



**Unfulfilled Promises**  
**Achieving Justice for**  
**Crimes Against Humanity**  
**in East Timor**

**November 2004**

OPEN SOCIETY  
**JUSTICE INITIATIVE**

**CIJ**  
COALITION FOR  
INTERNATIONAL  
JUSTICE

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## **EXECUTIVE SUMMARY**

In the wake of the violence that engulfed East Timor in 1999 and marked the final bloody chapter of Indonesia's brutal 24-year occupation, the United Nations and the international community committed themselves to the principle that the perpetrators of these atrocities could not go unpunished. That commitment has not been fulfilled. Despite the energy and resources that have been invested, both trial processes established after the 1999 atrocities—the UN-established Special Panels in East Timor and the Ad Hoc Human Rights Court in Indonesia—have failed fundamentally to bring to account those most responsible for the atrocities in East Timor.

The UN is scheduled to pull out of the justice system in East Timor in May 2005. To do so while allowing these serious crimes to remain unredressed would undermine the ongoing process, in both East Timor and Indonesia, of building effective institutions to protect human rights and strengthen the rule of law. Furthermore, it would deeply compromise the credibility of the United Nations and the international community.

The Secretary-General has recently emphasized the UN's commitment to justice and accountability, as exemplified in his groundbreaking report on the rule of law and transitional justice (S/2004/616). In that report, he highlighted the need to embrace integrated and complementary approaches to justice in post-conflict societies, stating: "The challenges of post-conflict environments necessitate an approach that balances a variety of goals, including the pursuit of accountability, truth and reparation, the preservation of peace and the building of democracy and the rule of law." We support that holistic approach.

In 2003 and 2004, the Coalition for International Justice and the Open Society Justice Initiative joined with other NGOs in calling for the United Nations to establish an international Commission to assess the existing justice mechanisms for redressing the East Timor crimes and to recommend initiatives to remedy their failings. In September 2004, Louise Arbour, the UN High Commissioner for Human Rights, appointed Grant Niemann, an experienced international criminal lawyer, to review the justice processes in East Timor and Indonesia, and determine whether a UN Commission should be established to make recommendations to the UN for remedying the failures. In the event Mr. Niemann and Justice Arbour recommend such a Commission to the Secretary-General, this report is intended to lay the groundwork for a Commission's task.

Our analysis and recommendations are informed primarily by our discussions in Indonesia and East Timor during August and September 2004 with survivors, judges, prosecutors, government policymakers, civil society representatives, and international observers. They are also based on our consistent monitoring of and involvement with the justice mechanisms in East Timor and Indonesia since the UN took over the transitional administration of East Timor in 1999. Our recommendations take into account and address the most substantial obstacles to securing justice, namely Indonesia's intransigence in shielding its officers from accountability and East Timor's present vulnerability and unwillingness to even request that Indonesia extradite indictees to the

Special Panels in East Timor. These problems are exacerbated by limited international political will and competing demands on resources.

We urge the international community not to give up on justice in East Timor. It is both essential and possible to establish a meaningful measure of legal accountability that also corrects the historical record of the violence. By thinking creatively and devising new justice mechanisms, the international community can overcome the obstacles that have hindered the search for justice to date, and help to establish long-term peace and stability in East Timor while strengthening the rule of law in Indonesia.

### **Failures of the Human Rights Court in Indonesia**

In response to international pressure following the 1999 atrocities, including threats of the establishment of an international criminal tribunal, Indonesia devised a new system of human rights courts within its domestic legal system, with jurisdiction over war crimes, crimes against humanity, and genocide.

The decision to entrust Indonesia with the task of pursuing justice for East Timor was understandable at the time, given the financial and political obstacles to other solutions as well as high hopes for democratic reform in post-Suharto Indonesia. But since the trials and appeals have been thoroughly flawed, it now must be recognized that the East Timor cases have been a failure in every important respect.

#### ***Prosecution – unable and unwilling***

The most glaring failures have been those of the Attorney General's office, where a lack of capacity was manifested in several ways, including:

- Prosecutors were unfamiliar with the elements of crimes against humanity, and with the concepts of individual and command responsibility;
- trial prosecutors were insufficiently skilled and often ill-prepared; and
- prosecutors were often unable to bring critical witnesses from East Timor, in part because there was no effective system of witness protection.

Prosecutorial inability was accompanied by the government's substantial lack of political will to pursue justice:

- Of the 33 individuals identified as responsible for the crimes in a January 2000 report by Indonesia's own National Human Rights Commission, many were never charged, including the highest level perpetrators;
- prosecutors failed to introduce a major portion of the evidence collected by the National Human Rights Commission. The Attorney General's office furthermore never directed the commission to conduct further investigations, nor did prosecutors exercise the power to subpoena evidence and witnesses, a power the commission lacked but the prosecutors had;

- prosecutors did not present evidence demonstrating that the violence was carefully orchestrated. Instead they presented charges and statements that reflected a view of the East Timor violence that the Attorney General's office and the military promoted—that a civil conflict got out of hand, during which regrettable but perhaps inevitable acts were committed; and
- the prosecution ultimately requested the acquittal of the highest-ranking military officer who had been prosecuted, General Adam Damiri, and subsequently appealed his conviction.

### ***Judges and the trial process***

Based on NGO observers' reports, the judges apparently varied considerably in competence and preparation. Judges from the career judiciary lacked knowledge and, in many cases, motivation. The "ad hoc" judges, drawn from Indonesia's law school faculties, were in some but not all cases better prepared. Moreover, career judges were paid by the Ministry of Justice until April 2004, an arrangement that interfered with judicial independence from the government.

Intimidation of witnesses, judges, and lawyers was another major problem during the trials. The courtrooms were often crowded with armed, uniformed officers bused to the courtrooms in military vehicles as part of an organized show of support for the accused generals. Some prosecutors received death threats, which understandably undermined prosecution efforts.

Since the Ad Hoc Human Rights Courts were established and the East Timor trials began in Jakarta in 2002, there have been some improvements in the judicial process (most notably the establishment of a specialized human rights division within the Attorney General's office and international law training programs for judges). Yet without the political will to prosecute the high level perpetrators, these developments will not benefit victims in East Timor. A window of opportunity exists for international pressure now that there is a new government in Indonesia. But unless Indonesia clearly indicates that it now recognizes that the East Timor trials undermined its legal reform efforts and global standing, and is thus genuinely able and willing to bring the accused to justice, accountability for the East Timor crimes will have to be found outside Indonesia.

### **The Serious Crimes Unit and Special Panels in East Timor**

Parallel to the Indonesian process, the United Nations Transitional Administration in East Timor (UNTAET) in 2000 established Special Panels that operate within the Timorese judicial system, with Timorese and UN-employed international judges. A Serious Crimes Unit (SCU) operates within the prosecutor's office. The SCU and Special Panels have exclusive jurisdiction over "serious crimes," defined to include the international crimes of genocide, crimes against humanity, and war crimes, as well as certain murder, torture, and sexual offenses.

### ***Perpetrators out of reach***

The shortcomings of the serious crimes process in East Timor are myriad. The primary one, however, is that the prosecutors have been unable to reach the highest level indictees