," in Cesare P. Romano et al. eds., *Internationalized Criminal Courts*, Oxford: Oxford University Press, 2004, (hereafter 'Internationalized Criminal Courts'), pp. 33, 37, 38.

18. Further to Security Council Resolutions 1543 and 1573, United Nations involvement in the Serious Crimes project terminated on May 20, 2005, along with the mandate of the United Nations Mission of Support in East Timor. The East Timor Commission of Experts recommended the retention of an international presence and participation via the United Nations in the conclusion of outstanding investigations and any prosecutions.



engage in consideration of the dynamics of change, but my objective in this study has actually been to follow the differing routes of the various accountability processes, understand them and put these striking developments into perspective. In this, any consideration of accountability in context should not just be about the past, but also the present and future, and whether the past is being used as an opportunity to propel a nation towards a better future. Also, my appreciation of accountability in East Timor, Indonesia and Cambodia is not just of the internationalised domestic chambers, sometimes called mixed or hybrid panels, which have caught the attention of many observers. Complex situations are too often misunderstood if viewed simplistically through a single issue focus. In order to see that context and put things into perspective, I have therefore identified nine significant points of common reference. These are: the piecemeal approach to transitional justice, the infiltration of global norms into the local, problems of retroactivity, selectivity of jurisdiction, the eclipsing of State responsibility, amnesties and pardons, the particular problems of what I call 'too little too late, too much too soon and too many cooks', the handling of victim and witness issues and the role of the ICC. I build my study around these thematic points of reference, which serve as springboards for more detailed analysis allowing me to take stock of the wider picture of what has happened in these countries, while also drawing in consideration of the longer-term restoration of law and order and rebuilding of national legal and judicial systems that should run alongside the efforts to secure accountability.

This study proceeds on the basis that readers have sufficient basic knowledge about East Timor, Indonesia and Cambodia and goes straight into the issues. For those needing more background, the footnotes should provide ample detail

## **II. NINE POINTS OF COMMON REFERENCE**

### **A. The piecemeal approach: weak or no coherent justice strategies**

Despite what the statistics may suggest, East Timor, Indonesia and Cambodia have not seen the light on the road to Damascus. Each has vacillated, and continues to do so, over how best to handle the issue of massive violations of human rights. The desire to hold previous regimes accountable has been equivocal and tempered by considerations of issues such as the overall stability of fragile post-conflict societies and opposed interests of major stakeholders, in-

cluding those members of the previous regime who continue to wield influence.

A common feature in all three countries has been the weakness, or absence of, a comprehensive strategy for justice. The responses have tended not to be self-initiated from within the establishment, but emerged as a result of strategic concessions to pressure from without (NGOs, victims groups, the international community). In the case of East Timor, the responses were imposed by the United Nations as transitional administrator. As a result, there are piecemeal, *ad hoc* and uncoordinated developments, without a clear realistic vision of the objective and the means and methods of reaching it. There are no clearly thought out strategies, for example, that place justice as a foundation stone in the development of rule of law and the consolidation of fragile democratic governance. Too often, processes have been put into motion in circumstances where it is doubtful if what is sought is actually individual accountability, deterrence, punishment, establishing a common truth about the past as part of the effort to come to terms and move on, or the (re) assertion of Rule of Law and all the theoretical underpinnings that come with it. Historic accountability, to the extent that it has been allowed, runs on a parallel track to ongoing efforts at essential systemic reform to address judicial and legal failings. The accountability mechanisms are rarely strategically designed to be a means of supporting or catalysing that underlying reform processes.

Design of an effective justice strategy should be associated with the vision of the new regime, and is invariably affected by the degree to which it has been associated with the past. While all three countries have embarked on experiments to deal with the past, the mechanisms often introduce some form of selective restriction such as temporal, personal or subject matter jurisdiction that has been heavily negotiated. There seems to be an assumption that such atrocities could only be committed by previous regimes, which would explain why the legal protections for the present and future are not what one would expect. For example in Cambodia, to this day, it is only the Khmer Rouge that can be prosecuted for genocide, crimes against humanity or war crimes.<sup>19</sup> In Indonesia, there

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19. Prior to the Paris Peace Accords of 1991, the Vietnamese regime of administration in Cambodia (People's Republic of Kampuchea) introduced legislation for the prosecution of what was termed 'genocide' (Decree Law Nos.1 and 2 of 1979). One may question whether the laws of that era were ever valid, given Vietnam's controversial status in Cambodia (occupier or liberator?). But, Article 158 (previously Article

is no way to prosecute torture in its own right or war crimes in internal armed conflict, which sadly, have been regular features on the human rights landscape. In East Timor, the law only permits the Special Panel comprised of mixed nationality judges to take jurisdiction over Serious Crimes and so when that project ends, there is no way to prosecute atrocities of the present and future, bar changing the law or creating a new Special Panel.

Designing a strategy requires consideration of extremely complex issues, and implementing it involves a whole new set of challenges. There are difficult normative choices to be made. The three countries under discussion are facing multi-dimensional crises, but their challenges are actually not unique and have been faced by others such as Chile, Argentina, South Africa, Poland, Czechoslovakia and South Korea. The spectre of renewed disorder is to some degree always present, and may be exploited by those of ill intent whenever the need arises. The question of what to do interlocks with others such as how to prioritise multiple pressing demands, how to address accountability when persons and institutions linked with previous regimes retain immense influence, and whether more harm than good is done by re-introducing horrors of the past into the public sphere. Are all conflicting demands of equal importance, or are some so important as to be non-derogable? Even if a *bona fide* will to address these issues exists, is there the capacity to deal with the huge legacy of violence and repression through the law and order mechanisms? How much accounting for atrocity can a fragile society in transition take?

At independence, the United Nations handed over a ready-made State, warts and all, to East Timor's first elected leaders. In-

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139) of the Constitution provides that laws and standards that safeguard, *inter alia*, rights and freedoms in conformity with national interests, shall continue to be effective unless altered or abrogated by new texts, to the extent that such provisions are not contrary to the Constitution. This could mean that no matter if they were lawfully implemented or not, pre-existing laws at the date of adoption of the Constitution continue to be in force unless overridden by new laws or found unconstitutional. Yet Article 158 is controversial, for it is either viewed as limited in effect to laws and regulations actually in force at the time of its coming into force in 1993, or as allowing the continued applicability of laws prior to its adoption. The bottom line is that there remains uncertainty over whether pre-1993 Constitution laws are actually applicable in Cambodia. In practice, legal practitioners continue to use pre-1993 laws to 'fill in gaps'. For example, the arrest and detentions of the two Khmer Rouge detainees Duch and Ta Mok have been on the basis of a hotchpotch of laws, including decrees of the Republic of Kampuchea. The UNTAC Law is one such law predating the Constitution that is regularly used in the courts of Cambodia.

cluded in the package were two mechanisms that were already up-and-running, which were created through UNTAET's authority to decide what would be best for East Timor under transitional administration.<sup>20</sup> There is no getting around the fact that the Serious Crimes project was not the result of open and informed public debate by the people of East Timor on a coherent and common approach on how to deal with their legacy of massive human rights violations. The CAVR (Truth Commission) process on the other hand, while also resulting from an executive decision of the Transitional Administrator, was the result of wider discussion.<sup>21</sup> Even so, those discussions were on the precise form of the mechanism that decision makers approved, not the kind of approach that the nation should be taking in respect of massive human rights violations of the past. Problems of lack of East Timorese ownership have plagued both institutions, with local participation either minimal or superfluous due to the control exerted by international personnel.<sup>22</sup> Since independence, the government has had its hands tied, but has nevertheless vacillated on accountability for atrocities of the past. It has enthusiastically become party to many international treaties on human rights, including the ICCPR<sup>23</sup>, the Convention against

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20. UN Security Council resolution 1272 (1999) on East Timor. S/RES/1272 (1999), October 25, 1999.

21. A commission for truth and reconciliation was originally proposed in the National Council of Timorese Resistance (CNRT) workshop in June 2000 and subsequently endorsed by the CNRT Congress in August 2000. There is not known to have been any prior comprehensive assessment of the various transitional justice options open to East Timor. Detailed planning for its operation was carried out by a Steering Committee comprising representatives of CNRT, six East Timorese NGOs, UNHCR, and the UNTAET Human Rights Unit, assisted by two international experts in reconciliation. In addition to receiving the endorsement of the National Council and the Cabinet, the Steering Committee conducted consultations in every district on the proposed Commission. CAVR was established by UNTAET Regulation 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, July 13, 2001. CAVR is required to, *inter alia*, establish the truth regarding the pattern and scope of human rights violations from April 24, 1974 to October 25, 1999, and to make recommendations on accountability. This covers not just the period of Indonesia's occupation, but the preceding political conflict between the East Timorese political groups. CAVR's mandate has been extended four times beyond its original 24 month mandate, and it is at time of writing due to submit its Final Report by October 2005.

22. See for example, the report on CAVR in *The La'o Hamutuk Bulletin*, Vol. 4, No. 5 (November 2003).

23. International Covenant on Civil and Political Rights, opened for signature on December 19, 1966 (entered into force on March 23, 1976) (hereafter 'ICCPR').

Torture<sup>24</sup> and the Statute of the ICC, but on the other hand has openly disassociated itself from the Serious Crimes project<sup>25</sup> and even become party to what promises to be the most bogus truth commission ever established, the Truth and Friendship Commission with Indonesia.<sup>26</sup> But, East Timor has had to balance the realities of its devastated, under-developed circumstances, and the very real threat of a dominant neighbour, which also happens to be the one-time oppressor and reason for the massive violations of human rights inflicted on the people of the half-island. That country's dominant military remains resentful about the loss of East Timor and many Indonesians believe that the exercise of self-determination at the referendum of August 30, 1999 was a fraud committed on the Indonesian nation. Then, there are the East Timorese themselves, who, with the support of the highly influential Catholic Church, demand justice very vocally.<sup>27</sup> But the accountability they want is for all gross violations of human rights going back to 1975,

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24. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature on December 10, 1984 (entered into force on June 26, 1987) (hereafter 'Convention against Torture').

25. The Government's conduct in the matter of the Wiranto Arrest Warrant most clearly demonstrates its hostility towards the Serious Crimes process. Wiranto was the Minister of Defence and Head of the Armed Forces in 1999. It disclaimed the process, claiming it was a UN project. It has since refused to transmit international arrest warrants issued by the Special Panel to INTERPOL. See Jill Jolliffe, "Timor PM Slams UN on War Criminals," *Asia Times*, May 15, 2003. Days after the arrest warrant was issued, the President of East Timor travelled to Bali on a 'private' but highly publicised trip, where he was photographed embracing Wiranto for the media. Ironically, the United Nations also disclaimed responsibility for the issue of the warrant, despite it being in control of the Serious Crimes process, and the warrant being issued by one of its employees, an international judge of the Special Panel for Serious Crimes, at the request of another of its international employees, the Deputy General Prosecutor for Serious Crimes.

26. See the Terms of Reference for the Commission of Truth and Friendship Established by the Republic of Indonesia and the Democratic Republic of Timor-Leste, available at <<http://www.deplu.go.id>>, accessed on April 23, 2005. This Commission has a mandate "to establish the conclusive truth in regard to the events prior to and immediately after the popular consultation in 1999, with a view to further promoting reconciliation and friendship, and ensuring the non-recurrence of similar events." It will also "recommend amnesty for those involved in human rights violations who cooperate fully in revealing the truth."

27. See the following examples: The Catholic Church of East Timor, 'Position on Justice for Crimes against Humanity', presented to the Commission of Experts appointed by the Secretary-General, April 5, 1999; Aderito de Jesus Soares, "Justice in Limbo: The Case of East Timor," presented at the *Symposium on the International Criminal Court and Victims of Serious Crimes*, Faculty of Law, University of Tokyo, March 29, 2005.

and not the convenient 1999 cut-off date that is favoured by the international community, including their own State, Indonesia, the USA and other states that had some role in allowing or assisting the invasion and occupation of East Timor. Fully aware of the problems of prosecutions within East Timor itself, they want justice dispensed by the international community in an *ad hoc* international criminal tribunal, as was done for the former Yugoslavia and then Rwanda.

Of the three countries, Indonesia is the only one which has had something of a basic blueprint for justice. The vision, set out for the first time in the 1999 Law on Human Rights<sup>28</sup> and fleshed out in the 2000 Law on Human Rights Courts<sup>29</sup>, has provided the legal framework for the investigation and prosecution of gross violations of human rights through a permanent or *ad hoc* human rights court, and made provision for a truth and reconciliation commission.<sup>30</sup> But even so, the overlapping mandates and multiplicity of institutions evidences lack of coherence in planning. One of the immediate challenges to an effective strategy for accountability has been the continuing dominance by the un-reformed military and beneficiaries of the Soeharto era. Depending on how it is used, that influence can paralyse, hinder or sabotage efforts to secure justice. Accountability has come to be a battleground in the complex war of

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28. Law No. 39/1999 on Human Rights (Undang-Undang No. 39 tahun 1999 tentang Hak Asasi Manusia, September 23, 1999) published in Lembaran Negara Republik Indonesia (Official Gazette of the Republic of Indonesia) 1999 No. 3886.

29. Law No. 26/2000 on Human Rights Courts (Undang-Undang Republik Indonesia Nomor 26 Tahun 2000 Tentang Pengadilan Hak Asasi Manusia), November 23, 2000, published in Lembaran Negara Republik Indonesia (Official Gazette of the Republic of Indonesia) 2000 No. 208 (hereafter 'Law 26/2000').

30. The truth commission option had been first introduced into Indonesian law as a way to deal with ongoing tensions in the country's Eastern-most province of West Irian or Papua. The law on special autonomy for Papua (UU 21/2001, Otonomi Khusus bagi Propinsi Papua), passed on November 21, 2001 and entered into force on January 1, 2002, introduced a truth and reconciliation commission as part of a three-pronged approach to the human rights problems in the eastern province. Chapter XII of the law allows for a commission for truth and reconciliation to be created by Jakarta to "*clarify the history of Papua to stabilize the unity and integrity of the nation within the Unitary State of the Republic of Indonesia*" and under Article 46 (2)(a) it is also tasked to "*identify and determine measures for reconciliation*." The reason for this is that many Papuans dispute the validity of the method by which Papua came to be part of the Republic of Indonesia through an Act of Free Choice in 1969, and assert that their right to self-determination was denied. It seems unlikely that this is a genuine truth-seeking exercise, but rather one which seeks a version of history that will 'confirm' the correctness of the central government position on Papua's incorporation and disprove complaints about self-determination and the Act of Free Choice itself.

attrition between reformers and the old guard, who cede occasional tactical concessions from time to time yet remain very much in control throughout. This is very clearly to be seen in the tribulations of the *ad hoc* trials for East Timor<sup>31</sup> and Tanjung Priok<sup>32</sup> and the establishment of the Truth and Reconciliation Commission (KKR).<sup>33</sup> The arbitrariness of accountability, which keeps open the possibilities for political manipulation, is also to be seen in the lack of clarity in the divisions between *ad hoc* courts and the KKR. In fact, the preference for a non-judicial solution becomes clear when one considers that the creation of an *ad hoc* court has to go through the obstacle course of a political screening involving recommendation by Parliament and approval by the President, while the amnesty-granting truth commission procedure is automatic on receiving a complaint. Then, there is the scale of what has to be dealt with in a country steeped in violence and repression (the where-to-begin challenge). There are also fundamental issues surrounding the balancing of the rights of the individual as against collective rights of society, and the right of the State to defend its territorial integrity from those who would choose to exist separately from it. The solution is not as simple as putting on a few trials and then moving on. In the years since independence, millions have lost or had their lives destroyed by State sponsored violence and large numbers of fellow Indonesians have caused that destruction, or just stood by. Many perpetrators of atrocity have done wrong believing that by acting in the interests of the State, they were acting for a greater good. The importance of a coherent and wide-ranging strategy for systemic change that complements accountability is also clear when one considers the kind of impact that holding a few unlucky scapegoats accountable would have in a situation where it is generations of soldiers, policemen and State officials who have followed institutionalised norms of conduct and been richly rewarded for it. It was

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31. See the many reports of the Indonesian NGO ELSAM at <<http://www.elsam.or.id>>; the report of Professor David Cohen (Intended to Fail: The Trials Before the Ad Hoc Human Rights Court in Jakarta, International Center for Transitional Justice); Suzannah Linton, "Unravelling the First Three Trials at the Ad Hoc Court for Human Rights Violations in East Timor," *Leiden Journal of International Law*, Vol.17 (2) (2004), pp. 303-361.

32. See the reports of the Indonesian NGO ELSAM at their website <<http://www.elsam.or.id>>.

33. Law No. 27/2004 on the Establishment of a Truth and Reconciliation Commission (Undang Undang Republik Indonesia, Nomor 27 Tahun 2004 Tentang Komisi Kebenaran Dan Rekonsiliasi, Tambahan Lembaran Negara Republik Indonesia Nomor 2004 No. 4429).

only in January 2003 that the National Human Rights Commission (Komnas HAM) opened a wide-ranging investigation into the atrocities of the Soeharto era and it continues to this day amid much military obstruction, and genuine fear amongst victims.<sup>34</sup> Even if a *bona fide* will to address these issues exists, is there the institutional capacity to deal with the huge legacy of violence and repression through the law-and-order mechanisms?

Almost fifteen years of intense international community investment into legal and judicial reform in Cambodia have seen minimal returns. Its justice system is “*in a disastrous state. . . riddled with flaws, political interference and corruption.*”<sup>35</sup> The link between impunity for the past and the current state of human rights, particularly the impunity for violations that stymies the development of a healthy legal and judicial system, is well documented.<sup>36</sup>

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34. Established by President Soeharto through Presidential Decree Number 50 of 1993, Komnas HAM was widely regarded as a public relations gimmick to divert attention from the intense international pressure mounted on the Indonesian Government in the wake of the 1991 Santa Cruz massacre in East Timor, where security forces shot and killed over 200 demonstrators. The decree was issued one week before the World Conference on Human Rights in Vienna and shortly before Indonesia's CGI meeting. Today, the institution is revamped and technically independent, but continues to have strong military and police representation. It has had a patchy record ranging from inexplicable failure to act in some very serious situations (such as the 2001 massacre at PT Bumi Flora in Aceh) to the issuing of ineffective and weak reports (Maluku) to making robust recommendations for prosecution (for example, East Timor in 2001, Abepura in Papua in 2002). Under new leadership, it is showing promising signs of fulfilling more of its promise.

35. Amnesty International, “Cambodia: Getting away with Murder,” December 22, 2004.

36. See for example, the Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Peter Leuprecht, Commission on Human Rights, Sixty-first session, Item 19 on the provisional agenda, U.N. Doc. E/CN.4/2005/116, December 20, 2004: “14. It has become increasingly clear that impunity is not only the result of low capacity within law enforcement institutions and of a weak judiciary. By upholding a system under which selected institutions and individuals have been allowed to breach the law and violate human rights without being held to account, those with economic and political power have been able to obtain personal enrichment and maintain vested interests. 15. The Special Representative's analysis of patterns and cases of violations of human rights over the last decade shows that human rights violations have often not been carried out at the direct behest of key power holders, but that they have been condoned to maintain vested interests. Thus, members of the armed forces, police, and others have routinely not been arrested or prosecuted even when suspicions and evidence have been well known to the authorities and the general public. . . 17. . . It is unlikely that technical assistance and capacity-building efforts directed at law enforcement institutions and the judiciary will produce the results expected by donors unless this pattern of impunity is broken, and political decisions are made to address the problem. . . 32. There can be little progress in the justice sector unless political decisions for delivering reform are



Even though gross violations continue to occur in Cambodia, the question of accountability for the crimes of the Khmer Rouge has been all consuming and exceptionally politicised.<sup>37</sup> Yet, legal and judicial reform and the struggle to ensure prosecution of the Khmer Rouge have proceeded on parallel tracks as if they had nothing to do with each other. With the green light now given to proceed with the setting up of the Extraordinary Chambers, they will soon meet in head-on collision. Cambodia's leaders have also very clearly vacillated about what to do – the vacillations have included the original 1997 request to the United Nations to assist with accountability<sup>38</sup>, then a few months later talk of digging a hole and burying the past in it<sup>39</sup>, rejection of an *ad hoc* international criminal tribunal<sup>40</sup>, then backtracking on accountability<sup>41</sup> and talk about a South African style (amnesty granting) truth commission<sup>42</sup>. This is partly because the Royal Government of Cambodia (hereafter 'RGC') has sought

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*made at the highest levels of Government. The situation in many ways remains as elusive as when the Special Representative first took up his appointment in August 2000. Progress will be evident when Cambodia's courts can rule in accordance with the law without fear of reprisal and politically motivated disciplinary action, and when they begin to treat all citizens as equal before the law."*

37. See Balakrishnan Rajagopal, "The Pragmatics of Prosecuting the Khmer Rouge," *Yearbook of International Humanitarian Law*, Vol. 1 (1998), p. 189; Rajiv Chandrasekaran, "25 Years After Khmer Rouge's Rise, Would Justice Derail Peace? Cambodia's Tribulations/A 'Culture of Impunity'," *International Herald Tribune*, April 18, 2000; George Chiagas, "Cornering the Khmer Rouge," *Bangkok Post*, March 19, 2000; Craig Etcheson, "The Politics of Genocide Justice in Cambodia," in *Internationalized Criminal Courts*, *supra* note 17, p. 181-207.

38. *Letter dated June 20 1997 from the First and Second Prime Ministers of Cambodia to the Secretary-General*, annexed to UN Doc.A/1997/488, June 24, 1997), "Identical letters to the President of the General Assembly and the President of the Security Council."

39. Amnesty International, Kingdom of Cambodia - No Solution to Impunity: The Case of Ta Mok, AI-index: ASA 23/005/1999, April 22, 1999; H. Watkin, "Irony not lost as Hun Sen 'buries' the past," *South China Morning Post*, December 30, 1998.

40. *Letter from the Prime Minister, Hun Sen, Royal Government of Cambodia, to the Secretary-General of the United Nations*, March 3, 1999, at <<http://www.camnet.com.kh/ocm/government7.htm>>.

41. See Aide Memoire, "An Analysis on Seeking a Formula for Bringing Top KR Leaders to Trial," provided to H. E. Ambassador Thomas Hammarberg, the UN Secretary-General's Special Representative on Human Rights in Cambodia, by Samdech Hun Sen during the meeting on January 21, 1999, reprinted in *Cambodia New Vision*, No. 14 (January 1999).

42. *Letter from the Prime Minister of Cambodia to the Secretary-General of the United Nations*, March 3, 1999, at <<http://www.camnet.com.kh/ocm/government7.htm>>. This was the Royal Government's initial formal reaction to the report of the Cambodia Group of Experts Report.

to balance the legal and moral imperative for justice for acts of utter barbarity with the *realpolitik* of complex strategies that were undertaken in relation to the Khmer Rouge (ranging from outright military defeat to winning over enemies through amnesty, pardon, reconciliation and reintegration) in order to bring, and maintain, an end to the armed conflict. The political rivalries between the two main political parties have been constant features in the rollercoaster of accountability in Cambodia. And, the government is not unaffected by the reality that there are those in high office who were once Khmer Rouge cadre. Another factor has been the sub-standard criminal justice system and infrastructure, and its inability to take on such an enormous undertaking without international support.<sup>43</sup> Finally, a persistently troubling question is this: notwithstanding the legal and moral imperative requiring accountability, with horrific crimes going back 30 years involving over a million victims and thousands of perpetrators, and given the abysmal circumstances outlined above, is the court of law that will focus on a handful of frail and elderly men really going to bring Cambodians the justice that is so overdue?

### **B. The infiltration of the global into the local**

Given the tragic experiences of all three countries, one would expect them to welcome the incorporation of international human rights norms into their domestic framework in order to deter or repress any repetition. To some extent that has been true; the transition between regimes allows a space for infiltration of international norms and practices. East Timor leads the way in Southeast Asia with its participation in international treaties on human rights and has an extremely human rights protective Constitution.<sup>44</sup> The Paris Peace Accords of 1991 ushered in a flood of treaty accessions or ratifications by Cambodia, and since 1993, its Constitution and domestic laws have contained a raft of human rights protections derived from International Law.<sup>45</sup> Indonesia's age of *reformasi* has

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43. See U.N. Doc. CCPR/C/81/Add. 12, Initial Reports of States Parties due in 1993: Cambodia, September 23, 1998, where the RGC itself conceded to the Human Rights Committee that "*As the independence of the judiciary and the equality of all before the law are not fully guaranteed, the impartiality of the courts also cannot be fully guaranteed.*"

44. Part II of the Constitution (sections 16-61) devotes itself entirely to fundamental human rights, "*duties, freedoms and guarantees.*"

45. Article 31 of the Constitution provides that "*The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Uni-*

ushered in substantial legal reform, including Constitutional amendments to strengthen human rights protections and legislation to allow for the prosecution of gross violations of human rights. Prosecution of historic atrocities using some mix of international and domestic law is taking place in all three countries. International Law, its content and reasoning, has been applied in Indonesian and East Timorese courts dealing with cases of gross violations of human rights. But a closer examination reveals a more nuanced situation.

Cambodia well demonstrates how waters are muddied when the international comes to resonate in the local. What has been adopted is a Constitution whose content was dictated by the terms of the 1991 Paris Peace Accords; it does not reflect the reality of life in Cambodia or the culture, values or ideals, resulting in a 'surrealist scenario' of a legislative framework imposed by external forces and devoted to the rule of law, thrust on a country with few resources and neither the historical nor contemporary motivation or experience to implement it.<sup>46</sup> As time progresses and Cambodia continues to languish, it becomes increasingly clear that the international community has been trying to impose a system onto Cambodia which its leaders do not want - there is some truth in the argument that this arises because "*sophisticated and foreign concepts of western liberal democracy have been imposed on a society virtually devoid of the institutions necessary to protect and nurture them.*"<sup>47</sup> The preamble of the Constitution speaks of the Kingdom of Cambodia as a liberal democracy guaranteeing human rights for its people; Article 128 has an independent judiciary tasked to "*guarantee and uphold impartiality and protect the rights and freedoms of the citizens.*" It deals with human rights in Articles 31-50 (The Rights and Obligations of Cambodian Citizens). Article 31 provides, *inter alia*, that the "*Kingdom of Cambodia shall recognise and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights.*"<sup>48</sup>

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*versal Declaration of human Rights, the covenants and conventions related to human rights, women's and children's rights.*"

46. Yash Ghai, "Some Thoughts on the Cambodian Constitution," University of Hong Kong Faculty of Law, Law Working Paper Series, Paper No. 10 (July 1993).

47. Kathryn E. Neilson Q.C., "They Killed All the Lawyers: Rebuilding the Judicial System in Cambodia," *Occasional Paper* No. 13 (October 1996), Center for Asia Pacific Initiatives, p. 15.

48. In 1992, Cambodia became party to the International Covenant on Economic, Social and Cultural Rights, ICCPR, Convention on the Elimination of All Forms of

The Constitution does not declare if Cambodia follows a monist or dualist approach, and Article 31 appears to introduce international human rights norms directly into Cambodian law, but the courts refuse to entertain claims that are, in the absence of enabling legislation, directly based on international laws, or even for that matter, the Constitution.<sup>49</sup>

The triggering request of the Cambodian Co-Prime Ministers for United Nations assistance to bring the Khmer Rouge to justice was in part based on concern over the inability of the domestic system to hold to account those responsible for the horrors inflicted on the nation and its citizens during the reign of the Khmer Rouge. This drew on three other issues, the first being Cambodia's own right and duty to prosecute its own nationals for crimes committed in Cambodia on Cambodians. Secondly, it drew on the collective interest, even responsibility, of the international community to assist with the repression of international crimes. Third, it drew on the international community's failure to intervene to stop the humanitarian disaster in Cambodia when it was going on between 1975-1979, and its continued recognition of the Khmer Rouge for many years after its fall as the legitimate representatives of Cambodia, despite knowing what they had done. Yet, throughout the vacillations in its dealings with the United Nations, the RGC remained constant on one thing: it always sought to keep any international involvement on its terms. The vigorous battle fought to control the Extraordinary Chambers by placing them within the Cambodian court system, using Cambodian criminal procedure, and ensuring the Cambodian judges would be in a majority, could be seen as efforts not just at controlling the process but limiting the extent to which the international would permeate the local. After all, if international involvement cannot be prevented, the risk of wider

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Discrimination against Women, Convention against Torture, and Convention on the Rights of the Child.

49. Monist systems view international and domestic law as a unified legal system, although international norms may be of higher status. Dualist systems view the two bodies as separate, each operating in its own domain. Monist systems allow for the direct applicability of international law in municipal courts, dualist systems require implementing legislation. France, from whom Cambodia gained independence, follows a monist system but the RGC's preference for dualism is clearly stated in its 1997 Report to the Committee on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/292/Add. 2, May 5, 1997: "*These covenants and conventions may not be directly invoked before the courts or administrative authorities. However, they provide a basis for the development of national legislation, such as that pertaining to the observance and protection of human rights.*"

change is reduced if one restricts that international involvement. When the RGC had to compromise on the Khmer Rouge issue, it permitted, through the amended Law on Extraordinary Chambers, international infiltration into the local, but only so far as it deemed fit to permit. For example, the injection of international personnel is limited by *Doppelgängers* (the international investigating judge is balanced by the Cambodian investigating judge; the international prosecutor is balanced by the Cambodian prosecutor), and the law is strictly limited in temporal, personal and subject matter jurisdiction. Although the law incorporates the provisions of Article 14 of the ICCPR, the procedure of the court is to be based on the wholly inadequate Cambodian criminal procedure (with recourse to relevant international practice in case of inconsistency or voids in the law).<sup>50</sup> Rooting the procedure in Cambodian law with its abundant loopholes and inconsistencies allows for more influence over the Extraordinary Chambers.

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50. There are generally two criminal laws used in Cambodia - the 1992 Supreme National Council Law Relating to the Judiciary and Criminal Law and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period (passed during the period of transitional administration under the United Nations mission established by Security Council Resolution 745 (1992) and referred to as 'UNTAC') (hereafter 'UNTAC Law') and the 1993 State of Cambodia Law on Criminal Procedure (hereafter 'SOC Law on Criminal Procedure'). Technically, the SOC Law on Criminal Procedure is not valid as it was passed by a body that had no legislative authority - under the 1991 Paris Peace Accords, only the Supreme National Council (which promulgated the UNTAC Law) had executive and legislative powers. Nevertheless, the SOC Law on Criminal Procedure is in fact applied in Cambodia as law, on the grounds that it was passed after the UNTAC Law and thus meant to supersede certain of its procedural provisions. It is sometimes inconsistent with UNTAC, for example on arrests, and even though there are two laws, there continue to be abundant loopholes. Article 237 of the SOC Law on Criminal Procedure provides that the provisions of any law which contradict with its provisions are abrogated, while Article 73 of the UNTAC Law abrogated any inconsistent legal rules. The solution may not be as simple as saying *if* the SOC Law on Criminal Procedure is to be treated as law and there is a clash with UNTAC Law, the former should prevail, being the later law. See also *supra* at 19 for consideration of other criminal laws. Article 158 of the Constitution provides that laws and standards that safeguard rights and freedoms in conformity with national interests shall continue to be effective unless altered or abrogated by new texts, to the extent that such provisions are not contrary to the Constitution. Pursuant to this, the UNTAC Law, which is designed to safeguard rights and freedoms in the criminal justice process, should still be valid law. Yet Article 158 is controversial, for it is either viewed as limited in effect to laws and regulations actually in force at the time of its coming into force in 1993, or as allowing the continued applicability of laws prior to its adoption. The bottom line is that there remains uncertainty over whether pre-1993 laws are actually applicable in Cambodia.

Indonesia's reformist movement, which led to the overthrow of Soeharto in 1998, demanded the introduction of international human rights standards into the domestic legal framework. The Constitution of Indonesia has been amended four times since the fall of Soeharto: in October 1999, August 2000, November 2001 and August 2002. In August 2000, the Constitution was amended to strengthen the protection of human rights. New Articles 28 A-J guarantee, *inter alia*, the right to legal protection and to fair and equal treatment before the law; the right to protection of private life, family, dignity and property; the right to life; freedom from torture; freedom of thought and conscience; and freedom of religion. A more controversial prohibition on retroactive application of legislation was also included. New Article 28I(1) confirms that the right not to be prosecuted on the basis of retroactive laws is one that cannot be diminished under any circumstance. The judges of the Ad Hoc Court dealing with the East Timor and Tanjung Priok cases rejected defence challenges to the validity of Law 26/2000 on the grounds of violating this provision, as did the judges trying the Bali Bombing cases (Amrozi bin Nurhasyim, Iman Samudra *et al*).

At the time, there was no Constitutional Court and the matter had to be decided by those courts or not at all. The Constitutional Court has now been established and has accepted the arguments in appeals in the Bali Bombing cases that the anti-terrorism legislation passed retroactively in order to permit the prosecution of terrorism as a separate crime violated this Constitutional provision.<sup>51</sup>

This is not to suggest that Indonesia's accountability experience has been insulated from outside influences. The East Timor Ad Hoc Court would never have materialised were it not for international pressure and the desire to avert a process controlled by the international community.<sup>52</sup> International Law reasoning and jurisprudence has found its way into judgements. But, while it receives all the attention, it is just one aspect of the story of accountability in Indonesia and in itself is unusual for being a domestic response to

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51. For more, see Ross Clarke, "Retrospectivity and the Constitutional Validity of the Bali Bombing and East Timor Trials," *Australian Journal of Asian Law*, Vol. 5(2), pp. 2-32; Tim Lindsey, Simon Butt and Ross Clarke, "Review is not a Release," *The Australian*, July 27, 2004; Tim Lindsey and Simon Butt, "Indonesian Judiciary in Constitutional Crisis," Parts I and II, published in the *Jakarta Post* on August 6 and 7, 2004.

52. The Deputy Speaker publicly admitted that they had taken this step to counter international attention and avoid international intervention over prosecution of the East Timor cases. See "Indonesia: Timor war criminals remain free," *Green Left Weekly*, March 28, 2001; "To End Impunity," *Inside Indonesia*, July to September 2001 edition.

immense international pressure for accountability. While it has over the years shown occasional sensitivity to external criticisms of its human rights record (for example, putting a few low ranking soldiers on trial after the Santa Cruz massacre in Dili on November 12, 1991 caused a worldwide furore),<sup>53</sup> Indonesia has managed to retain absolute control over all processes of accountability. It has created the Human Rights Courts as a stand-alone mechanism for the prosecution of human rights violations, although just one out of four 'permanent' courts is functioning (and it has been occupied with just one case in the past year).<sup>54</sup> Its subject matter jurisdiction is limited to genocide and crimes against humanity, which are very high threshold crimes and difficult to prove. Deliberately omitted are two of the most common serious offences in Indonesia: atrocities in internal armed conflict and torture. The continuing refusal to provide a means of prosecuting torture and grave breaches of the Geneva Conventions in domestic law, despite treaty obligations,<sup>55</sup> reveals the conflict faced by a State that is prepared to acknowledge the illegality of such acts and give international commitments thereto, but faces the reality at home that prosecutions of such acts would almost certainly ensnare many members of its armed forces at multiple levels within the hierarchy – and perhaps most importantly – those at higher levels.

In East Timor, International Law, in particular the right of a people to self-determination, was very quickly recognised as giving the struggle against Indonesia's occupation legitimacy, and provided an important political foundation. International Law was regularly invoked by supporters of the East Timorese during the long years of the occupation, and therefore has particularly high moral standing.<sup>56</sup> The establishment of UNTAET<sup>57</sup> as a mul-

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53. See "East Timor: The Courts-Martial," *Asia Watch*, Vol. 4 No.16 (June 23, 1992); "Remembering History In East Timor: The Trial of Xanana Gusmão and a Follow-Up to The Dili Massacre," *Asia Watch*, Vol. 5, No. 8 (April 1993).

54. The Human Rights Court in Makassar is hearing a case from Papua concerning police brutality in Abepura.

55. Indonesia is party to both the Geneva Conventions (See Law 59/1958 Concerning the Ratification by the Republic of Indonesia of all the Geneva Conventions of 12 August 1949, 30 September 1958) and the Convention against Torture (signed on October 23, 1985, ratified on October 28, 1998).

56. See for example the work of the International Platform of Jurists for East Timor, leading to the publication of an influential collection of legal writings, *International Law and the Question of East Timor*, published jointly with the CIIR in 1995.

57. United Nations Transitional Administration in East Timor, Established by Security Council Resolution 1272, October 25, 1999.

tidimensional peacekeeping operation fully responsible for the administration of the territory during its transition to independence, with full lawmaking and law-enforcing powers, allowed for massive formal infiltration of international norms into domestic law. Section 3.1 of UNTAET's first regulatory instrument, Regulation 1999/1, provided that "*Until replaced by UNTAET regulations or subsequent legislation of democratically established institutions of East Timor, the laws applied in East Timor prior to 25 October 1999 shall apply in East Timor insofar as they do not conflict with the standards referred to in section 2, the fulfilment of the mandate given to UNTAET under United Nations Security Council resolution 1272 (1999), or the present or any other regulation and directive issued by the Transitional Administrator.*"<sup>58</sup> Section 3.1 does not make provision for international treaties to have direct effect or applicability in East Timor, but provides for the existing laws (those of Indonesia, the occupying power, rather than those of Portugal, the administering power) to be read subject to them. The existing laws also needed to be read in light of UNTAET's mandate and the regulations and directives issued by the Transitional Administrator. Several laws were expressly declared to be no longer applicable in East Timor.<sup>59</sup> While International Law is not directly applicable as such, all public officials are required to act in accordance with international standards, including the Universal Declaration of Human Rights and the ICCPR. Since independence, the Constitution has become the litmus test of East Timor's laws, but the continuing reliance of UNTAET laws means that the international standards still apply as legal benchmarks. In the legislation introduced by UNTAET, two regulations stand out for incorporating the global into the local. Regulation 2000/15 on the establishment of the Special

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58. UNTAET Regulation 1999/1 on the Authority of the Transitional Administration. The standards in Section 2 include The Universal Declaration on Human Rights of December 10, 1948; The ICCPR and its Protocols; The International Covenant on Economic, Social and Cultural Rights of December 16, 1966; The Convention on the Elimination of All Forms of Racial Discrimination of December 21, 1965; The Convention on the Elimination of All Forms of Discrimination Against Women of December 17, 1979; The Convention Against Torture; and The International Convention on the Rights of the Child of November 20, 1989.

59. These were the notorious Indonesian Laws on Anti-Subversion (Law No. 5 of 1969, Implementing Presidential Decree No. 11 of 1963), Social Organizations (Law No. 8 of 1985, Concerning Social Organisations), National Security (Law No. 27 of 1999, on Changes to the Criminal Code in Connection with State Security), and National Protection and Defence, Mobilization and Demobilization and Defence and Security (Law No. 20 of 1982, Concerning Basic Provisions on the Defence and Security of the Republic of Indonesia (replacing Act No. 29 of 1954)).



Panels had its substantive provisions virtually lifted from the Statute of the ICC; Regulation 2000/30 on criminal procedure<sup>60</sup> was also heavily based on the same, and introduced the demands of a five star regime onto one of the least developed countries in the world. Critics have observed how UNTAET itself could not abide by the human rights standards it set for East Timor.<sup>61</sup>

### C. Too little too late, too much too soon and too many cooks

In the period 1999-2005, East Timor has been the subject of:

- A UN Commission on Human Rights-sponsored investigation into the events of 1999 whose primary recommendation, the establishment of an *ad hoc* tribunal, was rejected by the United Nations;
- A UN investigative commission comprised of three of the Commission on Human Rights' special human rights rapporteurs, who also recommended the establishment of an *ad hoc* tribunal (although in more cautious terms) which was not heeded by the United Nations;
- A UN investigative commission comprised of three experts to assess the adequacy of the judicial processes instituted in East Timor and Indonesia in relation to 1999;
- The world's first ever internationalised domestic chamber, set up to try the most serious offences in the international order in a physically devastated nation with massive human and infrastructural inadequacies;
- The world's first ever truth and reconciliation commission to work traditional dispute mechanisms into its mandate, facilitate the return of East Timorese refugees in Indonesia, investigate all human rights in the 25 years from 1974-1999, function as a 'capacity building' exercise and produce a re-

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60. UNTAET Regulation 2000/30 on Transitional Rules of Criminal Procedure as amended by UNTAET Regulation 2001/25, Amendment of Regulations 2000/11 (Organisation of the Courts) and 2000/30 (Transitional Rules of Criminal Procedure) (September 14, 2001).

61. For a critical examination of how UNTAET met its human rights obligations, see Carla Bongiorno, "A Culture of Impunity: Applying International Human Rights Law to the United Nations in East Timor," *Columbia Human Rights Law Review*, Vol. 33 (2002), p. 623; Joel Beauvais, "Benevolent Despotism: A Critique of UN State Building in East Timor," *New York University Journal of International Law and Policy*, Vol. 33 (Summer 2001), p. 1101; *A Review Of Peace Operations: A Case For Change: East Timor Study*, Kings College, Conflict, Security and Development Group, March 10, 2003.

port, all of this with minimal infrastructure and human resources, and in the space of two years (it has since had to be extended four times);

- The world's first ever truth and friendship commission, where East Timor and Indonesia have agreed jointly to settle on a version of the 'truth' about what happened in 1999 and amnesty perpetrators of human rights violations.

In Indonesia, since the fall of Soeharto in 1998, there have been:

- Regular human rights commission investigations into gross violations of human rights (the most famous being the investigation into East Timor) and numerous recommendations for prosecution;
- Several military and *koneksitas* trials;
- One functioning Human Rights Court (Makassar) with the establishment of three others long overdue;
- The establishment of one *ad hoc* human rights court to try those accused of crimes against humanity in East Timor (1999) and Tanjung Priok, Jakarta (1984);
- A truth and reconciliation commission which focuses on individual complaints and recommendations of amnesty and compensation for victims
- The truth and friendship commission with East Timor mentioned above.

Since the Paris Peace Accords in 1991, Cambodia has seen:

- A United Nations group of experts investigating and advising on the situation and whose recommendation, the establishment of an *ad hoc* international criminal tribunal, was rejected by Cambodia itself;
- An almost-established internationalised chamber within the Cambodian court system to try the horrific crimes of the Khmer Rouge – at time of writing, the tribunal has moved into the start-up phase.

From virtually nothing being done on accountability prior to the key dates mentioned, the above evidence the explosion of a transitional justice industry. The proliferation has reached the stage in Indonesia and East Timor where several bodies have sometimes been engaged on the same issues. Some of the mechanisms, particularly in East Timor, have been grandiose in design and hopelessly unrealistic in the devastated circumstances of that country. But what actual impact has all of this activity had on improving the

state of human rights and general stability in East Timor? Not much beyond symbolism and being 'better than nothing', the informed reports of organisations that monitor events in East Timor closely, such as the Judicial System Monitoring Programme, Human Rights Watch and Amnesty International would suggest. To be fair, although it is five years since the Serious Crimes project began in East Timor, the question may yet be premature. The lack of impact is certainly linked to the immensity of the challenges, and the long span of time required to engender genuine systemic and societal changes. But the lack of impact is also a reflection of flaws in design and implementation that led to discredited processes in East Timor and Indonesia.<sup>62</sup> It may in some instances be the result of lack of good faith, in that the mechanisms may have been used by parties on both sides of the border and even within the United Nations as a tactical attempt to distract attention by 'doing something' and thus defusing pressure on the issue of human rights violations.

The heavily marketed truth commission seems to be coming to be seen as of value in its own right rather than the better-than-nothing option where it is not possible to provide the preferred mechanism. This latest 'must have' accessory in transition, *if* designed as a *bona fide* mechanism, is meant to combine fact-finding with extensive foray into complex social engineering through socio-political projects aimed at reconciliation and therapeutic release for victims through 'truth-telling'. Beyond that is hoped to lie a successful transition to democracy and rule of law. But the experiences in Indonesia and East Timor have certainly not allayed the fears of those who have serious concerns about the truth commission as a convenient means of pulling-wool-over-the-eyes, an easy way out or leading to travesties of justice for cementing impunity

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62. The enthusiasm of the Report of the Commission of Experts for the Serious Crimes project, describing it as having had "*considerable success in discharging its mandate since 2000*," and having been a "*highly effective*" contributor to "*strengthening respect for the rule of law in Timor Leste*" came as a surprise to many who have monitored the process. For example, whilst acknowledging improvements and crediting the fact that some of those working within the institution made a genuine effort, the regular reports of the Judicial Systems Monitoring Programme established in 2001, at <<http://www.jsmp.minihub.org>> including a jointly authored report with Amnesty International in 2004 ("Justice for Timor Leste: The Way Forward") and Open Society Institute and Coalition for International Justice ("Unfulfilled Promises: Achieving Justice for Crimes Against Humanity in East Timor"), November 2004, offer remarkably harsher assessments of the project. David Cohen's forthcoming report, *A Legacy of Indifference: The United Nations and the Politics of International Justice in East Timor*, exposes how far from the truth the Report of the Commission of Experts was on this point.

and putting forth simplistic and politically convenient versions of the 'truth' that are in fact wholly unreliable. Interestingly, all three countries have perhaps instinctively first begun with establishing a framework that allows for the exercise of formal criminal jurisdiction over gross violations of human rights. After all, in cases of gross violations of human rights, the State is not under any truth-and-reconciliation obligations, but is under an obligation to investigate, prosecute and punish (or extradite) and to provide an effective remedy for violations of human rights. In East Timor, the Serious Crimes project was established before that of the CAVR; in Indonesia, the Human Rights Courts regime was established before that of the Truth Commission; in Cambodia, the Extraordinary Chambers will stand alone – a truth commission is not on the agenda.<sup>63</sup> But, the belated arrival of the truth commission in the other two countries bolsters the argument about ad-hoc-ism, demonstrating lack of or absence of a coherent transitional justice. In East Timor, it was after the passing of Regulation 2000/15 that the truth commission option was first openly explored; in Indonesia, discussions about a South African style truth commission (i.e. amnesty granting) ran parallel to discussions about accountability; in Cambodia, the South African model has drawn some attention from the Royal Government and the former Khmer Rouge, but virtually none from the public. In Indonesia and Cambodia, the truth commission has always been attractive to those seeking an alternative to justice, rather than as a complement to the formal justice system. The complementary approach had been the vision in East Timor for the CAVR, which was partly designed to support the fragile justice system by reducing some of its workload on less serious crimes, and thus had capacity-building potential. Ironically, the new Truth and Friendship Commission seems to be about bypassing the criminal justice system altogether.

Accountability for the past in East Timor, Indonesia and Cambodia has been a very long time coming, and what has come has hardly been impressive. Where there has been accountability, as with the East Timor trials in Jakarta, and the Serious Crimes process in Dili, it has been seriously flawed.<sup>64</sup> It is 30 years since the

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63. See Suzannah Linton, *Reconciliation in Cambodia*, Documentation Center of Cambodia, 2004, (hereafter 'Linton, *Reconciliation in Cambodia*'), pp. 88-93, 239.

64. See the regular monitoring reports of the East Timorese NGO, the Judicial System Monitoring Programme, Suzannah Linton, "Cambodia, East Timor and Sierra Leone: Experiments in International Justice," *Criminal Law Forum*, Vol. 12 (2001), pp. 185-246; Amnesty International, "East Timor: Justice Past, Present and Future," ASA

Khmer Rouge came to power and not one of its leaders has yet been held to account. In Indonesia, the violence goes back even further, for example it is 40 years since the bloodbaths of 1965, for which no one has ever been held to account. And so too in East Timor, where there has been impunity for gross violations of human rights that can be dated back to 1975. Transition should open up the space for issues of the past to be brought into the public arena, but the reality is more complex. Cambodia has had 30 years to discuss what to do with the Khmer Rouge, but there continues to be governmental reticence to engage with the public on the issue and genuine fear among the public.<sup>65</sup> Indonesia has since 1998 been debating what to do about its past, yet that debate is not one that draws in all levels of society, but is restricted to contentious dispute between reformists, human rights NGOs and victims groups on the one side, and the establishment, including the military, on the other. Here too, there is plenty of fear that holds people back.

The situation in East Timor is rather different. The fact-finding work of the CAVR over the period 1975-1999 is unique for striving to view the situation in context. The CAVR has yet to report, but even when it does, it is unlikely that lifting the veil on some of the horrors of the occupation will reverse the unwillingness of the international community to address accountability for what happened before 1999. Every other commission of inquiry or justice mechanism that has operated has been fixated with 1999, ignoring the evidence that this was one terrible year out of 24 terrible years. In fact, the flurry of activity in relation to the 1999 atrocities has been very rushed, with little opportunity given to the East Timorese people as a nation to decide for themselves what they want to do. The circumstances of East Timor since the departure of Indonesia have been so extreme that for the first two to three years, basic survival, including rebuilding lives after the recent traumas, has been the first priority. And so it is that East Timor has yet to have an open discussion about what to do with its terrible legacy of violence and

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57/001/2001; Suzannah Linton and Caitlin Reiger, "The Evolving Jurisprudence of East Timor's Special Panel for Serious Crimes on Admissions of Guilt, Duress and Superior Orders," *Yearbook of International Humanitarian Law*, Vol. IV (2002), pp. 167-213; Suzanne Katzenstein, "Hybrid Tribunals: Searching for Justice in East Timor," *Harvard Human Rights Journal*, Vol. 16, Issue 6 (June 2003), pp. 245-278; Sylvia De Bertodano, "East Timor: Trials and Tribulations" in *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia*, *supra* note 17; and Open Society Institute/Coalition for International Justice, "Unfulfilled Promises: Achieving Justice for Crimes against Humanity in East Timor," November 2004.

65. See Linton, *Reconciliation in Cambodia*, *supra* note 63, pp. 59-66.

oppression.<sup>66</sup> Yet, despite this, the country has become a veritable feasting ground for the transitional justice industry. Depending on one's perspective, East Timor has been either the beneficiary of creative thinking, the victim of terrible incompetence, empire-building, a laboratory for ill-considered experiments, fallen to Machiavellian attempts to sabotage justice by designing over-ambitious mechanisms that were bound to fail, or a bit of some or all of the above.

Outside of the basic question of efficiency and waste when several institutions are looking at the same issues, there are matters such as overlapping mandates, sharing information and materials, coordination and competition for scarce resources that have to be dealt with. East Timor has had several institutions engaged on 1999 with enormous potential for clash. Lack of cooperation between the UN Commission of Inquiry and Indonesia's Komnas HAM, both engaged in investigations on the same events at the same time in 1999, has been documented.<sup>67</sup> Early turf battles existed within UNTAET over which departments within the mission would control the Serious Crimes project. Since that was resolved through the creation of a dedicated Serious Crimes Unit under the direction of the Deputy General Prosecutor for Serious Crimes, the greatest potential for clash has been between the restorative justice practised through the CAVR's community reconciliation processes, designed to reintegrate repentant wrongdoers, and the formal justice system. The law establishing the CAVR was crafted to include filters to prevent Serious Crimes cases from going through the reconciliation process.<sup>68</sup> Some did slip through the filters and emerged in the course of community reconciliation processes. In such cases, proceedings were terminated and the matter referred to the Deputy General Prosecutor for Serious Crimes. Further, when one looks at the situation in context, arson, intimidation, light assault and theft amount to important aspects of the widespread and systematic attack on the civilian population that took place in 1999. Some such

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66. One of the few attempts to do so was in September 2004, when JSMP organised a meeting where people from the districts were brought out to Dili to engage in discussion with Dili-based local and international experts. See JSMP Conference Report on *Justice For East Timor: Civil Society Strategic Planning*.

67. David Cohen/International Center for Transitional Justice, "Intended to Fail: The Trials Before the Human Rights Court in Jakarta," p. 9.

68. UNTAET Regulation 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, July 13, 2001, UNTAET/REG/2001/10, (Regulation 2001/10), amended by UNTAET Directive No. 2002/9 of May 18, 2002 and Law 7/2003 of September 24, 2003.

cases involving property damage have in fact been charged as crimes against humanity, in recognition of how arson was used as a way to force population movement or as a form of persecution.<sup>69</sup> The reality is that there just has not been the capacity to prosecute all cases including the less serious of the wide spectrum of Serious Crimes. The practice of the Deputy General Prosecutor was to return some cases back to the CAVR, including murder and severe beatings,<sup>70</sup> citing that there was evidence that the person may have been involved in Serious Crimes, but the office did not have the capacity to pursue the case. On May 20, 2005, when the Serious Crimes project was closed down, the Serious Crimes cases referred by the CAVR to the Deputy General Prosecutor had not been indicted. In fact, given the extreme circumstances of the Serious Crimes project, it was always predictable that none of the cases of Serious Crimes that were extracted from the CAVR process would be indicted, let alone tried.<sup>71</sup> So, accountability for Serious Crimes has boiled down to a question of luck. The potential for other conflicts was large too.<sup>72</sup> But in practice, the potential remained largely moot, for the divisions of labour between the CAVR and the Serious Crimes process worked relatively well, thanks in part to a memorandum of understanding agreed by the two institutions on June 4, 2002. Both institutions were overstretched and under-resourced, and pursued a different emphasis: the Serious Crimes project focused on 1999 alone and CAVR took a wider view over 25 years. If the Sierra Leone court-truth commission relationship was of plumber and electrician working on a house, the East Timor accountability-truth commission relationship was more like two sickly

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69. For example, all of the following included property destruction as crimes against humanity: Lospalos (Case 9/2000); Joanico Gusmão (Case 07/2003); Burhanuddin Siagan *et al.* (Case 8/2003); Eurico Guterres *et al.* (Case 13/2003); and Joko Suharsoy *et al.* (Case 3/2004).

70. CAVR Co-ordinator of Community Reconciliation Process, cited in JSMP, "Torture and Transitional Justice in East Timor," April 2005, p. 22.

71. The CAVR's community reconciliation process is generally assessed to have worked as a dispute resolution mechanism because it was premised on a belief in communities that those who did commit Serious Crimes would be tried and punished through the formal justice system. There is a risk that failure to bring those persons to account may lead to destabilisation and unravelling of the reconciliation fostered by the process.

72. Conflicts between the two processes could have arisen, for example, where important and relevant information was not shared; access was denied or hindered through lack of cooperation; witnesses gave conflicting statements to different institutions or refused to work with one; access to Serious Crimes detainees was denied; or the different institutions reached different findings on key issues.

builders of a very ramshackled house sharing their tools from time to time.<sup>73</sup>

But, more than any of the problems within East Timor itself, it is the 'efforts' across the border in Indonesia that have rendered the Serious Crimes project a lame duck from start to finish.<sup>74</sup> After the issuing of Komnas HAM's powerful report on January 31, 2000,<sup>75</sup> Indonesia's efforts to prosecute, in which such faith was put by the international community, were agonisingly slow, and degenerated into farce over the course of the trials, held in 2002 and 2003.<sup>76</sup> The fact that trials were actually held at the Ad Hoc Court for human rights violations in East Timor is simply the last of several excuses for failing to cooperate with the Serious Crimes project. And, with Indonesia clearly unwilling or unable to produce a *bona fide* process of accountability, the entire burden of accountability for 1999 fell on the troubled Serious Crimes Unit. Yet, it was never provided with sufficient political support, capacity and resources to deal with that mammoth task. To make matters worse, despite the terms of a Memorandum of Understanding with UNTAET allowing for the transfer of suspects to East Timor and cooperation in legal, judicial and human rights related matters on April 6, 2000,<sup>77</sup> Indonesia has not extradited a single Indonesian national to stand trial before Dili's Special Panels, citing nationality and their own proceedings at the Ad Hoc Court as grounds. Proceedings in Dili, such as the indictment of General Retd. Wiranto, have not spurred the Attorney General to open an investigation into the one-time Minis-

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73. William Schabas, "Internationalized Courts and their Relationship with Alternative Accountability Mechanisms: The Case of Sierra Leone," in *Internationalized Criminal Courts*, *supra* note 17, p. 180.

74. For more, see Suzannah Linton, "Cambodia, East Timor and Sierra Leone: Experiments in International Justice," *Criminal Law Forum*, Vol. 12 (2001), pp. 185-246, at pp. 222-223; Open Society Institute/Coalition for International Justice, "Unfulfilled Promises: Achieving Justice for Crimes against Humanity in East Timor," November 2004, p. 39.

75. KPP-HAM, "Ringkasan Eksekutif Laporan Penyelidikan Pelanggaran Hak Asasi Manusia di Timor Timur," January 31, 2000. The entire report is not publicly available.

76. See ELSAM, "Monitoring Pengadilan HAM Tim-Tim," January 28, 2003; David Cohen/International Center for Transitional Justice "Intended To Fail: The Trials Before the Ad Hoc Human Rights Court in Jakarta," 2003; Suzannah Linton, "Unraveling The First Three Trials at Jakarta's Ad Hoc Court for Human Rights Violations in East Timor," *Leiden Journal of International Law*, Vol.17 (2) 2004, pp. 303-361.

77. Memorandum of Understanding between the Republic of Indonesia and UNTAET on Cooperation in Legal, Judicial and Human Rights Related Matters, April 6, 2000.



ter of Defence and Commander in Chief of the Armed Forces, responsible for the security of East Timor in 1999.

In Indonesia itself, things have been even more disturbed in terms of mutual cooperation between different institutions involved with accountability for atrocity. For example, the military justice system, the House of Representatives and the human rights commission (Komnas HAM) were all in competition to investigate the shootings of student activists at the Trisakti University and nearby Semanggi interchange, key events in the violent chaos and political turmoil preceding and after the fall of President Soeharto in 1998.<sup>78</sup> The military conducted its own investigations (the police was then part of the armed forces). In August 1998, two police officers were convicted by a military tribunal in relation to the shooting of the four students at Trisakti University.<sup>79</sup> On June 18, 2001, another military tribunal began hearing the case of a further ten members of Indonesia's Mobile Police Brigade charged with premeditated murder in relation to the Trisakti killings.<sup>80</sup> In January 2002, they were sentenced to between three and six years' imprisonment.<sup>81</sup> Few believed the scenario that just a handful of ill-disciplined security personnel were involved, so on May 7, 2002, the People's Legislative Assembly (hereafter 'DPR') took it upon itself to investigate. But, the investigation was strongly dominated by individuals associated with Soeharto's New Order<sup>82</sup> and so had little credibility, even more so after it concluded that there was no evidence of gross viola-

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78. The first case (Trisakti) involved the fatal shooting by armed riot police (BRIMOB) on May 12, 1998 of six unarmed student demonstrators and the wounding of many others. The students had been demonstrating against President Soeharto and were attempting to march on Parliament. This led to massive rioting and loss of life in Jakarta, forcing the resignation of President Soeharto on May 21, 1998. On November 14, 1998, TNI and BRIMOB troops opened fire on a demonstration in front of the Atma Jaya University in Semanggi, Jakarta. This occurred in connection with the 1998 MPR (People's Consultative Assembly) meeting and students calling for fundamental systemic reform. Five students were killed and many wounded (this incident is referred to as Semanggi I). On September 24, 1999, five students were killed by the armed forces in the Semanggi district while protesting increases in military power through new security laws (Semanggi II).

79. "Nine Police Stand Trial for 1998 Trisakti Shooting Incident," *Jakarta Post*, June 18, 2001.

80. "Peradilan HAM Ad Hoc Trisakti/Semanggi Harus Tetap Digelar," *Radio Nederland*, June 18, 2001, transcript at <<http://www.rnw.nl>>.

81. Amnesty International Annual Report 2003, Indonesia.

82. Iwan T. Aulia A/Fitri & GB, "Trisakti Special Committee Formed But Witnesses Too Scared To Appear," *Detikworld*, January 31, 2001.

tions of human rights.<sup>83</sup> The DPR found that the security forces had been provoked by the students, and concluded that there was no evidence of gross violations of human rights and refused to recommend the establishment of a special *ad-hoc* court. To the extent that there was criminality, suspects should be tried in civilian or military courts as relevant.<sup>84</sup> The pressure to get to the bottom of the matter also led the human rights commission (Komnas-HAM) to commence investigations.<sup>85</sup> Its position vis á vis the controversial DPR report was that it was not a judicial decision and did not prevent Komnas HAM from conducting its own investigations, which it was entitled to do under the Law on Human Rights.<sup>86</sup> Key Army (TNI) personnel refused to cooperate on the grounds that the DPR had already determined there had been no violations committed, and thus it was not any business of the commission.<sup>87</sup> Contrary to the findings of the DPR, Komnas HAM's inquiry team reported that the student killings amounted to crimes against humanity; they were part of a widespread, systematic attack aimed at the civilian population comprising killings, assault, torture and arbitrary arrest/detention.<sup>88</sup> It recommended that the Attorney General carry out further investigations and that the cases be tried as

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83. "Rekomendasi 'Telur Busuk' DPR dan Sikap Bisu Pemerintah," *Kompas Cyber Media*, May 15, 2002, at <<http://www.kompas.com/utama/news/0205/15/010101.htm>>.

84. "Rekomendasi 'Telur Busuk' DPR dan Sikap Bisu Pemerintah," *Kompas Cyber Media*, May 15, 2002 at <<http://www.kompas.com/utama/news/0205/15/010101.htm>>; Kompas Online, July 10, 2001, 'Students Protest Decision of Parliament' at <<http://www.kompas.com/kompas-cetak/0107/10/ENGLISH/stud.htm>>; Forum Cybernews, July 10, 2001, 'Dengarlah Jeritan Rakyat' at <<http://www.forum.co.id/terkini/07-01/pansus.htm>>.

85. Investigatory Commission for Trisakti and Semanggi I and II, Komnas HAM decision SK No. 34/KOMNAS-HAM/VII/2001 of August 27, 2001. See <<http://www.komnasham.or.id>>. See also "Pengadilan HAM Pembunuh Mahasiswa," *ASASI*, Penerbitan ELSAM, October 2001.

86. Asmara Nababan, Secretary General of Komnas HAM, cited by Imanuddin, *Jakarta Post*, "Questioning Impunity in Human Rights Abuses," February 11, 2002.

87. Vaudine England, "Generals Snub Inquiry into Killings," *South China Morning Post*, February 11, 2002.

88. Suara Karya, March 22, 2002, "KPP HAM Rekomendasikan Peradilan Sejumlah Jenderal." The team stressed the obstruction of justice that had occurred in the course of investigations into May 1998 and the surrounding events, and linked the Trisakti-Semanggi killings to the political situation. It named 50 members of the police and military who were involved in the killings (the public report does not name them, but they comprise 36 field operators, 11 at the operational level and 3 decision-makers).

gross violations of human rights before an *ad hoc* court but no prosecutions have emerged.<sup>89</sup>

The establishment of the Indonesian Truth and Reconciliation Commission (KKR) will create even more complications. The handling of gross human rights violations that occurred prior to the adoption of Law 26/2000 on Human Rights Courts is now in theory to be divided between specially created *ad hoc* courts and the KKR. The former is founded on Komnas HAM acting as inquirer (it alone is authorised to conduct inquiry: following its recommendations, investigations may be undertaken by the Attorney General with a view to prosecution). Article 3 of Law 27/2004 on the Truth and Reconciliation Commission stresses the task of the KKR is to resolve gross violations of human rights that occurred before the passing of Law 26/2000 on Human Rights Courts “*outside of the court of law in order to establish national peace and unity*” and “*establish national reconciliation and unity in the spirit of mutual understanding*.”<sup>90</sup> It establishes a process whereby the KKR acts like an adjudicator, receiving complaints of gross violations of human rights, investigating them and making recommendations for amnesty, compensation or rehabilitation as appropriate. Article 7(1)(g) gives it “*authority to*” refuse a request for compensation, restitution, rehabilitation or amnesty, if the case has been registered at the Human Rights Court. The problem is, of course, that discretion is very unhelpful where there is need for clear division of labour, and while the law speaks to simple registering of a claim at the Human Rights Court, such courts do not have jurisdiction over gross violations of human rights that occurred before the passing of Law 26/2000 on Human Rights Courts. There must first be political consent to the establishment of a special *ad hoc* court, required under Article 18 of Law 26/2000 on Human Rights Courts. In practice, Komnas HAM will first have to conduct an investigation establishing gross violations of human rights. There is nothing in Law 27/2004 on the Truth and Reconciliation Commission that deals with questions of coordination or divisions of labour or hierarchy between the institutions.

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89. “Komnas HAM Tolak Lengkapi Berkas Penyelidikan KPP HAM Trisakti, Semanggi I-II,” *Kompas*, September 3, 2002. The Attorney General rejected the report, seeking to have certain statements made under oath, to have military personnel summoned again (they had refused to comply with all previous summonses) and questioned the need for further action as a number of persons had already been successfully prosecuted before military tribunals.

90. Already in Article 47 of Law 26/2000, it was foreseen that there would be established a truth and reconciliation commission to ‘resolve’ gross violations of human rights.

Could it be that the KKR is meant to oust Komnas HAM's role in relation to historic crimes? More specifically, is this mechanism meant to divert attention from the massive rights violations arising out of events in 1965-1966? There is no facility for the KKR to refer cases to either Komnas HAM or the Attorney General; the only provision for referral is in Article 29(3) - if a perpetrator is neither willing to acknowledge the truth and wrongdoing, nor prepared to show any remorse, then he or she forfeits the 'right to an amnesty' and the case will be submitted to the *ad hoc* human rights court. The KKR has no standing under the Law on Human Rights Courts, and if no court exists, nothing can be done and there will be impunity. Finally, under Article 44, cases of gross violations of human rights 'resolved' by the KKR may not be brought before the courts; whether amnesty is sought or not, there is a statutory bar on prosecution in cases where some kind of settlement is reached.

#### **D. One size does not fit all**

The protection against prosecution on the basis of new laws criminalising what was not criminal at the time is enshrined in article 11(2) of the Universal Declaration of Human Rights and Article 15(1) of the ICCPR. But, acts that were already crimes under customary international law such as genocide, even if not expressly prohibited in legislation, may be prosecuted using a law passed after the crimes were committed. This is confirmed by the precedent established in the Nuremberg and Tokyo processes, and enshrined in article 15(2) of the ICCPR. In such a circumstance, the *ex post facto* law simply provides a mechanism for prosecuting what was already criminal, it does not make something lawful unlawful and thus does not violate the prohibition against retroactive prosecution. Closer scrutiny of this issue in relation to prosecution of historic crimes in East Timor, Indonesia and Cambodia reveals particular problems in substantive criminal law, particularly in relation to crimes against humanity, as well as in general principles of criminal law, in areas such as superior orders.

The Group of Experts for Cambodia stressed the importance of ensuring that the crimes under consideration be judged by the law of the time.<sup>91</sup> The principle of legality is not formally protected in the Constitution<sup>92</sup> or in Cambodian criminal procedure law, al-

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91. Cambodia Group of Experts Report, *supra* note 7, para. 60.

92. It is arguably indirectly protected through the vague provisions of Article 31 of the Constitution: "The Kingdom of Cambodia shall recognize and respect human rights

though it is protected under the 1956 Penal Code. Strangely, there is no provision directly addressing *nullum crimen, nulla poena sine lege* [there can be no crime committed, and no punishment meted out, unless the act involved violation of the existing law]. But the amended Law on Extraordinary Chambers generally reflects the principle. This is most clearly demonstrated by Article 3, which establishes the court's jurisdiction over the crimes of homicide, torture and religious persecution as violations of the 1956 Penal Code. The Penal Code's statute of limitations has been extended for a further twenty years. The provisions on international crimes are unique in Cambodia – such crimes can only be prosecuted within the Extraordinary Chambers project. Genocide as defined in Article 4 derives from Articles II and III of the 1948 Genocide Convention, although direct and public incitement to commit genocide as separate forms of genocide have been omitted.<sup>93</sup> The definition of crimes against humanity of Article 5 is taken from the Statute of the International Criminal Tribunal for Rwanda (hereafter 'ICTR')<sup>94</sup> – it is open to challenge as not reflecting custom between 1975 and 1979.<sup>95</sup> Article 6 gives the Extraordinary Chambers jurisdiction over war crimes, limited here to grave breaches of the 1949 Geneva Conventions.<sup>96</sup> There is also jurisdiction over breaches of the 1954 Cultural Property Convention, which have to date never been prosecuted.<sup>97</sup> Finally, the amended Law on Extraordinary Chambers provides that crimes against internationally protected persons pursuant to the 1961 Vienna Convention on Diplomatic Relations may also be prosecuted, although the basis of criminal action is in fact

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as stipulated in the United Nations Charter, the Universal Declaration of human Rights, the covenants and conventions related to human rights, women's and children's rights."

93. Cambodia became a party through accession on October 14, 1950.

94. 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 January 1, 1994 and December 31, 1994, established pursuant to Security Council Resolution 955.

95. Challenges can be raised to the element of discrimination in the *chapeau*, the widespread or systematic attack on the civilian population and whether the existence of a nexus to armed conflict was required. As the Cambodia Group of Experts pointed out, were that nexus still required as of 1975, the vast majority of the Khmer Rouge's atrocities would not be crimes against humanity: Cambodia Group of Experts Report, para. 71.

96. Cambodia became a party on December 8, 1958.

97. Cambodia acceded to the Cultural Property Convention, its attached regulations and the 1954 First Hague Cultural Property Protocol on October 12, 1961.

contained in the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents.<sup>98</sup>

There are also problems with taking a one-size-fits-all approach to general principles in criminal law. Defences will be problematic in litigation before the Extraordinary Chambers. The amended Law on Extraordinary Chambers has no provisions on defences, apart from a provision prohibiting the use of superior orders to negate criminal responsibility. Cambodia's current criminal procedure laws, which will apply to the Extraordinary Chambers, do not contain any provisions on defences, although Article 68 of the 1992 Supreme National Council Decree on Criminal Law and Procedure ('UNTAC Law') identifies factors that can mitigate sentence (they include self-defence and necessity, which are normally viewed as defences). Defences under the domestic law that applied at the time are contained in the 1956 Penal Code: (1) Insanity or unsoundness of mind (Article 90); (2) Youth (for those under 18 years of age, the court must determine the capacity for discernment) (Article 91); (3) Duress arising from a state of absolute necessity, that is when the accused was exposed to an actual and imminent danger that arose from circumstances beyond his control, and provided no other option (Article 97); (4) Superior orders, provided the order came by law or a legitimate authority (Articles 99, 100) and legality, for at the time of the commission of the crimes, this was a valid defence; and (5) Self-defence or the defence of another, subject to conditions set out in Articles 101 to 103.

Problems in relation to superior orders and duress are immediately apparent. Superior orders are examined closer in the paragraphs dealing with East Timor, where the same problem arises, namely that at the time of the commission of the crimes, superior orders were a defence in domestic law and that defence is denied to an accused being tried on the basis of a later law. Does that denial violate the prohibition against retroactive prosecution? Under the 1956 Penal Code, duress could be a complete defence to any crime within its scope. In International Law, it can sometimes be a defence. The general position in relation to duress taken up in the post World War II cases was set out in *Einsatzgruppen*: "*Let it be said at once that there is no law which requires that an innocent*

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98. Cambodia was a signatory to the 1961 Vienna Convention on Diplomatic Relations but neither signed, ratified nor acceded to the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents.

*man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real, and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever. Nor need the peril be that imminent in order to escape punishment.*"<sup>99</sup> In adopting the Statutes of the International Criminal Tribunal for the former Yugoslavia (hereafter 'ICTY') and ICTR, the Security Council chose, as did the drafters of the international military tribunals at Nuremburg and Tokyo, not to legislate on the issue of defences such as duress and to leave it to the judges. The specifics of the rules on duress in customary law have been confirmed in the seminal 1997 case of *Erdemovic* at the ICTY<sup>100</sup>: duress is generally available as a defence to crimes that do not involve the taking of innocent life, provided certain strict conditions are met.<sup>101</sup> But, the situation was less clear on offences involving the taking of human life. The majority of the judges could only reach a limited finding that duress is not a defence to a soldier charged with crimes against humanity or a war crime in relation to a crime involving the taking of innocent life. Thanks in part to the intellectual efforts undertaken at The Hague and Arusha, duress is available as a defence in limited circumstances at the ICC.<sup>102</sup> In the meantime, the judges of the Extraordinary Chambers of Cambodia have not been provided with any assistance on the matter of defences, despite it being abundantly clear that if ever there were a court that should

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99. *Trial of Otto Ohlendorf et al.*, ('Einsatzgruppen'), *Trials of War Criminals Before the Nuremburg Military Tribunals under Control Council Law No. 10*, (U.S. Govt. Printing Office, Washington D.C., 1950), Vol. IV, p. 480.

100. International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, established pursuant to Security Council Resolution 827 (1993).

101. These are that (i) the act in issue was committed under an immediate threat of severe and irreparable harm to life or limb; (ii) there was no adequate means of averting such evil; (iii) the crime committed was not disproportionate to the evil threatened; and (iv) the situation leading to duress was not voluntarily brought about by the person coerced. *Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22-A, Appeals Chamber, Judgment, October 7, 1997, with Joint Separate Opinion of Judge McDonald and Judge Vohrah, and Separate Opinions from Judges Cassese, Stephen and Li; see Separate Opinion of Judge Cassese, para. 16; Joint Separate Opinion, para. 66, Separate Opinion of Judge Li, para. 5.

102. Article 31(1)(d) of the Statute requires only three elements: a threat of imminent death or of continuing or imminent serious bodily harm; the accused must have acted necessarily and reasonably to avoid the threat; and the accused must not have intended to cause a greater harm than the one sought to be avoided.

not be faced with legal uncertainties or be engaging in complex studies of jurisprudence, it is these chambers.

As already discussed, the Indonesian Constitution protects against retroactive prosecutions. It is only the very high threshold crimes of genocide and crimes against humanity that may be prosecuted as gross violations of human rights under Law 26/2000 on Human Rights Courts. The definition of genocide is uncontroversial in its content although it wholly omits Article III of the Genocide Convention. The definition of crimes against humanity is an adaptation of the Statute of the ICC. It requires direct targeting of the civilian population, which suggests a nexus to armed conflict. It also introduces an appreciation of persecution as assault (*'penganiayaan'*), which is a crime defined under domestic criminal law. The crimes against humanity definition does not require that all crimes must have a discriminatory intent, only *'penganiayaan'* does. The list of core crimes is exhaustive, i.e. there is no 'catch all' clause. It is this law that is currently being used in the prosecution of crimes against humanity that were committed in the eastern province of Papua/West Irian. Yet, this law also provides the basis for the prosecution of gross violations in Indonesia going back in time, provided political approval for the establishment of an *ad hoc* court is given.<sup>103</sup> The one-size-fits-all definitions have so far been used for the prosecution of crimes against humanity in East Timor in 1999 and crimes against humanity in Tanjung Priok, Jakarta, in 1984. The significant problems with legality that may arise can be illustrated through consideration of the events surrounding 1965-1966. The situation is in fact being investigated by Indonesia's Human Rights Commission (Komnas HAM) as a gross violation of human rights. The facts remain disputed but essentially, there was an alleged 'coup' by members of the Indonesian Communist Party.<sup>104</sup> The coup was swiftly put down by General Soeharto, and it led to the slaughter of hundreds of thousands of suspected Com-

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103. Under Article 43 of Law 26/2000, the DPR must make a recommendation to the President for the issue of a decree establishing the court.

104. For a sampling of the enormous and diverse range of literature, see Benedict R. O'G. Anderson and Ruth T. McVey, "A Preliminary Analysis of the October 1, 1965, Coup in Indonesia," No. 52, Interim Report Series, Modern Indonesia Project, Southeast Asia Program, Cornell University, Ithaca, New York, 1971; Arnold C. Brackman, *The Communist Collapse in Indonesia*, Singapore: Asia Pacific Press, 1969; John Hughes, *The End Of Sukarno: A Coup That Misfired, A Purge That Ran Wild*, London: Angus & Robertson, 1968; Coen Holzapppel, "The 30 September Movement," *Journal of Contemporary Asia*, IX, 2 (1979), pp. 216-240; Amnesty International, "Indonesia: The 1965 Prisoners: How many more will die in jail?," ASA 21/43/96, August 1, 1996.



munists as well as arbitrary arrest and incarceration of thousands more. Even the CIA, which is widely believed to have assisted in the process, described this as “*one of the worst mass murders of the twentieth century.*”<sup>105</sup> Hunts for PIK members and affiliates continued for several years, with military operations in parts of Java in 1967 and 1968. Some detainees remained in prison until the late 1990s. All left leaning political parties were outlawed. Labour, peasant and women’s campaign organizations were banned, purged or otherwise neutered. Scores of magazines and newspapers were closed down. Family members and those who were released from detention continued to suffer discrimination until well after the fall of Soeharto.

The legal challenges that arise in taking this situation through the courts on the basis of Law 26/2000 are complex. Does Law 26/2000 reflect the applicable law at the time? Dutch-based Indonesian law certainly prohibited murder, sexual violence, maltreatment etc, and so much of what has been described earlier was unlawful at the time. But the events described go beyond ordinary crime. Even looking at it superficially, there appears to have been a widespread or systematic attack on the civilian population. A particular group, which seems to have been identified on the basis of political affiliation, was targeted. A wide range of fundamental human rights were grossly and systematically violated. The violations seem so immense and so significant as to amount to attacks on values going beyond the individual to humanity itself. This bears the hallmarks of what we know today as the crime against humanity, and one that carried on over a long period of time, although not necessarily in identical form throughout. There is no doubt that in 1965-1966, the crime against humanity was already criminalised under customary law.<sup>106</sup> But exactly what were the elements of the crime against humanity and did that change over the time that the crimes continued? Did the offence in 1965-1966 reflect the elements of Article 6(c) of the Charter of the IMT, which was approved by General Assembly Resolution 95(I), which affirmed the principles of International Law recognized by the Charter of the

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105. CIA, Directorate of Intelligence, “Indonesia – 1965: The Coup that Backfired,” Report, p. 71, cited in Peter Dale Scott, “The United States and the Overthrow of Sukarno, 1965-1967,” *Pacific Affairs*, Vol. 58 (Summer 1985), p. 239.

106. See Charter of the International Military Tribunal at Nuremberg, Article 6(c), Judgement of the International Military Tribunal, General Assembly Resolution 95(I) Affirming the principles of International Law recognized by the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal.

Nuremburg Tribunal and in the Judgement of the Tribunal? In 1965-1966, was it an element of the crime that there be a nexus with the armed conflict?<sup>107</sup> Did the acts committed against the civilian population have to be committed as part of a widespread or systematic attack on the civilian population?<sup>108</sup> Had the elements of persecution evolved since Nuremburg?<sup>109</sup> Was it necessary for all the acts to have been committed with a discriminatory intent? Did state or organisational policy matter for a crime against humanity in 1965? What did a person have to know about the wider attack and the location of his or her act within it? What mental element would have been required in 1965 – knowledge or specific intent? And how does all of that compare with the definition of the crime against humanity in Law 26/2000 on Human Rights Courts?

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107. Given that there was no ‘armed conflict’ in Indonesia at the time, the requirement of such a nexus to armed conflict in the *chapeau* would rule out there having been crimes against humanity. The International Law Commission’s drafts of the elements of the crime against humanity beginning with its 1954 Draft Code of Offences against the Peace and Security of Mankind did not retain a reference to armed conflict. By 1968, the nexus was not cited in the Convention on the Non-Applicability of the Statutory Limitation to War Crimes and Crimes against Humanity (General Assembly Resolution 2391, 1968). But the nexus found its way back in through the 1993 ICTY Statute, which defined the crime against humanity as: “*the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.*” It was not there in the Statute of the ICTR. But by the time the issue came to be examined by the Tadic Appeals Chamber in 1995, the ICTY was able confidently to hold that “[i]t is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict.” *Indeed. . . customary international law may not require a connection between crimes against humanity and any conflict at all,*” *Prosecutor v Dusko Tadic*, Case No IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 141.

108. Over time, the requirement that the particular actions be part of a widespread or systematic attack against the civilian population has come to form an integral part of the crime in customary law. This is evidenced in the 1993 Report of the Secretary-General accompanying the submission of the ICTY Statute to the Security Council, which explained that crimes against humanity are “*inhumane acts of a very serious nature . . . committed as part of a widespread or systematic attack against any civilian population,*” and are “*beyond any doubt part of customary international law.*” (See Report of the Secretary-General under Security Council Resolution 808, U.N. Doc. S/2504, May 3, 1993, para. 48). The ICTR was the first international instrument to codify ‘widespread or systematic attack on the civilian population’ as an element.

109. The IMT Charter enabled prosecution of persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal.

There are also problems with a one-size-fits-all approach to command responsibility. The basic concept is that a military commander may be held responsible for acts of subordinates if there was a superior-subordinate relationship; the superior knew or had reason to know that the criminal act was about to be or had been committed; and the superior failed to take the reasonable measures to prevent the criminal act or to punish the perpetrator. Command responsibility of military and civilian commanders was introduced into Indonesian law for the first time in Law 26/2000 (Article 42), which is roughly based on the definition employed in the Statute of the ICC.<sup>110</sup> Prior to this, there was no such head of criminal responsibility in Indonesian law, meaning that no one could have been held criminally liable for the acts of subordinates. And, even if International Law has recognised the basic concept of commanders being responsible for the acts of subordinates in certain situations since the Nuremburg and Tokyo trials (the fundamentals were set out in cases such as *High Command*<sup>111</sup> and *Yamashita*<sup>112</sup>), the precise content of the doctrine has been evolving since then. There are in fact important differences between the command responsibility formulations used in Article 86 of Additional Protocol I, at the *ad hoc* international tribunals (ICTY (Article 7(3)) and ICTR (Article 6(3)) and the ICC (Article 28).<sup>113</sup> Which of these reflected the content of the doctrine in 1965-1966 and does the command responsibility formulation used in Law 26/2000 meet that which applied in customary law?

Strikingly similar issues arise in East Timor. The right to protection from retroactive prosecution is in theory well protected. The Constitution in Section 31(2) provides that no one shall be tried and convicted for an act that does not qualify in the law as a criminal

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110. For critique of the substance of this provision *per se*, see ELSAM, "Monitoring Pengadilan HAM Tim-Tim," January 28, 2003, pp. 15-17, and the Report of the Commission of Experts, paras. 179-181.

111. *United States of America v. Wilhelm von Leeb et al*, Judgment, 11 Trials of War Criminals before the Nuremburg Military Tribunals Under Control Council Law No. 10, [1948].

112. *In Re Yamashita*, Supreme Court of the United States, 327 US 1 (1946).

113. See generally Ilias Bantekas, "The Contemporary Law of Superior Responsibility," *American Journal of International Law*, Vol. 93 (1999), p. 573; Matthew Lipman, "The Evolution and Scope of Command Responsibility," *Leiden Journal of International Law*, Vol. 13 (2000), p. 139; W. J. Fenrick, "Article 28: Responsibility of Commanders and Other Superiors," in Otto Triffterer ed., *Commentary on The Rome Statute of The International Criminal Court – Observers' Notes, Article By Article*, Baden-Baden : Nomos Verlagsgesellschaft, 1999, p. 519.

offence at the moment it was committed; in addition, sub-section 5 provides that criminal law shall not be enforced retroactively, except if the new law is in favour of the accused. Hence, historic Serious Crimes can only be prosecuted if the act was already a criminal act 'in the law' (customary international law could arguably count as 'law' in this context), and the definition used in the *ex post facto* law is more lenient than what already existed. Then, Section 5.2 of Regulation 2000/11 and Section 2.4 of Regulation 2000/15 both permit prosecution of acts committed before the establishment of the UN mission (October 25, 1999), but only where the law on which the serious criminal act is based is consistent with other applicable regulations, i.e. it is consistent with international standards and since independence, the Constitution. It suggests that other laws may be adopted to allow for the prosecution of Serious Crimes. The situation is made more complicated by Section 12 of Regulation 2000/15, which provides that a person may not be held criminally responsible unless the conduct in question constituted, at the time it took place, a crime under international law. There are several problems with this particular provision. Firstly, it conflicts with the jurisdiction of the Special Panels over certain Indonesian Penal Code offences, a jurisdiction that has in fact been exercised since 2000 in numerous Serious Crimes cases. These Indonesian crimes are not 'crimes under international law' in the sense of being 'international crimes'. The provision also exceeds the highest law of the land, the Constitution of East Timor, Section 31(2) of which sets a lower threshold: no one shall be tried and convicted for an act that does not qualify in the law as a criminal offence at the moment it was committed.

Not all the provisions of the Statute of the ICC on which East Timor's Regulation 2000/15 is based reflect customary law. The criminalisation of the acts listed in Regulation 2000/15 (genocide, crimes against humanity, war crimes, torture) are now crystallised as custom, but their elements have evolved over time, and in particular over the period of East Timor's history when major human rights violations were being perpetrated. The problems that arise from taking a one-size-fits-all approach to the prosecution of atrocities present, future and past can also be illustrated through consideration of war crimes in internal armed conflict.<sup>114</sup> It has only recently been recognised that war crimes may be committed in in-

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114. For problems with torture under Regulation 2000/15, see Linton, Experiments in International Justice, *supra* note 74, p. 219-222.

ternal armed conflict, and may be prosecuted as such.<sup>115</sup> So, when one has a situation of two parties engaged in an internal armed conflict, as occurred in East Timor in 1975, accompanied by unlawful killings, unlawful deprivation of liberty and serious maltreatment that violated the then-applicable Portuguese law, does it offend against the principle of legality to prosecute such conduct as war crimes when in 1975, the war crime had not been accepted as extending to non-international armed conflict? Further, can that conduct be prosecuted using the expansive definition of war crimes in non-international armed conflict contained in Regulation 2000/15 without violating the principle of legality? The dilemma is that the regulation itself prevents prosecution if there are retroactivity problems, and that would leave an accountability gap for the statutory limitations for the applicable domestic law (then Portuguese law) have long expired.

As with Cambodia, there are particular difficulties with superior orders. One needs to look at what the situation was at the time of the events under investigation. East Timor's Regulation 2000/15 adopts a provision that allows superior orders to be raised in mitigation only; it is not a defence. During the occupation, Indonesian laws were applied to East Timor.<sup>116</sup> The laws introduced by the

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115. Confirmation that breaches of Common Article 3 involved international criminality finally came with its appearance in the Statute of the ICTR in 1994, and even more so in 1995, when the ICTY's Appeals Chamber issued a landmark decision holding that breaches of Common Article 3 amounted to breaches of the laws and customs of war, and were thus prosecutable under Article 3 of the ICTY Statute. See *Tadic Appeal Decision on Jurisdiction*, paras. 131-134, "All of these factors confirm that customary international law imposes criminal liability for serious violations of Common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife." (from para. 134).

116. This touches on the complex matter of the applicable law, and the issues may only be noted briefly here. The invasion and occupation of Portuguese East Timor were violations of International Law and the wholesale replacement of the existing Portuguese system with Indonesian law was in violation of Article 43 of the Regulations Annexed to Hague Regulation IV and Article 64 of Geneva Convention IV. It is true that the Portuguese legal system, administered wholly by Portuguese, had collapsed in August 1975, and there were no functioning courts or judicial officers who could administer justice when Indonesia began to occupy the territory. This did entitle, even require, it to bring in Indonesian judges and prosecutors to meet those responsibilities. But they should not have replaced the entire pre-existing system with their own. The counter argument may be that the situation itself was an obstacle to meeting the duties of an Occupying Power and Indonesian law had been used out of necessity, but was in fact never raised in the 24 years of occupation. This calls into question the legitimacy of much of the legal structures and processes in East Timor under Indonesian rule, with

occupier (KUHP's Article 51) recognised a limited superior orders defence: "*Not punishable shall be the person who commits an act for the execution of an official order issued by the competent authority. An official order issued incompetently shall not exempt the punishment unless it was considered in good faith by the subordinate to be issued competently and its execution lay within the limit of his subordination.*" So, in occupied East Timor, one could not be criminally liable under Indonesian law if one acted in pursuance of superior orders in circumstances set out in Article 51. One cannot simply turn to International Law for a solution, for it has been unsettled on the issue. Two positions exist in relation to the question of superior orders:

1. Superior orders are never a defence but may be considered as a mitigating factor. This derives from the Charter of the International Military Tribunal at Nuremburg, and is used in the Statutes of the ICTY and ICTR. This reverses the duty on a subordinate who is faced with a blatantly unlawful order; instead of the duty to obey orders, he or she is obliged to disobey that blatantly unlawful order.
2. Superior orders may in certain limited situations amount to a defence. This derives from some World War II jurisprudence under Control Council Law No. 10 that moved away from the hard line of the Charter of the International Military Tribunal at Nuremburg when dealing with persons in subordinate positions (the accused at the tribunal were all in leadership positions) and certain military manuals such as the US Army Field Manual and British Manual of Military Law. The Statute of the ICC takes this position.

On this issue, the drafters of Regulation 2000/15 chose, for unrecorded reasons, to reject the superior orders provision in the Statute of the ICC and instead to use the definition of the ICTY and ICTR Statutes. The question remains: is it consistent with international standards for an accused in East Timor, on trial for Serious Crimes committed in say, 1985, to be denied a defence that was

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immense consequences for matters such as births, deaths, marriages, contracts and legal judgments, orders or decisions. But the reality is that Indonesian law was applied in East Timor from about 1976 until October 1999, and it is wholly unrealistic to ignore this by insisting on the application of a law which in theory should have been applied, but in fact was not. Despite objection from certain quarters, such as the East Timorese Court of Appeal in the case of Armando dos Santos, this has been the approach taken since October 1999, and much Indonesian law continues to apply in the independent State of East Timor today.

available in domestic law at the time the offence was committed, and which was not inconsistent with International Law?

### E. Selectivity in jurisdiction

In all three countries, the selectivity employed in settling upon jurisdiction for the accountability mechanisms arose partly out of an effort to ensure legality. Other factors such as convenience, the state of the judicial system, expediency and *realpolitik* had a significant role to play. Sometimes, one has the sense of there being different standards for the predecessor regime than those that the current regime is prepared to apply to itself, i.e. limiting the current regime's own exposure. And, those who are to be judged never have a say in the shape of the selectivity, with the result that it is inevitably to their detriment. This goes to the accuracy of the overall picture and basic fairness, for what is not within the jurisdiction may in fact be relevant to the defence of an accused. This sort of selectivity is reminiscent of the deliberate exclusion of carpet bombings and the Russian-German Pact from the scrutiny of the International Military Tribunal at Nuremberg.

Take Indonesia as an example. It is party to the Torture Convention, but still has not allowed for the prosecution of torture in domestic law.<sup>117</sup> A quick perusal of the reports of Amnesty International and Human Rights Watch will reveal there has been, and continues to be, a massive problem with severe maltreatment amounting to torture in the custody of State officials. This is a rule that is honoured in the breach. Reluctance to prosecute State officials for a practice that is so common that it may even be seen as condoned by the State may explain the selective approach on torture. To put such persons on trial is tantamount to putting the State on trial, and such trials would be happening constantly if the law worked as it should. With this mindset, the higher threshold crimes are more attractive as they reduce the likelihood of conviction. The

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117. For Indonesia's ratification, see *supra* note 55. Since August 18, 2000, torture has been prohibited under Article 28(g) of the Constitution, and under Article 4 of Law 39/1999 on Human Rights. But it has yet to be criminalised in domestic law. See UN Doc. CAT/C/XXVII/Concl. 3, November 22, 2001, Conclusions and Recommendations of the Committee Against Torture: Indonesia. 22/11/2001, Committee Against Torture, Twenty-Seventh Session, 12, November 12, 2001, Unedited Version, Consideration Of Reports Submitted By States Parties Under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture. For a comprehensive study of the issue of torture and reparation for torture in Indonesia, see Redress, *Reparation for Torture: Indonesia*, undated.

Indonesian legislation also omits any jurisdiction over situations involving armed conflict, whether international or non-international. This reflects an extreme sensitivity about scrutiny in areas such as Aceh and Papua, where low intensity armed resistance has been ongoing for years (in the case of Papua, since the 1960s). There is therefore reluctance to allow the courts jurisdiction, given that the majority of the crimes committed in such areas appear to be perpetrated by the military on civilians or captured rebels. Here too, the high threshold required for genocide and crimes against humanity serves to inhibit rather than encourage prosecutions. The exclusion of war crimes allows the State to avoid the spectacle of public litigation on issues of whether wars of national liberation, secession or simply non-international armed conflict are being waged on Indonesian soil. Also, given that the East Timor catastrophe was the dominant issue at the time of drafting, it is also possible that the law was deliberately restricted so there would be no argumentation about the legal status of East Timor (Indonesia insists it was its 27th province and not an occupied territory to which Geneva Convention IV applied). The continued reluctance of Indonesia to allow for the prosecution of grave breaches or other war crimes is even more noteworthy, given that as long ago as 1958, the Geneva Conventions were ratified into domestic law.<sup>118</sup>

In Cambodia, the amended Law on Extraordinary Chambers is restricted to prosecution of the senior leaders and “*those most responsible*” for crimes committed in Democratic Kampuchea between April 17, 1975 and January 6, 1979. One may legitimately question whether “*those most responsible*” can be extended beyond the Khmer Rouge. Yet, from the originating request of the Royal Government and despite at least one effort to raise the issue of a widened jurisdiction as a means of leverage,<sup>119</sup> it has always been clear that the focus of the prosecutions has been on the Khmer Rouge alone and on the unique nature of the criminality committed in Cambodia during the identified period. This approach had been recommended by the Cambodia Group of Experts for focusing on

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118. Law 59/1958 Concerning the Ratification by the Republic of Indonesia of all the Geneva Conventions of August 12, 1949, September 30, 1958).

119. In the Royal Government's response of March 3, 1999 to the recommendation of an ad hoc international tribunal, Prime Minister Hun Sen told the Secretary-General that what was being sought was “*comprehensive justice for Cambodia and her people, and for a full investigation into the crimes committed during the whole period of civil wars in Cambodia starting from 1970 to 1998.*”



the extraordinary nature of the Khmer Rouge's crimes.<sup>120</sup> The term "*those most responsible*" is designed to catch others outside the leadership, such as the chief of the notorious torture centre known as S-21 in Phnom Penh. This man (Kang Kek Ieu, also known as Duch), along with the one military commander who fought on till the end (Ta Mok), were in detention throughout the time that the draft was being agreed. It is no secret that the law has been drafted with a view to ensuring that if trials had to go ahead at all, at least these two would be the ones to be prosecuted.<sup>121</sup>

Another issue that stands out in the amended Law on Extraordinary Chambers is that it is only grave breaches of the Geneva Conventions that may be prosecuted. Internal armed conflict was rife in Cambodia, more common than the instances of international armed conflict where neighbouring Laos, Vietnam and Thailand were engaged in armed conflict with the forces of Democratic Kampuchea. One reason for its exclusion would have been the doubts over the status in customary law on war crimes in internal armed conflict during the period; Common Article 3 clearly applied as treaty law, but had never been prosecuted as a war crime until the advent of the *ad hoc* tribunals in the 1990s. Then, Cambodia was not party to Additional Protocol II and thus only bound in custom, and there had not been prosecutions for war crimes on this basis, until the Statute of the ICTR was adopted. It is also possible to view the entire situation as one internationalised armed conflict through involvement of the other States, beginning with the US bombardment and ending with Vietnam's departure from Cambodia, and thus the target period fell under the remit of the Geneva Conventions. Even if it were legally correct, this would not be consistent with the aims and objects of the drafters, who did not want that period opened up to scrutiny. In any event, the point does need to be stressed again that the jurisdiction suits the purposes of the drafters. The targeted party, the Khmer Rouge, would certainly

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120. Cambodia Group of Experts Report, *supra* note 7, para. 10.

121. See Daphna Shrager, "The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions," in *Internationalized Criminal Courts*, *supra* note 17, p. 24. Also, close analysis suggests that the government has been pursuing a policy akin to peace and reconciliation at all cost, and carefully controlled and calibrated justice if it absolutely could not be avoided. "*It follows from this reasoning that in the name of reconciliation those leaders of the Khmer Rouge/CPK who defected and 'reconciled' (Ieng Sary, Khieu Samphan, Nuon Chea) should not be prosecuted; on the other hand, those that remain regarded as 'enemies' (Ta Mok) or had no role in that 'reconciliation' (Duch) may and should be tried in the name of justice*" - Linton, *Reconciliation In Cambodia*, *supra* note 63, pp. 39-67.

have preferred to draw in such issues, for they would be relevant to their explanation of how things developed and why things went so wrong in Cambodia. In a situation where the law has not laid down what defences to an accused are available, a defence counsel may be justified in arguing that these matters may go towards a defence. They are also about the complete factual record of what happened in Cambodia, and in the event of findings of guilt, they may go towards mitigation of sentence.<sup>122</sup>

For the drafters of Regulation 2000/15 in East Timor, the Statute of the ICC seems to have provided a ready-made penal code; its provisions had been well worked over by the negotiators at Rome and in itself, it is highly progressive in terms of the protection of the human person. The law is directed at past, present and future. The mandate is wide open, with no directions on what level to target, such as if it is to be leaders or those most responsible. Yet, Regulation 2000/15 also illustrates selectivity, and the reasons for the deviation from the framework of the Rome Statute have never been publicly stated. Shrager points out that it “*pays little regard to their relevance in the realities of East Timor, or their customary or conventional international law nature.*”<sup>123</sup> For example, the crimes against humanity definition follows that of the Statute of the ICC, but it has a higher threshold in that it not only requires the prosecution to prove that the attack was committed as part of a widespread or systematic attack directed against the civilian population, but also that the act of the accused was itself directed against the civilian population. Then, it rejects the definition of ‘attack against the civilian population’ in that Statute but without providing an alternative. Section 6 dealing with war crimes has omitted the threshold of Article 8(1) of the Statute of the ICC, which only permits jurisdiction over war crimes ‘*committed as part of a plan or policy or as part of a large-scale commission of such crimes.*’ This makes it clear that an individual act can amount to a war crime under Regulation 2000/15. It has also omitted the provision in Article 8 (2)(b)(xx) of the Statute of the ICC on means and methods of warfare on ‘comprehensive prohibition’.

Then, the regulation employs two definitions of the crime of torture and potentially provides four separate ways to prosecute

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122. In reality, it is unlikely that a court would accept there is any justification that could negate responsibility for genocide or crimes against humanity. This is, after all, the position at the ICC.

123. Daphna Shrager, “The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions,” in *Internationalized Criminal Courts*, *supra* note 17, p. 33, fn. 44.

this crime (as a means of perpetrating genocide, a crime against humanity, a war crime and torture). Section 5.2(d) of Regulation 2000/15 provides the definition for torture as a crime against humanity: “[t]orture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.” The second definition of torture, that of Section 7.1, is to apply to torture when it is committed as a war crime, a means of committing genocide and the stand-alone international crime of torture: “torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him/her or a third person information or a confession, punishing him/her for an act he/she or a third person has committed or is suspected of having committed, or humiliating, intimidating or coercing him/her or a third person, or for any reason based on discrimination of any kind. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.” This selective mixing up of elements from sources such as the UN Declaration against Torture 1975<sup>124</sup> and the Convention against Torture and the Statute of the ICC suggests either confusion about the state of customary law on torture, or an effort to frame the *lex ferenda* rather than *lex lata*. One commentator suggests that “the main, or additional, intention of the framers of the Regulation has been to define, or redefine, torture as a common crime under domestic law.”<sup>125</sup>

Not one of East Timor, Indonesia or Cambodia allows for prosecution of aggression. Aggression was first prosecuted as an offence against peace under the Charter of the International Military Tribunal at Nuremberg after the Second World War - Article 6(a) defined the crime as the planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan for the accomplishment of war crimes or crimes against humanity.<sup>126</sup> This was recognised as a principle of International Law as early as 1946 when the General Assembly adopted Resolution 95

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124. United Nations General Assembly Resolution 3452 (XXX) of December 9, 1975.

125. Bert Swart, “International and Substantive Criminal Law,” in *Internationalised Courts and Tribunals*, *supra* note 17, pp. 302-303.

126. Article 5(a) of the Tokyo Tribunal was identical apart from the added words “declared or undeclared” before the words “war of aggression.”

(I) and in 1950 by the International Law Commission<sup>127</sup>. Although a definition of aggression as a violation of the *jus ad bellum* was adopted in General Assembly Resolution 3314 (XXIX) of 14 December 1974 (which also describes aggression as a crime against peace from which international responsibility flows), there has remained dispute over how to prosecute this as a crime. While they could agree that the ICC should have jurisdiction over aggression, States attending the Rome Conference in 1998 could not agree a definition of aggression which would form part of the subject matter jurisdiction of the ICC. So, aggression only becomes a crime within the jurisdiction of the court if and when a provision defining the crime and setting out the conditions of jurisdiction is adopted as an amendment to the Statute, at least seven years after the Statute's entry into force.

To be fair, aggression is not found in the Statutes of the ICTY or ICTR and has not been prosecuted since the end of the Second World War.<sup>128</sup> But the omission is surprising in the case of East Timor, whose experience of gross violations of human rights arose out of initial acts of aggression in 1975 that continued through with the invasion and occupation that lasted until October 1999. If ever there were a victim of aggression, it is East Timor. Even if *realpolitik* dictates that nothing could actually be done about it, one would have expected at least the symbolism of allowing the Special Panel of the District Court of Dili to have formal jurisdiction over crimes of aggression. As noted earlier, in Cambodia, the RGC did attempt to widen the temporal jurisdiction to 1970-1998 which would have brought in acts that would meet the General Assembly's 1974 definition of aggression, but it seems that this was simply a negotiating tactic.<sup>129</sup> Not only would it have brought the wrath of the USA, China and Vietnam down on the government, but it would have derailed the entire effort to prosecute the Khmer Rouge. It is also true that aggression would have detracted away from the enormous criminality of the Khmer Rouge. On the other hand, the limitation is an attempt to control the information that emerges through the

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127. International Law Commission, Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal, Yearbook of the International Law Commission, 1950, vol. II.

128. See Constantine Antonopoulos, "Whatever Happened to Crimes against Peace?," *Journal of Conflict and Security Law*, Vol. 6 (2001), pp. 33-62 for an exploration of why this is so.

129. See Daphna Shrager, "The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions," in *Internationalized Criminal Courts*, *supra* note 17, p. 24.

trials. What one sees is restriction of jurisdiction by those with the power to do so to the period when the target group was committing crime, but deliberate exclusion of the periods of time when they could have been the victims of crimes of others, including those currently in power. On the other hand, for States in such precarious situations as the three being studied here, judicial scrutiny of aggression by powerful others is just too controversial and complicated to handle.

#### **F. The eclipsing of State responsibility**

State responsibility arises when the conduct of a State, directly or in a manner which may be attributed to it, breaches an international obligation of that State. The situation may involve a bilateral agreement, where breach is of an obligation owed to the other State. It may involve a multi-lateral treaty, where the act may result in breach of obligations not just to the injured State party but to all other States party. It may involve breach of an obligation owed to the international community as a whole. It may also involve breach of rights or duties owed to individuals or other entities. Despite attempts by the International Law Commission to introduce the concept of State criminality, a State cannot yet be the subject of criminal sanctions.<sup>130</sup>

There has been enormous fixation with individual criminal responsibility in East Timor, Indonesia and Cambodia, to the extent of excluding traditional State responsibility. This is consistent with a tendency to eclipse State responsibility in the field of International Justice, which has single-mindedly pursued individual responsibility (the 'no peace without justice' approach).<sup>131</sup> All the effort

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130. The 1996 version of the ILC Draft Articles on State Responsibility contained an Article 19, which made a distinction between international delicts and international crimes. The majority of States expressed their opposition to the notion of States committing crimes. In 2000, Article 19 was deleted, but the notion of serious breaches remains, with special consequences arising in situations where the serious breach has been of an obligation owed to the international community as a whole. Under Article 40, serious breaches occur where the obligation breached is one arising under a peremptory norm of International Law, and it involves a gross or systematic failure by the responsible State to fulfil the obligation.

131. There is however a growing recognition of this imbalance, and it is being redressed, partly through the development of reparations for victims. Much work has been done by United Nations Special Rapporteurs Van Boven and Joinet on the issue of the right to restitution, compensation and rehabilitation of victims of gross violations of human rights and fundamental freedoms, culminating in the most recent draft of the United Nations Basic Principles and Guidelines on the Right to Remedy and Repara-

has been going into making States investigate, prosecute and punish individuals who, more often than not, are linked to a State through being an organ or *de jure* or *de facto* agent (this is particularly the case where policies of State are involved, usually in crimes such as genocide and crimes against humanity). In the normal course of events, such actions may be imputable to the State and it is liable to make reparation for that breach.<sup>132</sup> This is not to deny there are cases before the International Court of Justice; they are just infrequent in the scale of things.<sup>133</sup> For decades, Germany has been making reparation in relation to the atrocities of the Second World War. According to the German Foreign Office, at the end of 2000, total German reparations amounted to roughly EUR 55 billion, some 40% of this going to Israel or recipients in Israel.<sup>134</sup> The doctrine of human rights is, after all, rooted in obligations owed by States to other States about how they will treat individuals within their jurisdiction. But, the duty of the State to make reparation for breaches of international obligation, whether to individual victims of human rights violations or to other States who are victims of a breach of obligation, has been irrelevant in East Timor, Indonesia

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tion for Victims of Violations of International Human Rights and Humanitarian Law. In 2002, the Presidents of the both the *ad hoc* tribunals drew the attention of the Security Council to the weakness of measures of reparation and compensation of victims in their respective Statutes.

132. Reparation is the normal consequence of breach – in 1928 the Permanent Court of International Justice famously held that “*it is a principle of international law, and even a general conception of the law, that any breach of an engagement involves an obligation to make reparation.*” It should as far as possible “*wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.*” - Case Concerning the Factory at Chorzow (Claim for indemnity) (Merits), Germany v. Poland, Judgement (Merits), PCIJ (1928), Ser. A, No. 17, pp. 29, 47.

133. See for example, the following ICJ cases: Legality of the Use of Force (Serbia and Montenegro v. 10 NATO member states); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro); Armed activities on the territory of the Congo (Democratic Republic of Congo v. Uganda); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia and Montenegro); and Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda).

134. About EUR 256 million is paid out annually in compensation pensions and related payments to recipients in Israel. Added to this are substantial compensatory social security payments and payments for the equalization of burdens. Since 2000, a fund has been created to pay compensation to former victims of forced labour. See website of the German Foreign Ministry, at <[http://www.auswaertiges-amt.de/www/en/laender-infos/laender/laender\\_ausgabe.html](http://www.auswaertiges-amt.de/www/en/laender-infos/laender/laender_ausgabe.html)> accessed on May 5, 2005.

and Cambodia. Not one of the three has been or is involved in a claims compensation process, whether local or international and whether to resolve individual or inter-State claims.

Looking at Cambodia, the crimes of the Democratic Kampuchea era were overwhelmingly perpetrated upon fellow Cambodians although the Khmer Rouge also committed many significant crimes upon non-Cambodians. The ideologically driven crimes under the regime of Democratic Kampuchea were unique, and it is right that the jurisdiction of the Extraordinary Chambers draws that out. But the drawback is that there are significant accountability gaps at the individual and State levels. The Khmer Rouge was not the only ones to commit atrocities in Cambodia in all the long years of turmoil (1970-1999). Particularly relevant to this discussion is the question 'what about the States that supported the Khmer Rouge?'. Vietnam and China are usually fingered for direct support of the Khmer Rouge in their seizure and maintenance of power, but they were not alone. "*As the genocide progressed, for geopolitical reasons, Washington, Beijing, and Bangkok all supported the continued independent existence of the Khmer Rouge regime . . . Behind the scenes, the ousted Khmer Rouge received U.S. support from the Carter, Reagan and first Bush administrations.*"<sup>135</sup> What is at issue is possible complicity in genocide, crimes against humanity and gross violations of human rights. But

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135. Ben Kiernan, "Recovering History and Justice in Cambodia," *Comparativ*, Vol. 14 (2004), Heft 5/6, S. 76-85. "When U.S. President Gerald Ford and Secretary of State Kissinger visited Indonesian President Suharto on 6 December 1975, the transcript released in 2001 reveals that Ford, deploring the recent U.S. defeat in Vietnam, told Suharto: "There is, however, resistance in Cambodia to the influence of Hanoi. We are willing to move slowly in our relations with Cambodia, hoping perhaps to slow down the North Vietnamese influence although we find the Cambodian government very difficult." Kissinger explained Beijing's similar strategy: "the Chinese want to use Cambodia to balance off Vietnam. . . . We don't like Cambodia, for the government in many ways is worse than Vietnam, but we would like it to be independent. We don't discourage Thailand or China from drawing closer to Cambodia. . . . . Carter's national security advisor Zbigniew Brzezinski recalled Kissinger's earlier policy when he revealed that in 1979, "I encouraged the Chinese to support Pol Pot. Pol Pot was an abomination. We could never support him, but China could." According to Brzezinski, Washington "winked, semi-publicly" at Chinese and Thai aid to the Khmer Rouge. In 1982 the U.S. and China encouraged Sihanouk to join a DK coalition-in-exile. Secretary of State George Shultz refused to support a proposed international genocide tribunal. In 1989 his successor James A. Baker even urged that the Khmer Rouge be included in the Cambodian government. When Japan proposed a commission of inquiry into Khmer Rouge crimes, US Assistant Secretary of State Richard Solomon opposed the idea, stating on 18 March 1991 that it was "likely to introduce confusion in international peace efforts." [footnotes omitted].

global politics is such that any whiff of an attempt to investigate the roles of these other States would put an end to a process of accountability for the Khmer Rouge.

In Indonesia, the vast majority of human rights violations appear to have been (and continue to be) committed by State agents who are usually either military or police, otherwise individuals acting under their control. Their actions place the State in the role of violator of human rights. But, through the tactical concessions of permitting criminal justice and then shifting all the blame onto individual scapegoats, the responsibility of the State for those violations is conveniently ignored. Indonesian law does allow for victims to claim reparations, but it is linked to the individual perpetrator rather than the State. In time, the Truth and Reconciliation Commission may come to operate as a kind of compensation commission; under Article 24, if the Commission receives a complaint or a report of gross violations of human rights accompanied by a request for compensation, restitution, rehabilitation or amnesty, then it is obliged to settle the matter by giving a decision within a period of no more than 90 days from the date upon which the request was received. The Republic of Indonesia is responsible for compensation, *"in accordance with the financial capacity of the State in order to fulfil basic needs, including physical and mental health treatment."* There have been attempts at groundbreaking class action litigation: a first attempt was rejected by the Human Rights Court in Makassar, but a class action case based on Indonesia's Civil Code was filed against five Indonesian Presidents on December 17, 2004 by an NGO acting on behalf of seven groups of victims of the anti-Communist backlash after the alleged coup in 1965.<sup>136</sup> This goes to the issue between the State and its citizens. But, what about the States that stood by and did nothing while hundreds of thousands were getting butchered and maltreated in Indonesia? More to the point, what about the USA, which is widely alleged to have aided and abetted the pogrom against the Indonesian Communist Party, in particular allegations that the CIA identified lists of persons who

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136. Under Article 1365 of the Indonesian Civil Code, every act that violates the law and causes loss to others shall obligate those responsible to compensate for such loss; there is also the right of compensation as part of criminal proceedings under Articles 98-101 of the KUHP. See TAPOL, "Class Action against Five Presidents by Victims of 1965," April 20, 2005. See "Hakim Peradilan HAM Abepera Tolak Class Action," *Tempo Interaktif*, June 7, 2004.



were targeted by the Army?<sup>137</sup> Komnas HAM is investigating 1965 and its aftermath as part of a wider investigation of gross violation of human rights under the Soeharto regime, but has yet to report in full or make recommendations for how such matters should be dealt with.

In legal terms, the East Timor case would seem to be one that is ripe for a claims compensation process, such as exists between Ethiopia and Eritrea and have been established after the 1st Gulf War (United Nations Claims Compensation Tribunal) and as a result of events during the Iranian Revolution (Iran-US Claims Tribunal). More details will hopefully emerge when the report of the East Timor Truth Commission (CAVR) is made public, but even without the benefit of its investigations, information in the public arena clearly suggests that the following breaches of International Law could be pursued: interference in the domestic affairs of another State, sending armed groups to engage in acts of violence in a neighbouring State, infiltration of the borders of another State, full-scale invasion followed by occupation, violation of the laws of occupation, violation of fundamental human rights including the right to self determination, and then devastation of public and private property in September 1999. The issues raised include violation of the United Nations Charter, violation of customary laws, violation of obligations owed *erga omnes* and violations of treaties. This does not just concern Indonesia; there are other States that approved the invasion of East Timor and colluded in the suppression of the right of its people to self-determination.<sup>138</sup> This is in fact widely seen to be the reason for the total lack of support for the establishment of an *ad hoc* tribunal to investigate the violations in East Timor from 1975-1999.

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137. Kathy Kadane, "Ex-agents say CIA compiled death lists for Indonesians," State News Service, *Washington Post*, May 21, 1990. See, "US blocks Indonesia history revelations," *BBC News*, July 28, 2001. The allegations seem to be confirmed as fact by an accidentally released State Department history compilation (Foreign Relations of the United States, 1964-68, Vol. XXVI: Indonesia; Malaysia-Singapore; Philippines) that details the US role. The book was dispatched by accident and a copy of it has been placed on the website of George Washington University's National Security Archive (<<http://www.gwu.edu/~nsarchiv/>> accessed on May 5, 2005). This reveals that lists of top communist leaders that had been compiled by the US Embassy were provided to the Army, and funding was provided to the Army.

138. For an analysis in relation to Australia and the USA, see Jessica Howard, "Invoking State Responsibility for Aiding the Commission of International Crimes – Australia, the United States and the Question of East Timor," *Melbourne Journal of International Law*, Vol. 2, 2001, pp. 1-47.

East Timor is not in a position to make reparations for 25 years of human rights violations. The dire conditions of the country preclude that, and in any event, it is particularly inappropriate that a newly independent but impoverished State should be the one to try to make right the wrongs of others for whom it was not responsible, and worse still, were responsible for its condition.<sup>139</sup> But, unknown to many, the Truth and Reconciliation Commission (CAVR) has been disbursing World Bank-funded reparations through an Urgent Reparation Scheme to persons it has identified as victims of gross violations of human rights. By the end of December 2004, a total of US\$80,000 had been dispersed to 307 selected survivors and organisations.<sup>140</sup> The criteria for identification and selection have not been made public.

Nevertheless, East Timor is not exploring the issue of reparation with Indonesia. None of the meetings of the Indonesia–Timor-Leste Joint Ministerial Commission for Bilateral Cooperation have dealt with the issue of reparations for East Timor and its citizens. But, the extraordinary irony is that Jakarta is pursuing compensation on behalf of its nationals for assets lost in the devastation of 1999, including settlement of land claims and conversion of assets into equity in East Timor.<sup>141</sup> Point 12 of their joint statement after the 2002 meeting proclaimed the satisfaction of both parties “*with the recognition of the principle of international law that private individuals and corporations should have their legal rights duly recognized.*”<sup>142</sup> Legal rights are being pursued by Indonesia, not East Timor, on behalf of its citizens and corporations. The same *realpo-*

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139. The only situation where it may be possible to hold East Timor itself to account is in relation to actions of the national liberation movement itself, drawing on the customary rule expressed in Article 10(2) of the International Law Commission’s Articles of State Responsibility: “*The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.*”

140. CAVR Update, December 3–January 4.

141. See point 13 of the Joint Statement following the First Meeting of the Indonesia – Timor-Leste Joint Ministerial Commission for Bilateral Cooperation, October 8, 2002: “13. *The Meeting agreed to seek comprehensive solutions in the interests of further strengthening cooperation between close neighbours on residual legal matters such as assets (private individual, corporate and government) and the question of nationality. In addition, both Parties agreed in principle to find innovative settlement on corporate assets through conversion of those assets for Indonesian investment including joint venture.*” Also, “Indonesia to seek compensation for assets in Timor,” *AFP*, September 4, 2003.

142. Joint Statement following the Second Meeting of the Indonesia–East Timor Joint Ministerial Commission for Bilateral Cooperation, September 6, 2003.

*litik* that motors East Timor's position on accountability permeates this area too. It is not taking up the issue of reparation for the gross violations suffered by its citizens during the invasion and occupation with Indonesia, and it is not taking up the issue of reparation for the numerous violations of International Law committed in the period 1975-1999. More startling, it has been blocking the fulfilment of the right to an effective remedy through its opposition to the work, and then the continuance, of the Serious Crimes project, and actively opposes the establishment of an *ad hoc* tribunal to try crimes perpetrated by Indonesia.<sup>143</sup> Neither is it negotiating any form of *ad hoc* international fund comprised of voluntary contributions to be used as reparations to victims of gross violations.

### G. The touchy business of amnesties and pardons

Barriers to accountability by way of formal amnesty or pardon are an area where the municipal and international have one of their most violent collisions. They have been significant issues in each of East Timor, Indonesia and Cambodia. Domestic amnesty for the international crimes of genocide, crimes against humanity, war crimes and torture is not consistent with International Law.<sup>144</sup> The

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143. See for example, the statement of Foreign Minister Jose Ramos-Horta to the 61st session of the Commission on Human Rights, March 14 to April 22, 2005.

144. See Amnesty International, Sierra Leone: Special Court for Sierra Leone: Denial of Right to Appeal and Prohibition of Amnesties for Crimes under International Law, AI Index: AFR 51/012/2003, November 1, 2003, for a review of the many instances of rejection of the amnesty for genocide, crimes against humanity, war crimes, torture, extra-judicial executions and enforced disappearance by the Secretary-General of the United Nations, the Security Council, the UN High Commissioner for Human Rights, the UN Commission on Human Rights, the ICTY, the Committee against Torture, the Human Rights Committee and declarations emerging from major international conferences such as the 1993 World Conference on Human Rights. On the imperative to provide an effective remedy under comprehensive and regional human rights treaties, see Sherrie L. Russell-Brown, "Out of the Crooked Timber of Humanity: The Conflict Between South Africa's Truth and Reconciliation Commission and International Human Rights Norms Regarding 'Effective Remedies'," *Hastings International and Comparative Law Review*, Vol. 26 (2002-2003), p. 227, part I. On the duty to prosecute in relation to the victim's right to justice, see the original report of Louis Joinet (U.N. Doc. E/CN.4/Sub.2/1997/20. Rev.1 Annex II) updated by Diane Orentlicher (U.N. Doc. E/CN.4/2004/88 including U.N. Doc. E/CN.4/2005/102/Add. 1, the updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity) and approved by the Commission on Human Rights, April 19, 2005. On prosecution generally, see Diane F. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," *Yale Law Journal*, Vol. 100 (1991), p. 2537; Naomi Roht-Arriaza, "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law," *California Law Review*, Vol. 78 (1990),

most recent decision on this was taken by the Special Court of Sierra Leone in rejecting the argument that the general amnesty granted under Article IX of the 1999 Lomé Agreement prevented the court from taking jurisdiction.<sup>145</sup> The objection to amnesty is rooted in the moral and legal imperatives upon States to investigate, prosecute and punish or extradite, and provide effective remedies for gross violations of human rights (see for example, Article 8 of the Universal Declaration of Human Rights; Article 146 Geneva Convention IV; Article 2 (3(a)) of the ICCPR; Articles 1 and 4 of the Genocide Convention; Articles 2, 4, 5, 6, and 7 of the Torture Convention; preamble to the ICC Statute) that have trickled into custom, and is reflected in soft law such as the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power<sup>146</sup>. United Nations' independent experts appointed to study the problem of impunity are agreed that amnesty for the most serious crimes is not consistent with the obligations that exist in relation to certain crimes under International Law.<sup>147</sup> The position of amnesties in International Law is described by the Secretary-General in the following terms: "*Carefully crafted amnesties can help in the return and reintegration of both groups and should be encouraged, although. . .these can never be permitted to excuse geno-*

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p. 449; Jaime Malamud-Goti, "Transitional Governments in the Breach: Why Punish State Criminals," *Human Rights Quarterly*, Vol. 12(1) (1990), p. 5.

145. *Prosecutor v. Morris Kallon*, Case No. SCSL-2004-15-AR72 (E) and *Prosecutor v. Brima Bazzy Kamara*, Case No. SCSL-2004-16-AR72 (E), Decision No. SCSL-04-15-PT-060-I and Decision No. SCSL-04-15-PT-060-II. Contrast this with the findings of the truth commission, see the Final Report of the Truth & Reconciliation Commission of Sierra Leone, Vol. 3b, Chapter 6: The TRC And The Special Court For Sierra Leone, paras.10-12. Also see William A. Schabas, "Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone," *U.C. Davis Journal of International Law & Policy*, Vol. 11 (Fall 2004), p. 145 and Amnesty International, Sierra Leone: Special Court for Sierra Leone: Denial of Right to Appeal and Prohibition of amnesties for crimes under international law, AI Index: AFR 51/012/2003, November 1, 2003, for a review of the relevant jurisprudence and decisions at international level.

146. General Assembly Resolution 40/43 of November 29, 1985.

147. See the original report of Louis Joinet (UN Doc. E/CN.4/Sub.2/1997/20. Rev. 1 Annex II) updated by Diane Orentlicher (U.N. Doc. E/CN.4/2004/88 including U.N. Doc. E/CN.4/2005/102/Add. 1, the updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity). Also, Draft Basic Principles And Guidelines On The Right To A Remedy And Reparation For Victims Of Gross Violations Of International Human Rights Law And Serious Violations Of International Humanitarian Law (Rev. August 5, 2004), in particular principle 4, resulting from the work of the experts Theo van Boven and M. Cherif Bassiouni.

*cide, war crimes, crimes against humanity or gross violations of human rights.*"<sup>148</sup>

Amnesty has certainly sometimes been used to permit impunity, and thus undermines efforts to promote accountability and rule of law. But it is also a recognised legal concept in municipal law, drawing on the sovereign powers of the State or its supreme leader, to protect persons from the reach of the courts. It is also used as a legitimate and effective incentive to end armed conflict. Amnesty may sometimes be the price of ending violence and suffering and ushering a new era of peace. Despite its current statements of principle opposing amnesty for international crimes, the United Nations itself does have a patchy record on amnesties. In Haiti, it was involved in encouraging and drafting broad amnesty agreements involving war crimes;<sup>149</sup> in Cambodia, neither UNTAC nor the local authorities documented, investigated or prosecuted the Khmer Rouge atrocities<sup>150</sup> and the world body had no objection to an earlier Sierra Leone peace treaty (Abidjan Agreement) in 1996 which had amnesties worked in.<sup>151</sup> Tellingly, its celebrated statement (handwritten) in the Lomé Agreement was only appended at the last minute. Speaking to the amnesties in that situation, the Truth and Reconciliation Commission of Sierra Leone found itself unable to condemn those who had used the amnesty in an attempt to end hostilities; it was unable to find the amnesty too high a price – disallowing amnesty in all cases would be to deny the on-the-

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148. Report of the Secretary-General, The rule of law and transitional justice in conflict and post-conflict societies, S/2004/616, August 23, 2004, para. 32. See also Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915, October 4, 2000, para. 22.

149. Ian Martin, "Justice and Reconciliation: Responsibilities and Dilemmas of Peace-makers and Peace-builders," in Alice H. Henkin ed., *The Legacy of Abuse – Confronting The Past, Facing The Future*, Aspen Institute, New York University School of Law, 2002, pp. 81-82; Michael Scharf, "Swapping Amnesty for Peace: Was There a Duty To Prosecute International Crimes in Haiti?," *Texas International Law Journal*, Vol. 31(1) (1996).

150. For more, see Michael Vickery and Naomi Roht-Ariazza, 'Human Rights in Cambodia', in Naomi Roht-Ariazza ed., *Impunity And Human Rights In International Law*, Oxford, 1995, pp. 243-251; Steven Ratner, "The Cambodian Settlement Agreements," *American Journal of International Law*, Vol. 87(1) (1993). However, an illuminating description of the realities of the situation that UNTAC found itself in, explaining the reasons for this inertia on accountability, can be found in Stephen P. Marks, "Forgetting 'The Policies and Practices of the Past': Impunity in Cambodia," *Fletcher Forum of World Affairs*, Vol. 19 (Summer/Fall 1994), pp. 22-43, at pp. 30-35.

151. William A. Schabas, "Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone," *U.C. Davis Journal of International Law & Policy*, Vol. 11 (Fall 2004), pp. 145-169, at p. 157.

ground reality of violent conflict and the urgent need to bring such strife and suffering to an end.<sup>152</sup> South Africa, after much public debate, opted for a conditional and individualised amnesty through its Truth and Reconciliation Commission as the only way to ensure a peaceful transition out of apartheid and to encourage perpetrators to provide information that would otherwise not be known.<sup>153</sup> In fact, Article 6(5) of Additional Protocol II to the four Geneva Conventions of 1949, which governs non-international armed conflict, calls on States Parties to grant the “*broadest possible amnesty*” once the conflict is resolved.<sup>154</sup> There is growing recognition of the uses of amnesty in the normative framework. For example, Principle 24 of the updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity is a highly nuanced provision that attempts to balance the competing policy objectives of *bona fide* amnesties with the criminal justice imperative.<sup>155</sup>

Amnesties and pardons have played a tremendous role in the Cambodian odyssey. In spite of the utmost severity of the crimes committed in the Democratic Kampuchea era, the Cambodian leadership has for many years now used the amnesty/pardon as a key part of its strategy to destroy the Khmer Rouge and bring an end to the armed conflict.<sup>156</sup> Within months of taking control in 1979, the PRK (People’s Republic of Kampuchea) had issued

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152. *Supra* note 145.

153. Promotion of National Unity and Reconciliation Act, No. 34 of 1995, at <<http://www.truth.org.za>> on May 5, 2005. For an examination of the implications in International Law of amnesties given to those violators of human rights in the course of the South African truth commission process, see John Dugard, “Retrospective Justice: International Law and the South African Model,” in A. James McAdams ed., *Transitional Justice and the Rule of Law in New Democracies*, Notre Dame, Ind.: University of Notre Dame Press, 1997; Sherrie L. Russell-Brown, “Out of the Crooked Timber of Humanity: The Conflict Between South Africa’s Truth and Reconciliation Commission and International Human Rights Norms Regarding ‘Effective Remedies’,” *Hastings International and Comparative Law Review*, Vol. 26 (2002-2003), p. 227.

154. This is however meant to provide immunity from prosecution for those who took up arms against the State in the course of an internal armed conflict; in the normal situation, it is only the members of the armed forces who may lawfully engage in armed combat and the destruction of human life and property that accompanies it. It is not meant to shield those who committed violations of International Humanitarian Law in the course of that conflict.

155. See Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, U.N. Doc. E/CN.4/2005/102. Add. 1.

156. For an overview, see Suzannah Linton, *Reconciliation in Cambodia*, *supra* note 63, pp. 45-48, 81-88.

guidelines on the legal status of Khmer Rouge cadre and soldiers in a 'Circular On Punishment For Those Who Committed Offences Against The People During The Pol Pot-Ieng Sary Regime'.<sup>157</sup> Some Khmer Rouge foot soldiers have been punished for their roles in the atrocities.<sup>158</sup> A key platform of the regime's efforts at psychological warfare was in August 1979, when two of the leaders of the Khmer Rouge, Pol Pot and Ieng Sary, were tried *in absentia*, convicted and sentenced to death by a People's Revolutionary Tribunal of the PRK.<sup>159</sup> The convictions and death sentences imposed on Pol Pot and Ieng Sary have never been recognised by the international community, which regarded the process as politically designed show trial that lacked due process.<sup>160</sup> Then, in 1994, the government passed the Law Outlawing the Democratic Kampuchea Group.<sup>161</sup> Article 5 provided for immunity from prosecution for those low ranking Khmer Rouge/CPK who defected to the government within six months of the passing of the law. The government rewarded defecting Khmer Rouge officers with senior positions in the Royal Cambodian Armed Forces (RCAF).<sup>162</sup> By the end of 1994, the Royal Government had secured some 6,600 defections under the amnesty programme.<sup>163</sup>

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157. Evan Gottesman, *Cambodia: After the Khmer Rouge*, New Haven and London: Yale University Press, 2003, (hereafter 'Gottesman, *After the Khmer Rouge*'), pp. 61-62.

158. One of these was a guard from the notorious detention centre in Phnom Penh known as S-21 (Tuol Sleng), Him Huy. He was "re-educated" for more than a year in a prison in Koh Thom district, Kandal province - see Vannak Huy, "Him Huy Needs Justice" *Searching for the Truth Magazine*, Issue No. 28, p. 54. Suos Thy, another former S-21 employee, was detained in a high security prison for four years, again in Kandal province - see Vannak Huy, "Former S-21 Comrades Reunite and Recall their Past Experiences," *Searching for the Truth Magazine*, No. 31 (July 2002), p. 5.

159. The documents from the trials may be found in a single collection, Howard J. De Nike, John Quigley, and Kenneth J. Robinson, eds., *Genocide in Cambodia Documents from the Trial of Pol Pot and Ieng Sary*, University of Pennsylvania Press. 2000. Also see Gottesman, *After the Khmer Rouge*, *supra* note 157, p. 61-66; Peter Maguire, "War of Genocide," *Searching for the Truth Magazine*, No. 38 (February 2003), p. 41.

160. Cambodia Group of Experts, *supra* note 7, para. 43; William Schabas, "Cambodia: Was it Really Genocide?" (Book Review of *Genocide in Cambodia*), *Human Rights Quarterly*, Vol. 23, pp. 470-477, at p. 477.

161. Kingdom of Cambodia, Law to Outlaw the Democratic Kampuchea Group, Law No. 064, July 7, 1994.

162. The RCAF was formed in 1993 to unite the armed forces of the former Cambodian government with the military forces of one-time rivals FUNCINPEC and the KPNLF.

163. Grant Curtis, *Cambodia Reborn? The Transition to Democracy and Development*, The Brookings Institute Press, 1998, p. 35

In 1996, the issues of pardon and amnesty from future prosecution came to the fore when senior Khmer Rouge leader Ieng Sary along with a significant number of troops from the northwest of the country defected following internal strife.<sup>164</sup> He was one of the two who had been convicted *in absentia* in the 1979 trial. At the request of the two Co-Prime Ministers, on 14 September 1996, the King drew on his constitutional powers and pardoned Ieng Sary in relation to that conviction, and granted him amnesty from prosecution under the 1994 law.<sup>165</sup> The reasoning for this, as related by the Prime Minister to former United Nations Special Representative to Cambodia Thomas Hammarberg, was to encourage more defections.<sup>166</sup> The negative public response was tempered with reluctant understanding that this was “*a necessary and important step toward both ‘national reconciliation’ and the elimination of the Khmer Rouge as a guerrilla force.*”<sup>167</sup> Amnesty was also at issue with the defection of Khmer Rouge leaders Khieu Samphan and Nuon Chea in 1998,<sup>168</sup> but it is the Ieng Sary pardon that has dogged Cambodian-UN negotiations on the Law on Extraordinary Cham-

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164. David Ashley, “Between War and Peace: Cambodia 1991-1998,” in *Safeguarding Peace: Cambodia’s Constitutional Challenge*, Accord, Issue No. 5 (November 1998), at <<http://www.c-r.org/accord/index.htm/cam/accord5/index.htm>>.

165. Unofficial translation (Khmer Rouge Tribunal Task Force), Royal Decree (Reach Kret), NS/RKT/0996/72, September 14, 1996, Norodom Sihanouk. Under all the English versions of Article 27 of the Constitution that I have studied, the King has power to grant complete or partial amnesty; but the provision appears to mean something else in Khmer. “*The relevant constitutional provision uses the term ‘loekaengtoh,’ literally meaning to ‘lift guilt,’ implying that the King may only have the power to grant post-conviction pardon. The precise Khmer word for amnesty is nittooskamm,*” Bora Touch, “Been Pardoned, But Can Justice Still Stalk Ieng Sary?” at <<http://www.khmerinstitute.org/articles/art03c.html>>. The question of whether this Royal Decree was an amnesty from any future prosecution has been a subject of controversy, but the text itself seems clear that what was being pardoned was the 1979 conviction and what was amnestied was future prosecution under the 1994 Act only. Also the pardon is for a genocide conviction, and violates Cambodia’s treaty and customary obligations to punish genocide and to provide victims of gross violations of human rights with an effective remedy. The legality of the amnesty granted to Ieng Sary is also problematic, as the law itself provides that senior leaders could not benefit from amnesty.

166. Thomas Hammarberg, “How the Khmer Rouge Tribunal was agreed: Discussions between the Cambodian government and the UN,” *Searching for the Truth Magazine*, No. 18 (June 2001), p. 37.

167. Grant Curtis, *Cambodia Reborn? The Transition to Democracy and Development*, the Brookings Institute Press, 1998, p. 41.

168. “US demands ‘killing fields’ trial,” December 29, 1998, *BBC World*; H. Watkin, “Irony not lost as Hun Sen ‘buries’ the past,” *South China Morning Post*, December 30, 1998.



bers.<sup>169</sup> The RGC has refused to revoke the pardon and amnesty, insisting that it is not within its power to do as such powers vest in the King. In the UN-Cambodia agreement that was eventually ratified on 19 October 2004, the parties have agreed that the RGC will not request amnesty or pardon for crimes within the jurisdiction of the court, and that this is based on a “*declaration by the Royal Government of Cambodia that until now, with regard to matters covered in the law, there has been only one case, dated 14 September 1996, when a pardon was granted to only one person with regard to a 1979 conviction on the charge of genocide. The United Nations and the Royal Government of Cambodia agree that the scope of this pardon is a matter to be decided by the Extraordinary Chambers.*”<sup>170</sup> In accordance with this, Article 40 of the amended Law on Extraordinary Chambers now provides that the government will not request any pardons or amnesties and that “*the scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers.*” The United Nations and RGC have passed the ‘hot potato’ to the judges.<sup>171</sup>

In East Timor, the amnesty/pardon issue has brought to the fore strong differences over the wider challenge of how to deal with the massive legacy of rights violations in the nation’s particular circumstances. Under Section 85 of the Constitution, the President may grant pardons and commute sentences after consultation with the Government; Section 95(3)(g) grants the National Parliament power to amnesty. However, Section 160 obliges the government of East Timor to ensure the prosecution of those suspected of com-

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169. Daphna Shrager, “The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions,” in *Internationalized Criminal Courts and Tribunals*, *supra* note 17, p. 30-31.

170. Agreement Between The United Nations And The Royal Government Of Cambodia Concerning The Prosecution Under Cambodian Law Of Crimes Committed During The Period Of Democratic Kampuchea, signed on June 6, 2003, ratified on October 19, 2004. It governs the legal basis and the principles and modalities of cooperation between the two, and has status of law in Cambodia under the amended Law on Extraordinary Chambers (Article 47 *bis*). But while it has been ratified through the Law on Ratification of the UN-RGC Agreement, it has not been incorporated as domestic law as required in the dualist theory, which the RGC claims is applicable in Cambodia. It therefore does not currently have status of law in Cambodia. That does not affect its applicability between the parties (*pacta sunt servanda*).

171. For more on the practical implications that will likely face the chamber dealing with the Ieng Sary pardon and amnesty, see Suzannah Linton, “Comments on the Draft Agreement between the UN and Cambodian Government,” *Searching for the Truth*, No. 31 (April 2003).

mitting Serious Crimes between April 25, 1974 and December 31, 1999. This means that any amnesty for Serious Crimes is unconstitutional, and the government may not, through its actions or inactions, prevent or obstruct prosecution. In this context, it should be noted that Section 2(3) of the Constitution provides that “*validity of the laws and other actions of the State and local Government depends upon their compliance with the Constitution.*” The government’s hands are also tied by Section 9(3) (rules contrary to international conventions are not valid) and Section 120, providing that the courts may not apply rules that contravene the Constitution or the principles contained therein. The courts are therefore not required to follow laws or decisions of the executive or legislature that are unconstitutional (for example, they need not recognize amnesty from prosecution of Serious Crimes). Pardon for Serious Crimes is not prohibited by the Constitution.

Rather than pursuing justice in terms of accountability, President Gusmão has been using his tremendous personal stature to push amnesties and reconciliation onto the agenda. There are contradictions in his vision that reveal the immense pressures and contradictions inherent in the choices the nation must make. On the one hand, we are told that “*In East Timor, we seek reconciliation first, not justice first*”<sup>172</sup>, then that “*we have tried to forget the past and forge a new relationship with Indonesia*”<sup>173</sup>, and then on the other hand, “*We advocate a reconciliation process whereby there is justice but which eschews revenge, resentment or hatred. Reconciliation in Timor-Leste is a complex process requiring the careful balancing of interests. On the one hand, the interests of justice and the suffering of the victim, on the other hand the need to heal a land.*”<sup>174</sup>

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172. USINDO Brief, H. E. Xanana Gusmão, President of East Timor, USINDO Open Forum, October 3, 2002. The President has defined his vision of reconciliation in the following terms: “*Reconciliation is at once a simple and a complex concept. Say it quickly, as many people do, and we think we know what it means - long-time enemies coming together, making peace. Simple but intricate in the complexity of all the personal, psychological, cultural, political and social dimensions that this can mean even for any two individuals. Reconciliation is a simultaneous reaching into ourselves to find the strength and courage to make peace, and a reaching out to the other with whom we have been in conflict. We can see that this is never easy, it cannot be completed in one simple action but is a long, ongoing process.*” - HE President Kay Rala Xanana Gusmão, Chancellor’s Human Rights Lecture, “Challenges for Peace and Stability,” University of Melbourne, April 7, 2003.

173. USINDO Brief, H.E. Xanana Gusmão, President of East Timor, USINDO Open Forum, October 3, 2002.

174. HE President Kay Rala Xanana Gusmão, Chancellor’s Human Rights Lecture, “Challenges for Peace and Stability,” University of Melbourne, April 7, 2003.

In this vision, the amnesty is a means of cementing a good relationship with Indonesia, speeding up reconciliation and encouraging the return of those East Timorese who have not done so for fear of prosecution. There are few who deny the importance of a good relationship with the deadly giant next door, or that one has to be realistic. But the prevailing position within the NGO community and critics of the official approach is that the price of the bilateral relationship with Indonesia should not be justice for victims. Such a relationship is only possible if Indonesia becomes more democratic - upholding the rule of law and holding perpetrators of gross violations of human rights accountable are key factors in the democratization of Indonesia and from this flows stability and security for East Timor.<sup>175</sup> But, the President's first official act upon taking office was the calculatedly symbolic act of tabling a draft Bill on Amnesties before Parliament on May 20, 2002; it was not adopted.<sup>176</sup> Neither was it adopted on two other attempts, the last meant to be passed by the country's independence celebrations on May 20, 2004.<sup>177</sup> The President has nevertheless drawn on his constitutionally based powers to reduce sentences of persons convicted of crimes against humanity in relation to crimes committed in 1999.<sup>178</sup>

The issue of bars to prosecution by way of amnesty has again been put on the table by the President, this time in the Truth and Friendship Commission that has been agreed with Indonesia.<sup>179</sup>

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175. Aderito de Jesus Soares, "Justice in Limbo: The Case of East Timor," presented at the Symposium on the International Criminal Court and Victims of Serious Crimes, Faculty of Law, University of Tokyo, March 29, 2005.

176. Human rights groups criticized it for potentially undermining due process and equal protection of the law and allowing those responsible for some of the most serious rights abuses to go unpunished. See for example, JSMP, "Report on East Timor's Draft Law on Amnesty and Pardon," undated, 2002; Human Rights Watch, "Perpetrators of War Crimes May Escape Prosecution," July 18, 2002.

177. "Rights Groups Say East Timor Amnesty Bill Undermines Justice," *Associated Press*, May 8, 2004.

178. "East Timor President Reduces Sentences for 3 Militiamen," *Associated Press*, May 21, 2004. The three men had been convicted of crimes against humanity in East Timor's first such trial.

179. See the Terms of Reference for the Commission of Truth and Friendship Established by the Republic of Indonesia and the Democratic Republic of Timor-Leste, available at <<http://www.deplu.go.id>>, accessed on April 23, 2005. Note also that CAVR facilitates a form of immunity from prosecution following an agreement arising from the community reconciliation process. The community reconciliation agreement generally involves some form of compensation or community service, and is registered at the court. An offender who completes his 'punishment' pursuant to the agreement cannot be prosecuted or be subject to civil liability regarding the acts in question.

This appears to represent the worst of truth commissions, with none of the positive attributes. The East Timor Commission of Experts has expressed its “grave reservations regarding certain areas of the terms of reference” and advised that international cooperation be withheld until certain fundamental pre-conditions are met.<sup>180</sup>

It has a mandate “to establish the conclusive truth in regard to the events prior to and immediately after the popular consultation in 1999, with a view to further promoting reconciliation and friendship, and ensuring the non-recurrence of similar events.” It will also “recommend amnesty for those involved in human rights violations who cooperate fully in revealing the truth.” The government’s commitment in the agreement to amnesty human rights violations in 1999 is a commitment to prevent prosecution of grave breaches of Geneva Convention IV in an occupied territory, torture, genocide and crimes against humanity. This will cause East Timor to be in violation of treaty obligations to investigate, prosecute and punish, and the duty to provide an effective remedy for violations of human rights (i.e. Geneva Conventions, Convention against Torture, ICCPR). Furthermore, this agreement would appear to be unconstitutional for violating Section 160 (which imposes an obligation to ensure the prosecution of those suspected of committing Serious Crimes between 25 April 1974 and 31 December 1999), Section 2(3) of the Constitution (“validity of the laws and other actions of the State and local Government depends upon their compliance with the Constitution”) and Section 9(3) (rules contrary to international conventions are not valid).<sup>181</sup> East Timorese courts are in fact not bound to honour any such amnesties, for under Section 120 of the Constitution, the courts may not apply rules that contravene the Constitution or the principles contained therein; they are therefore not required to follow laws or decisions of the executive or legislature that are unconstitutional.

In Indonesia, former President Soeharto has benefited from a *de facto* amnesty as the courts have accepted that he is too ill to stand trial.<sup>182</sup> Others enjoy such amnesty because of their continuing influence and the passage of time. But, even if there were a will

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180. East Timor Group of Experts Report, para. 355, see also paras. 333-354.

181. See “The Constitutionality of the Commission of Truth & Friendship,” *JSMP*, Issue 8/2005, March 9-18, 2005, reaching the same conclusion, and who also question the constitutionality of entering into such an agreement with Indonesia without the prior consent of Parliament.

182. Corruption proceedings have been terminated on the grounds that he is suffering “dementia” and is too physically ill to stand trial.

to prosecute the immense numbers of people who have committed gross violations of human rights in Indonesia over the years, the inability of the system to cope leads to a *de facto* amnesty. Formal amnesty, which is permitted by the Constitution,<sup>183</sup> has been part of the wider transitional justice debate, and even more so now the DPR has passed legislation for the creation of an amnesty-giving Truth and Reconciliation Commission (KKR).<sup>184</sup> The purpose of the commission is stated as being to “*a. resolve past gross violations of human rights outside of the court of law in order to establish national peace and unity; and b. establish national reconciliation and unity in the spirit of mutual understanding.*” In fact, the Official Commentary to Article 2(f) explains that the commission works on the basis of ‘openness’, meaning “*giving the right to society to obtain information that is true, honest and not discriminative concerning all matters in connection to gross violations of human rights whilst always protecting individual and group human rights as well as state secrets*” (emphasis mine). The commentary to Article 5 is revealing. It explains that the commission serves a public institutional function, meaning to “*provide service and protection to the community by being given the authority to establish and express the truth concerning the gross violation of human rights, which is to be based on the national interest for unity and wholeness of the united Republic of Indonesia*” (emphasis mine). Indonesia has found inspiration in South Africa’s use of amnesty for a supposed ‘truth’ believed to be in the exclusive possession of the perpetrator. Yet, it does not make it conditional on the whole truth being told as part of the bargain. It even requires both victims and perpetrators to ‘forgive’ each other in order for there to be a recommendation of amnesty.<sup>185</sup> The victim who does not forgive does not get reparation. But even if the victim does not forgive, the commission may still recommend amnesty be given to a perpetrator. The law has been soundly criticised.<sup>186</sup>

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183. Under Article 14 of the Constitution, the President may grant clemency and rehabilitation taking into account the considerations of the Supreme Court, and grant amnesty and abolition taking into account the considerations of the DPR (House of Representatives).

184. Undang Undang Republik Indonesia, Nomor 2 Tahun 2004 Tentang Komisi Kebenaran Dan Rekonsiliasi, Tambahan Lembaran Negara Republik Indonesia Nomor 2004 No. 4429.

185. The Commission may only make recommendations; the power to amnesty is strictly that of the President.

186. See for example, International Center for Transitional Justice, Comment on the Bill Establishing a Truth and Reconciliation Commission in Indonesia, undated.

## H. Weakness in handling victim and witness issues<sup>187</sup>

*"It should never be forgotten that it is the victims who are central to the pursuit of justice."*<sup>188</sup> Victims and witnesses have come to be a subject of great concern and care through the work of the ICTY and ICTR, and this has culminated in the exceptionally progressive provisions in the Statute of the ICC. Standard setting has evolved rapidly too, beginning with the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,<sup>189</sup> and ongoing work of UN experts leading to a draft Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, and a Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, both of which should eventually be adopted as General Assembly resolutions. There have therefore come to be very high expectations and demands about victim and witness issues, centring around two matters: protection and reparation.

But even if there is legal regulation and a genuine will to address the issues, there may just not be the infrastructure or capacity to do so in any meaningful way. After all, no developed country in the world has ever had witness and victim protections as progressive and demanding as those that apply at the ICC. Seeking implementation of ever higher normative standards is certainly commendable, but the East Timor experience, where basic criminal procedure including on victims and witnesses is heavily based on the ICC, has shown it to be unrealistic to place such demands on

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187. One issue that requires much more in-depth investigation than I have been able to conduct for this paper is the treatment of gender-based crimes. Despite many reports of widespread sexual violence in East Timor, not one of Indonesia's crimes against humanity cases has involved sexual violence; in East Timor, the Serious Crimes project has seen very few cases involving gender violence. The racial and gender focus of the violence in the Indonesian riots of May 1998 has not been brought before the courts. In Cambodia, there has been little emerging on the gender crimes situation, possibly because it was not a particular feature due to the harsh moral edicts on sexuality issued by the Khmer Rouge, or because it has been downplayed. Gender justice requires not just the design of appropriate laws and establishment of a sophisticated and supportive infrastructure, but overcoming tremendous social and cultural obstacles.

188. Richard Goldstone, "Advancing the Cause of Human Rights: The Need for Justice and Accountability," in Samantha Power and Graham Allison eds., *Realizing Human Rights: Moving from Inspiration to Impact*, New York, St. Martin's Press, August 2000, p. 217.

189. UN General Assembly Resolution 40/34, November 29, 1985.

such vulnerable justice systems. Countries like East Timor, Indonesia and Cambodia simply do not have the human, legal or physical infrastructure to cope. It is here pertinent to recall the caution advised by Warbrick in 1998, arguing that even for the ICC, we need to focus on a common set of minimum standards rather than 'best practice'; in other words we should be realistic and aim for trials that are 'fair enough' rather than raising expectations of an exemplary or superior level of 'fairest of all' which we all know will never be met.<sup>190</sup> It must be said that legislating for the highest possible standards runs the danger of setting a precedent of permanently out-of-reach benchmarks, and entrenching a lower standard of practice as the norm. One of the more uncomfortable features of internationalised models of justice in post-conflict countries is that despite significant problems, they benefit from a much higher standard of process than the ordinary proceedings. Taking Cambodia as an example, it is also inadvisable to establish another tier to the existing system which is already plagued by a differing standard of justice for the privileged and for the un-privileged.<sup>191</sup>

In tackling the issue of victim and witness rights, policymakers do have to be sensitive that the entire concept may be alien to a legal and social culture; people need time to adjust to a new approach, and training in how to apply new legal provisions. Judges, prosecutors and lawyers need to know what they can and cannot do under the law. Those who actually deal with victims and witnesses need special training, especially those dealing with victims of sexual violence and children. Re-traumatisation is a very real danger when survivors of traumatic experiences relive their experiences, and adequate counselling services are essential. Victims and witnesses need to know what their rights are, what can and cannot be done or said to them, and what their remedies are. Victims and witnesses may also need protective measures after they testify. Entire structures need to be put into place to achieve all of this. There has to be coordination between government agencies. Perhaps the most that can realistically be done in situations where there is mini-

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190. Colin Warbrick, "International Criminal Courts and Fair Trial," *Journal of Armed Conflict Law*, Vol. 3 (1998), pp. 45-64, at p. 54.

191. See SRSR Cambodia Report 2004 para. 24, relating the tale of the Prime Minister's nephew against whom all charges of unlawful killing (witnesses say he opened fire on a crowd following a traffic accident) were controversially dropped by a closed session hearing of the Court of Appeal, and the man who stole the equivalent of \$0.65 but was sentenced to four years imprisonment after his mother could not pay the \$1,000 bribe requested in exchange for his release.

mal infrastructure is to begin with a special regime for crimes against humanity proceedings that operates as a pilot scheme, introducing a new approach into the legal system; that is also a way of addressing the creation of a dual standard whereby one class of proceedings is deemed worthier of a higher standard than all others.

My point is that when things go wrong on victim and witness issues, it is not necessarily all about bad faith. Take the case of Indonesia, which does not have a special witness protection regime. Article 34 of Indonesia's Law on Human Rights Courts provided that victims and witnesses of gross violations of human rights have "*the right to physical and mental protection from threats, harassment, terror, and violence by any party whosoever*" and that such protection is "*an obligatory duty of the law enforcement and security apparatus provided free of charge.*" There was no elaboration on how to implement this. A government regulation on witness protection in cases before the human rights courts was rushed through as the first trials were beginning.<sup>192</sup> There are just three options for protection in Section 4:

- a. protection of the victim or witness' personal security from physical or mental threats;
- b. confidentiality of the identity of the victim or witness;
- c. testifying to the court out of the presence of the accused.

While this is the first witness protection measure as such, it does not set down a specialised witness protection regime. Not all of its provisions are revolutionary. The basic rule is that witness testimony is given in person, and in the presence of the accused. But, Article 153(3) of KUHAP authorises closed session hearings for cases concerning 'morals' or where the accused is a child, and article 173 of KUHAP provides exceptional discretion for testimony to be given with the accused not being present (the grounds for exercising that discretion are not specified).

The legal regime proved to be inadequate in the East Timor and Tanjung Priok trials.<sup>193</sup> The Ad Hoc Court for East Timor and Tanjung Priok operated out of the Central Jakarta District Court, a Dutch-era building that was simply not suitable from a witness pro-

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192. Peraturan Pemerintah Nomor 2 Tahun 2002.

193. See ELSAM, "Perlindungan Saksi dan Korban: Catatan atas Pengalaman HAM Ad Hoc Tim-Tim," undated; David Cohen/International Center for Transitional Justice, "Intended to Fail"; Suzannah Linton, "Unravelling The First Three Trials at Jakarta's Ad Hoc Court for Human Rights Violations in East Timor," *Leiden Journal of International Law*, Vol. 17 (2) (2004), pp. 303-361; trial monitoring reports of ELSAM (Progress Reports #1-3, 'Monitoring Pengadilan Hak Asasi Manusia Kasus Tanjung Priok').



tection perspective, with no private entrance, exit, toilet or secure room for witnesses and victims.<sup>194</sup> None of those involved, from judges to prosecutors to police to court staff, were given specialised training on witness and victim issues in advance of the trials. The various protective measure options were not presented to victims and witnesses. Police were provided to 'secure' the East Timorese witnesses who came to testify, but that is hardly settling for a witness who comes to testify that the members of the police perpetrated gross violations of human rights. Equally unsatisfactory in the particular circumstances of the East Timorese was the placement of 'safe' accommodation (marked with a sign outside saying 'Safe House') within an Indonesian police compound. Individuals associated with the defence, including one particularly notorious militia leader, were allowed access to at least one victim-witness. A number of judges were harassed through telephone calls and email messages.<sup>195</sup> The audience was packed with aggressive, sometimes heckling militia and uniformed military personnel (including high ranking officers) who could have been ejected from the courtroom for being disruptive, but were not.<sup>196</sup> Defence counsel were allowed to harass witnesses, sometimes judges did so too. The aggressive and hostile treatment of earlier witnesses discouraged others from attending and this impacted on the prosecution cases across the board. Trial monitors reported that the situation in the Tanjung Priok trials was even more extreme, emphasising intimidation of victims and witnesses and retraction of previous incriminating statements.<sup>197</sup> Observers noted how victims appeared to be on trial for their audacity in taking on the military as an organ of State.<sup>198</sup> As with the East Timor trials, accused military officers appeared in civilian courts in full uniform, sending the clear message to the court that on trial was not the individual but the institution. Members of

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194. The following, unless referenced, are personal observations from my own monitoring of the first three trials. See Suzannah Linton, "Unravelling The First Three Trials at Jakarta's Ad Hoc Court for Human Rights Violations in East Timor," *Leiden Journal of International Law* Vol.17 (2) (2004), pp. 324-327.

195. David Cohen/International Center for Transitional Justice, "Intended to Fail," pp. 49-50.

196. On this problem, even if there were a will, it is hard to see how the court personnel could actually take on large numbers of uniformed security personnel, some of whom were armed.

197. ELSAM (Progress Reports #1-3, 'Monitoring Pengadilan Hak Asasi Manusia Kasus Tanjung Priok').

198. "Peradilan HAM Indonesia Hanya Layani Kepentingan Tentara," Transcript of interview with Usman Hamid, Warta Berita, *Radio Nederland*, August 23, 2004.

units directly involved in the Tanjung Priok event and from the notorious Special Forces (Kopassus) flooded the court. There were even military formations on the premises. The military presence was so oppressive as to render the concept of open trial meaningless. In desperation, victims sought protection from the court, from the Attorney General, from the Police and even from the military.<sup>199</sup>

On the issue of reparation for gross violations of human rights, Indonesia's Law 26/2000 on Human Rights Courts provides in Article 35 that every victim of a violation of human rights or his/her beneficiaries shall receive compensation, restitution, and rehabilitation and that any such awards are to be recorded in the judgment of the court.<sup>200</sup> This was further developed in Government Regulation No. 3/2002 on compensation, restitution and rehabilitation for victims of gross violations of human rights, which only applies to the cases before human rights courts.<sup>201</sup> No requests for compensation were made during the East Timor cases. But, in the Tanjung Priok case, reparation was sought by 85 victims.<sup>202</sup> Awards totalling 658 million Rupiah (material damages) and 357.5 million Rupiah (non-material damages) were granted to 13 victims.<sup>203</sup> The court took into account the '*ishlah*' (private Islamic peace agreement) entered into by the majority of the claimants with senior military officials and this was considered to be restitution as defined in the Law on Human Rights Courts. As for the Truth and Reconciliation Commission, it seems that it will operate to its own procedures on reparation. Article 27 provides that compensation or rehabilitation can be ordered only if the perpetrator is granted an amnesty. But there is no further elaboration of this.

In Cambodia, problems faced by victims and witnesses in regular court proceedings are one aspect of a wholly dysfunctional system. Article 23 of the UN-Cambodia agreement places responsibility for witness protection on the co-investigating judges,

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199. See Tiarna Siboro, "Priok Witnesses Ask for Protection," *Jakarta Post*, October 28, 2003.

200. See Amnesty International, Comments on the Law on Human Rights Courts, (comments on reparation), internet version, no page number.

201. Peraturan Pemerintah Nomor 3 Tahun 2002 tentang Pemberian Kompensasi, Restitusi dan Rehabilitasi Kepada Korban Pelanggaran HAM yang Berat.

202. "13 Pelaku Kasus Priok dituntut 10 Tahun," *Suara Merdeka*, July 10, 2004.

203. See "Korban Tanjung Priok Peroleh Kompensasi," *Suara Pembaruan Daily*, August 21, 2004; transcript of interview with Usman Hamid, Warta Berita, *Radio Nederland*, August 23, 2004, 'Peradilan HAM Indonesia Hanya Layani Kepentingan Tentara.' The reparations remain unpaid.

the co-prosecutors and the Extraordinary Chambers, who are to ensure their security, safety and protection. Under Article 22, witnesses and experts may not be prosecuted, detained or subjected to any other restriction on their liberty by the Cambodian authorities, nor may they be subjected by the authorities to any measure which may affect the free and independent exercise of their functions. However, Article 33 of the amended Law on Extraordinary Chambers simply provides (in a chapter that only covers the trial proceedings) that it is the 'Court' that shall provide for the protection of victims and witnesses; this is to include but not be limited to, the conduct of in camera proceedings and the protection of victim's identity. That is all there is. Leaving aside the conflict between the agreement and the law (both of which have power of law in Cambodia), the important point here is that the underpinning procedure at the chambers will be Cambodian law, which has no provisions on witness protection. In fact, victims and witnesses ordinarily hardly turn up at Cambodian trials. Observers believe one of the reasons is because they are subject to severe intimidation.<sup>204</sup> But their absence does not stop convictions from being entered.<sup>205</sup> This failure to legislate is quite startling, given that the UN has always been critically aware of the state of affairs in the Cambodian legal and judicial system, and given its experience with victims and witnesses at the ICTR and ICTY, which has left it with a pool of staff having a wealth of expertise that could be so usefully shared with Cambodia. The obvious solution would have been for the UN itself to

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204. One NGO claims that 76.3% of witnesses do not attend. It cites four possible reasons for non-attendance: "*One is historical. Under the earlier judicial system, statements in the absence of witnesses were permitted; hence, although now illegal some practices from that period persist. A second is that witnesses may face threats against their lives, families and property. Cambodia still does not have a witness protection programme. This fear factor is very serious, and must be addressed if more witnesses are to appear in court. Third, many witnesses may be unwilling or unable to lose a day's income by attending the court instead. Fourth, witnesses may also not understand the purpose of giving evidence in court: after long years of exceptional cruelty, most Cambodians have no awareness of fair trial practices, and concomitant weakened civic consciousness.*" Written statement submitted by the Asian Legal Resource Centre (ALRC), to the Commission On Human Rights Sixty-first session, Item 11 (d) of the provisional agenda, Civil And Political Rights, Including The Questions Of Independence Of The Judiciary, Administration Of Justice, Impunity. The extent of the problem of non-attending witnesses has been confirmed by the Center for Social Development, "The Court Watch Project: the first 12 months of court monitoring," October 2003-September 2004, p. 37.

205. Center for Social Development, "The Court Watch Project: the First 12 Months of Court Monitoring," October 2003-September 2004, p. 37.

have taken on all witness protection or at least formally pledged to provide substantial assistance to Cambodia on this particular matter.

Then, there is nothing in Cambodia's amended Law on Extraordinary Chambers addressing the issue of reparations. There is only Article 39 providing that all unlawfully acquired property of convicted persons is to be returned to the State (is there to be a separate status determination process?).<sup>206</sup> In the existing criminal procedure, victims may lodge civil claims. Victims can be joined as civil parties to criminal proceedings; such civil action must be brought during preliminary investigations or during the sentencing period (Article 27, UNTAC Law). Convicted persons and their accomplices are jointly liable for reparations or compensation. Importantly, this article directly draws in the United Nations Declaration of Basic Principles for Victims of Crime and Abuse of Power. Article 2 of the SOC Law on Criminal Procedure recognises that any criminal offence may give rise to a public (criminal) action and a civil one.<sup>207</sup> A civil award has to be proportionate to the damage suffered. Under Article 9, an injured person may also lodge a civil claim along with the prosecution case; it may be exercised against principals, co-principals and others who are criminally responsible for the offence (Article 15). Civil claims can also be filed separately, but cannot be dealt with until the criminal case is determined (Article 16). These provisions are sometimes used in Cambodia – for example, some of the families of victims of the 1994 Khmer Rouge attack on the Phnom Penh-Sihanoukville train were awarded civil damages by the court that convicted the three former Khmer Rouge soldiers. But given the scale of victimisation that occurred in the period under consideration by the Extraordinary Chambers project, it is difficult to see how pecuniary awards could be anything beyond symbolic. In any event, time limits barring a claim may be an issue; there is confusion over time limits, which vary from 5 years to 30 years.<sup>208</sup> Furthermore, it is unclear if the 1969 Penal Code continues to apply – this provided that the limitation period for civil claims stemming from a criminal act runs parallel to that of the criminal offence, and that if a crime was jointly committed by several persons and proceedings were commenced against one of them, then the limitation period ceases to run for

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206. Victims do however have the right to appeal to the Supreme Court of the Extraordinary Chambers under Article 36.

207. *Supra* note 50.

208. Koy Neam, *Cambodian Judicial Process*, the Asia Foundation, 1998, pp. 42-43.

that accused as well as all the other defendants from that date.<sup>209</sup> It is not clear if the extension of the time limits for crimes under the 1956 Penal Code will affect such civil claims.

Devastated East Timor had to build its justice system from scratch, and to this day, its infrastructure remains rudimentary.<sup>210</sup> Yet, the applicable law for all its criminal procedure is drawn from the five-star standards of the ICC. Sections 24-25 of Regulation 2000/15 require the Special Panels to take appropriate measures, in light of age, gender, health and the nature of the crime, to protect the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses. Victims have the right to participate in the process, for example by requesting specific investigative measures, to be heard during proceedings, and to request review of a prosecutorial decision to dismiss a case. There is, in theory, a Trust Fund established from fines, seized properties and voluntary donations, for the benefit of victims and their families. It does not exist and so no relief has been given to victims and their families. Criminal procedure is set down in Regulation 2000/30,<sup>211</sup> which provides a raft of highly sophisticated witness protection provisions that are simply not feasible in East Timor. For example, giving victims extensive rights to participate in proceedings is pointless if they don't know about such rights, or understand why they have such rights. Then, in a country with significant difficulties in communication and a rudimentary legal and judicial system, requiring that victims be notified of all times and dates of proceedings during investigation and trial simply doesn't work.<sup>212</sup> David Cohen's important research into the Serious Crimes project has revealed that many

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209. *Ibid.*, p. 91.

210. See Human Rights Watch World Report 2005, East Timor: "*East Timor's national judiciary and criminal justice system remain weak, under-resourced, and overburdened. As a result of insufficient staffing, the Court of Appeal was shut down for eighteen months in 2002 and 2003. Due to public frustrations with formal judicial processes, many serious crimes, including rape and domestic violence, are habitually referred to traditional customary law mechanisms rather than to the courts. Such mechanisms lack basic due process protections and regularly fail to provide justice for victims, especially victims of sexual violence*"; Suzannah Linton, "Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor," *Melbourne University Law Review*, Vol. 25 (2001), pp. 122-180.

211. UNTAET Regulation No. 2000/30 on the Transitional Rules of Criminal Procedure amended on September 14, 2001 by Regulation 2001/25 on the Amendment of UNTAET Regulation No. 2000/11 on the Organisation of Courts in East Timor and UNTAET Regulation No. 2000/30 on the Transitional Rules of Criminal Procedure.

212. The drafters anticipated the issue in Section 12.4, providing that defects in notification do not deprive the Court of jurisdiction to proceed. What then, one may won-

witnesses and victims found themselves living in the community with alleged perpetrators who were either not prosecuted or were released pending trial. *"There are 5 documented cases of interference by accused with witnesses in the communities. Also, because witness protection typically provided no transportation to Dili, witnesses were often just taking the bus to Court, sometimes with the accused or supporters of the accused in the same bus. In one case a victim of sexual violence was in a bus going to Court with a man accused of raping her."*<sup>213</sup> No resources were ever devoted to witness protection nor was any serious thought given at the institutional level as to what effective witness protection actually required. Witness protection was probably a factor in the strikingly few persons who appeared as witnesses for the defence, although the most direct reason was almost certainly the miserably inadequate resources that the UN provided to the defence.<sup>214</sup>

The right to reparation has never been utilised in East Timor.

## **II. The role of the International Criminal Court**

Both Cambodia and East Timor have committed themselves to accountability by choosing to become parties to the Statute of the ICC. Cambodia has yet to adopt appropriate legislation, although efforts to reform the Penal Code and Penal Procedure Code have been underway for several years. This means that outside the Extraordinary Chambers project, there is no means of prosecuting genocide, crimes against humanity, war crimes or torture in Cambodia today. East Timor's legislation, as has already been seen, is very heavily drawn from the Statute of the ICC. However, efforts to draft new legislation apparently involve amending the Rome-based definitions of crimes used in Regulation 2000/15, thus affecting East Timor's treaty obligations.<sup>215</sup> As for Indonesia, it has put accession to the Rome Statute on its Human Rights Action Plan (RANHAM 2004-2008) and has just ratified the ICCPR and International Covenant on Economic Social and Cultural Rights. Yet, being a non-party does not mean it is safe from the reach of the court. The

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der, is the point of granting victims such rights if their non-compliance makes no difference?

213. David Cohen, Email to the author, August 20, 2005. His forthcoming report, *A Legacy of Indifference: The United Nations and the Politics of International Justice in East Timor*, examines this in greater detail.

214. *Supra* note 64.

215. See "Report Analysing the Draft Penal Code," *JSMP*, March 2004; "Overview of the Justice Sector," *JSMP*, March 2005.

Darfur situation has set a precedent; should the situation in Indonesia deteriorate substantially and there arise very serious and widespread violations of human rights amounting to international crimes, of such magnitude as to cause a serious threat to international peace and security, the Security Council may draw on its Chapter VII powers to refer the entire situation to the ICC.<sup>216</sup>

As is well known, there are a number of inherent limitations to the jurisdiction of the ICC. One of these is that the court cannot take jurisdiction over situations or actions that arose prior to July 1, 2002, when the Statute entered into force. This means that even if the proceedings held in Dili or Phnom Penh do not meet international standards, the ICC cannot take on the prosecution of the Khmer Rouge or Serious Crimes cases unless they occurred after July 1, 2002. The intention of the drafters was very clearly laid down in Article 11: the court can only take jurisdiction over crimes committed after its entry into force (i.e. July 1, 2002). *Pacta sunt servanda*.<sup>217</sup> Thus, even the Security Council cannot override this by referring a situation of impunity arising from say, the unsatisfactory accountability situation in East Timor.<sup>218</sup>

Other restrictions on the Court taking jurisdiction include those that relate to the exercise of complementarity, where the State is conducting a *bona fide* investigation and prosecution that meets international standards. Article 17 prevents the court from dealing with situations where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it – in this situation, the court may only take jurisdiction if the State is unwilling or unable genuinely to carry out the investigation or prosecution.
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned – in this situation, the court may only take jurisdiction if the decision resulted from the unwillingness or inability of the State genuinely to prosecute.

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216. Security Council Resolution 1593 (2005) of March 31, 2005. Security Council referrals are possible under Article 13(b) of the Statute of the ICC.

217. Article 26 of the Vienna Convention on the Law of Treaties of May 23, 1969: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

218. The East Timor Commission of Experts Report contains some unconvincing speculation about the possibility of the Security Council overriding the temporal jurisdictional limitations (see paras. 455-458).

- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the ICC is not permitted because of the principle of *non bis in idem* (Article 20(3)) – but the principle does not apply where the proceedings in the other court: (a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the ICC; or (b) otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by International Law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.
- (d) The case is not of sufficient gravity to justify further action by the ICC.

As parties to the Statute of the ICC, East Timor and Cambodia have three options in the unfortunate event that crimes within the jurisdiction of the court occur within their territory:

*Trying perpetrators on the basis of complementarity*

It is the right and duty of a State to exercise jurisdiction over crimes committed on its territory.<sup>219</sup> The possibility of a State creating *ad hoc* internationalised chambers as a means of dealing with complex crimes that are out of the depth of the regular courts is certainly possible. But, the track record of the Serious Crimes project in East Timor suggests that where the underlying infrastructure is very weak, and there is lack of political and material support, such mechanisms will have significant problems meeting fundamental standards of fair trial and due process.<sup>220</sup>

Should they choose to exercise jurisdiction over international crimes, both East Timor and Cambodia need to ensure that they do so in accordance with Constitutional provisions (both of which require consistency with international standards) and that there is a basic law enabling them to investigate and prosecute. For example, Cambodia needs to enact legislation that allows for the prosecution of international crimes that are not committed by the Khmer Rouge.<sup>221</sup> East Timor will first need to address various complica-

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219. The Preamble of the Statute of the ICC recalls that “*it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.*”

220. *Supra* note 64.

221. There is nothing in the Constitution, but judicial practice and the RGC’s statements to the UN indicate it is practising dualism. See earlier discussion at *supra* note 49.



tions that arise from existing laws, including the Constitution. Sections 1 and 2 of Regulation 2000/15 provide that the jurisdiction of the Special Panels of the District Court of Dili is exclusive and universal<sup>222</sup> in relation to genocide, crimes against humanity, war crimes and torture without time limit, and exclusive over murder and sexual offences committed between January 1, 1999 and October 25, 1999. The Special Panels are special for being a separate chamber within the District Court of Dili, composed of judges from different countries and having exclusive jurisdiction over certain crimes. But, Section 123 of the Constitution prohibits “*courts of exception*” and provides that “*there shall be no special courts to judge certain categories of criminal offence.*” Then, Section 163 of the Constitution provides that so long as there are Serious Crimes committed between January 1, 1999 and October 25, 1999 under investigation, the Special Panels must continue to exist in order that the proceedings may be completed. This suggests that for crimes after October 25, 1999, there need not be international judges, contradicting Regulation 2000/15 which is directed at the establishment of Special Panels with exclusive jurisdiction to try Serious Crimes past, present and future. These inconsistencies need to be resolved.

Article 17(1) of the Statute of the ICC allows the court to consider the basic capacity of a State to investigate and prosecute. The track record of East Timor’s Special Panels in the first 2-3 years of operation suggests that there was no genuine desire or capability within the mission’s hierarchy to conduct a meaningful process of accountability. Things certainly improved and reached their best at the time the unit was closed down in May 2005, but one issue that keeps being ignored is the fact that for some 2-3 years individuals were convicted in circumstances where they probably did not get a fair trial with due process and remain in prison. Now, given that international assistance through the United Nations has now been terminated, an East Timorese-only operation stands even less chance of meeting international standards. The point was also taken by the East Timor Commission of Experts, who recommended international involvement through the United Nations.<sup>223</sup>

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222. The reference to universal jurisdiction is explained in section 2.2 as being irrespective of territoriality, nationality of accused or nationality of victim. What is in fact being exercised is territorial jurisdiction. In one case, that of Leonardus Kasa, the Special Panel refused to take jurisdiction over the accused alleged sexual violence in the refugee camps in West Timor.

223. See East Timor Commission of Experts Report, paras. 459-491.

But that alone does not mean the ICC will or should take jurisdiction.

Article 17(3) of the Statute of the ICC addresses itself to situations of *mala fide* on the part of the prosecuting State. The provision focuses on three situations. The first is where the State holds proceedings that are “*for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the ICC.*” The second is where there is “*an unjustified delay in the proceedings, which in the circumstances is inconsistent with an intent to bring the person to justice.*” The third is where the proceedings were otherwise “*not conducted independently or impartially in accordance with the norms of due process recognized by International Law or were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.*” As a result of their treaty obligations, East Timor and Cambodia have allowed the ICC to examine the quality of proceedings within their courts, and take jurisdiction whether they like it or not. With the Cambodia trials coming up, that may be one way to keep the pressure on the RGC.

#### *Trying perpetrators with the assistance of the ICC*

In theory, this may be a possible way to bring an international process back to the country where the crimes were committed, the significance of which should not be underestimated. Taking the cases of East Timor and Cambodia as examples, the underlying systems are so weak and flawed that the only way the ICC may meet its onerously high standards of procedure is to handle the entire process itself. Such an operation requires immense resources and necessarily involves engaging with legal reform, institution and capacity building, which are not the tasks of the ICC and run serious risks of ‘mission creep’.

#### *Referral to the ICC*

Given the state of the judicial and legal sectors in both Cambodia and East Timor, referral to the ICC would seem to be the most practical option. This has been done by other countries whose legal systems cannot support a judicial effort to prosecute international crimes – Côte d’Ivoire, Democratic Republic of the Congo, Colombia, Central African Republic and Uganda. But, this is opening up the danger that rather than taking responsibility themselves and ensuring that their legal and judicial systems are able to investigate and prosecute to international standards, States may simply abro-

gate that responsibility and use the ICC as an auxiliary court for certain unwanted matters. This is not what the ICC was set up to do.

### III. CONCLUDING OBSERVATIONS AND PROGNOSIS

This attempt to take stock and put developments in East Timor, Indonesia and Cambodia into perspective has revealed the paradoxes of accountability for atrocities, and the tensions and contradictions that are at the heart of political and social transitions. While the fact that so much has happened in such a short period of time in one of the less politically liberal regions of the world is truly significant, the proliferation of the transitional justice industry in this *ad hoc* and uncontrolled manner has created a schizophrenic situation in all three countries. Those of good will and intent will not be satisfied. Ultimately, it is the East Timorese, Indonesians and Cambodians themselves that need to take stock of where their countries are going in their transition and what is needed in order to change, improve, support or further develop what is being done. The United Nations, while respecting the parameters of State sovereignty, needs to consider more effective ways of coordinating all these accountability efforts to ensure some sort of consistency, for example in the procedures and substantive laws that are applied.<sup>224</sup>

The nine thematic points of reference in this paper - the piecemeal approach to transitional justice, the infiltration of global into local, problems of retroactivity, selectivity of jurisdiction, the eclipsing of State responsibility, amnesties and pardons, the particular problems of 'too little too late, too much too soon and too many cooks', the handling of victim and witness issues and the role of the ICC - have all drawn out surprisingly similar experiences in East Timor, Indonesia and Cambodia. All three have been grappling with the same issues and challenges; in all three, global and local have become deeply intertwined but have yet to make a happy marriage. There is no escaping the fact that these striking developments have not come as a result of genuine embracing of democracy, rule of law and fundamental human rights in Southeast

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224. The investigations of the Commission of Experts for East Timor into the accountability processes involved assessment of the quality of what has been done. A permanent body within the United Nations monitoring the domestic accountability processes for international crimes, perhaps in the form of a special rapporteur for rule of law in times of transition, with linkage to the organisation's capacity building and technical assistance programmes, could be a way to do so.

Asia. They have come either through United Nations administration, or at moments of 'weakness' as tactical concessions by governments retaining elements of authoritarianism, and form part of ongoing power struggles, identity crises and competing priorities. There is a clear sense that each of these countries is engaged in a deadly dance very close to the fire from which it has escaped. Yet to date, the accountability efforts have not caused major disruption or destabilisation in any of the three countries. In Indonesia, this has been because the State has maintained its control over processes of accountability and has not allowed the proceedings to stray beyond the boundaries it has set. Also, repression remains close to the surface and fear discourages public dissent. In East Timor, there has not been social disorder because what justice there has been has been victor's justice on the side that won the referendum; but disorder may come as public disquiet over the failed accountability efforts grows. In Cambodia, violence is also close to the surface and may be relatively easily stoked up, although most commentators dismiss the threat of violence arising from an effort to prosecute the Khmer Rouge as blown out of proportion.<sup>225</sup>

The territorial State has always had the right, and more recently, the duty to, investigate prosecute and punish or extradite international crimes committed on its territory. In historical context, the global record of accountability for atrocity has been abysmal, whether at domestic or international level. Impunity is, and continues to be, the norm. It would therefore be misleading to suggest that accountability is some new external concept that has been introduced into East Timor, Indonesia or Cambodia as a result of liberal normative developments on the international level or in the local. What has changed is that there is a growing expectation, from within and without, that States will abide by the legal obligations that have been evolving in International Law and have now crystallised as the duty to prosecute certain crimes, or extradite suspects for trial elsewhere. Regardless of the motives and quality of what is being done, what one sees in the three countries is movement towards meeting those obligations. This greater willingness to act at the domestic level is consistent with the normative impact of the ICC and the principle of complementarity.

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225. See for example, Rajiv Chandrasekaran, "25 Years after Khmer Rouge's Rise, Would Justice Derail Peace? Cambodia's Tribulations/A 'Culture of Impunity'," *International Herald Tribune*, April 18, 2000; Brad Adams, "Justice for Khmer Rouge crimes is there for the taking," *Searching for the Truth*, No. 34 (October 2000), p. 16.

Liberal international relations theorists have spoken with enthusiasm of 'communities of courts' around the world engaged in common endeavours to bring justice for gross violations of human rights, or 'transjudicial dialogue'.<sup>226</sup> As noted in the introduction to this paper, an interesting feature has been the cross-fertilisation taking place within the Southeast Asia region, with the Cambodian model of the internationalised domestic chamber being adopted for East Timor, and civil society awareness of developments outside their national interests.<sup>227</sup> Given the tangled histories of East Timor and Indonesia, it was always inevitable that their justice efforts on issues arising from the period of Indonesia's intervention from 1975-1999 in East Timor would to some extent overlap. Each of the accountability processes in both countries kept an eye on what was happening in the other country, with greater interest being paid by the East Timor side to judicial developments in Indonesia. Aspects of that overlap have been seen in this study; it has hardly been 'common endeavour' or a healthy 'transjudicial dialogue'.

It is tempting to try and fit these developments in Southeast Asia within a conceptual framework that explains why these otherwise conservative States have permitted accountability for gross violations of human rights. But reality often defies conceptualisation; theories seem to miss the mark in the circumstances of East Timor, Indonesia and Cambodia.<sup>228</sup> The realist would say that the transitional justice activity is simply a reflection of State power and interests; as weaker States in the international order, these three Southeast Asian nations have had to accept international obligations because they were compelled to do so by more powerful States.<sup>229</sup> Supporters of ideational theories of human rights law would say that these States have behaved as they have done because they genuinely believe in the principled ideas that underpin

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226. Anne-Marie Slaughter, "International Law in a World of Liberal States," *European Journal of International Law*, Vol. 6 (1995), pp. 1-39; Laurence R. Helfer and Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication," *Yale Law Journal*, Vol. 107 (1997), pp. 273-391; William Burke-White, "A Community of Courts: Toward a System of International Criminal Law Enforcement," *Michigan International Law Journal*, Vol. 24 (2003), pp. 1-101.

227. *Supra* at p. 5.

228. For an assessment of the viability of international relations theoretical frameworks in relation to the realities of Cambodia, see Ellen Stensrud, "Mixed Courts: The Cambodian Case," Unpublished Thesis, University of Oslo, Department of Political Science, December 2004.

229. Andrew Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe," *International Organisation*, Vol. 54 (2000), p. 217.

the human rights doctrine; they are ready to enter into commitments on accountability not just because of pre-existing state or societal interests, but due to strongly held ideas about right and wrong.<sup>230</sup> Liberal theoreticians may claim that the activity on accountability arises from a deliberate attempt to entrench democratic rule, that the rational pursuit of national interests reflects the “*preferences of component constituencies and the domestic and transnational context in which they are embedded.*”<sup>231</sup> The realities examined in this paper reveal that while the theories often miss the mark, all contain some elements that ring true.

And what of the liberal argument that regime type affects behaviour?<sup>232</sup> All three States proclaim democracy (‘liberal democracy’ in the case of the Constitution of Cambodia) but display varying degrees of continuing authoritarianism. They have allowed remarkable developments on accountability for atrocity for a variety of reasons already discussed. They can converse in the language of ‘democracy’, ‘reform’, ‘transparent government’ and ‘rule of law’; at the risk of being overly cynical, these are after all the buzzwords that the international donors pouring money into all three nations wish to hear. The three States have also behaved idiosyncratically in relation to international commitments, with East Timor signing up to almost every agreement on human rights despite its devastated circumstances and fundamental inability to meet the obligations set out therein; Indonesia picking and choosing its treaty participation carefully, continuing to remain outside the ICCPR and ICESCR, but still refusing to allow for prosecution of war crimes and torture in domestic law despite treaty obligations; and Cambodia regularly failing to meet its international obligations such as under the ICCPR and Convention against Torture. Across the board, State responsibility for breach of obligation remains unimplemented.

One theory that is more plausible when applied to the issues discussed in this paper comes from the ideational school; it is the notion of the five step ‘spiral model of human rights change’ ex-

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230. Ellen Lutz and Kathryn Sikkink, “The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America,” *Chicago Journal of International Law*, Vol. 2 (Spring 2001), pp. 1-33, at p. 6.

231. Andrew Moravcsik, “Taking Preferences Seriously: A Liberal Theory of International Politics,” *International Organisations*, Vol. 51 (1997), p. 513.

232. Anne-Marie Slaughter, “A Liberal Theory of International Law,” *American Society of International Law Proceedings*, 2000, pp. 240, 241.

plaining compliance with human rights agreements.<sup>233</sup> Risse and Sikkink have proposed that there are five stages that States go through: at stage one, States deny the validity of international jurisdiction, and respond to domestic human rights demands through repression of local advocates. Then, domestic advocates begin to forge links with transnational human rights networks, increasing the pressure on the State. In the third stage of the spiral, States make minor 'tactical concessions' in response to the combined pressures, often without being aware that this enables advocacy groups to corner them, and initiate a dialogue that eventually changes minds and interests. The fourth stage sees human rights norms acquiring 'prescriptive status.' Where their validity is acknowledged, human rights norms are internalised into domestic law, and States begin to ratify international human rights treaties. In the final stage of the spiral, States behave in accordance with human rights norms and the international agreements that they have entered into, and the role of the pressure groups diminishes.

Each of East Timor, Indonesia and Cambodia appears to be at the early stages of the spiral; it is difficult to pinpoint exactly where, for there are always contradictions. Superficially, the three countries seem to be undergoing varying degrees of what analysts of human rights developments in Latin America have identified as a 'justice cascade', where a normative shift occurs causing a substantial position change on accountability.<sup>234</sup> Within the spiral theory of Risse and Sikkink, the 'justice cascade' would occur between stages two and four. Undeniably, there has been a normative shift

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233. Thomas Risse and Kathryn Sikkink, "The Socialization of International Human Rights Norms into Domestic Practice: Introduction," in Thomas Risse et al. eds., *The Power of Human Rights: International Norms and Domestic Change*, Cambridge: Cambridge University Press, 1999.

234. Ellen Lutz and Kathryn Sikkink, "The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America," *Chicago Journal of International Law*, Vol. 2 (Spring 2001) pp. 1-33. The authors draw from the concept of 'norms cascade,' developed in the writings of authors such as Cass R. Sunstein, *Free Markets and Social Justice*, Oxford 1998 and Kathryn Sikkink, "Transnational Politics, International Relations Theory, and Human Rights," *Political Science and Politics*, Vol. 31 (3), pp. 516-523. There are said to be two stages: the emergence of the norm followed by its acceptance or a norm cascade. These two stages are divided by a threshold or tipping point, at which a critical mass of relevant publics accepts the norm. As these principles are increasingly shared and are less contested, a norms cascade develops and the norm becomes recognised as legitimate. "'Norm cascades' are collections of norm-affirming events." The authors argue that in South America, the 'justice cascade' took place within the wider context of a 'human rights norms cascade' introduced by a 'transnational justice network.'

made possible by the fact of transition in all three countries. Regardless of the quality, East Timor and Indonesia are certainly seeing much activity on accountability. The accountability issue has come to be commonly debated in all three countries, and Constitutional enshrinement of human rights, the passing of laws and establishment of institutions are the obvious signs of creation of a normative framework. Yet, this paper has demonstrated that internalisation of the norm has yet to become meaningful, and statistics aside, there has yet to be a significant shift in conduct and attitudes. At this point in time, it seems premature to speak of 'justice cascades'.

Then, on the face of it, the transitional justice growth industry in East Timor, Indonesia and Cambodia does seem to have been influenced by a degree of 'boomerang effect', arising from efforts at seeking support on justice issues from abroad.<sup>235</sup> A 'boomerang' pattern of influence exists when domestic groups in a repressive state bypass their State and directly search out international allies to try to bring pressure on their State from outside. In all three countries, domestic groups such as NGOs, opposition movements and others have linked up with global networks to pressure the international community to tackle the problems of gross violations of human rights directly with their State. It is particularly true in the case of the struggle for the independence of East Timor, which garnered immense support from NGOs and supportive networks around the world. It is also true that Indonesia's interest in prosecuting its military for atrocities in East Timor has been to avert the threat of establishment of an external judicial institution to try its nationals. But here too, the individual sagas of accountability are more complicated than the boomerang concept suggests. For example, the theory greatly emphasises the impact of foreign litigation, such as occurred with the Pinochet case. There has indeed been foreign litigation in respect of human rights violations in Indonesia, specifically actions in US courts against multinational corporations such as ExxonMobil<sup>236</sup> and Freeport-McMoran<sup>237</sup> and the conduct

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235. Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders*, Ithaca: Cornell University Press, 1998.

236. In June 2001, ExxonMobil was sued in the Federal District Court of the District of Columbia for its role in the gross violations of human rights allegedly committed by the Indonesian armed forces who were engaged in protecting its premises. The case, based on the Alien Torts Claims Act, is still pending; a decision is awaited on the respondent's motion to dismiss the complaint.

237. The claim of *Beanal v. Freeport-McMoran Inc* (197 F.3d 161 (5th Cir. (1a), November 29, 1999) was dismissed. Tom Beanal, a West Papuan activist, brought an action



of individual Indonesian military officials in East Timor.<sup>238</sup> But the only victories, in the East Timor cases, have been moral and symbolic – the multi-million dollar default judgements issued have never been enforced and have not been the source of the startling array of accountability processes in the two countries concerned. If anything, they have contributed to the two class action claims in Indonesia, but these have not borne fruit – the boomerang is still in orbit.

At the heart of transition lies the challenge of seizing a unique historical chance to fashion new approaches, policies and practices that will stand the test of time. Understanding the main currents of a nation in transition, preventing it from slipping into violent dissension, discouraging it from a retreat into a new form of authoritarianism, and through it all, protecting the interest of the poor and the excluded, are the great development challenges of the day.<sup>239</sup> The success of these developments must not be measured by the fact of their existence, nor in terms of mere output (for example, the number of indictments filed or the number of persons charged) but in terms of the quality of the proceedings and their ability to meet the *bona fide* purposes that international law requires. Processes of transitional justice have been started in Southeast Asia and their success must be measured by the contributions they make to entrenching fundamental rights and principles such as individual accountability and State responsibility, and fomenting genuine

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alleging environmental abuses, human rights violations and genocide against the mining company in relation to its operations in West Papua under the Alien Tort Claims Act and the Torture Victim Protection Act.

238. The absence of effective remedies for violations of human rights in occupied East Timor drove two sets of claimants to seek remedies in the courts of the United States of America through the 1789 Alien Tort Claims Act and the 1992 Torture Victim Protection Act. In 1992, following his dismissal from the military after the Santa Cruz massacre, Major General Sintong Panjaitan was sent abroad to Harvard University's Business School. He was sued by Helen Todd in relation to the killing of her 19 year old son, Kamal Bamadhaj, the only foreigner killed at the notorious Santa Cruz Cemetery massacre on November 12, 1991. Panjaitan was found responsible for having ordered the troops to open fire, resulting in the massacre of 271 mourners at the Santa Cruz cemetery and ordered to pay US\$14 million. On September 10, 2001, Judge Alan Kay of the District Court of Columbia awarded a total of US\$66 million in damages to five unnamed East Timorese plaintiffs (who had alleged torture, wrongful killing, summary execution, assault, battery, intentional infliction of emotional distress and other harms done to them in 1999) against Major General Johny Lumintang (*Jane Doe et al. v. Lumintang*, Civil Action No. 00-674 (GK), United States District Court for the District of Columbia, Findings of Fact and Conclusions of Law, September 10, 2001).

239. Adapted from *United Nations Common Country Assessment for Indonesia*, December 2001, p. 1.

change in societies and institutions. We have yet to see that. The deep structures of denial and authoritarianism remain; the genie is not fully released from the bottle. For now, the jury should stay out on whether the various permutations of the transitional justice industry will be taking East Timor, Indonesia and Cambodia back into the fire or out to safety. In the meantime, the United Nations and the international community, while respecting the right of a people to determine how to deal with their darkest moments in a consultative, principled and responsible manner, must seize every opportunity to work with these three States to entrench rule of law and accountability. If they fail to engage effectively, repressive authoritarianism and massive abuse of human rights are very likely to return.

# **GLOSSARY OF TERMS USED**

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Ad Hoc Court	Specialised human rights courts in Indonesia dealing with crimes committed prior to the passing of the legislation establishing permanent Human Rights Courts
ASEAN	Association of Southeast Asian Nations
CAVR	East Timor's Reception Truth and Reconciliation Commission
Extraordinary Chambers	Extraordinary Chambers established in Cambodia to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes committed during the period 17 April 1975 to 6 January 1979
Human Rights Courts	Courts set up in Indonesia to adjudicate human rights violations (defined as Genocide and Crimes against Humanity)
IMT	International Military Tribunal at Nuremberg
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
KKR	Indonesia's Truth and Reconciliation Commission
Komnas HAM	Human Rights Commission of Indonesia
KPP HAM	Special Investigative Commission set up by Komnas HAM to investigate gross violations of human rights committed in East Timor in 1999
KUHP	Indonesian Penal Code
KUHAP	Indonesian Code of Criminal Procedure

NGO	Non-governmental organization
RGC	Royal Government of Cambodia
Serious Crimes	War crimes, crimes against humanity, genocide and certain domestic crimes falling within the jurisdiction of the Special Panels of the District Court of Dili.
Special Panel(s)	East Timor's Special Panel(s) for Serious Crimes
SRSG	Special Representative of the Secretary-General
TNI	Indonesian Army (if before 1999, the term referred to the entire armed forces)
Truth and Friendship Commission	Truth and Friendship Commission between Indonesia and East Timor
UN	United Nations
UNMISET	United Nations Mission of Support in East Timor
UNTAC	United Nations Transitional Authority in Cambodia
UNTAET	United Nations Transitional Administration in East Timor

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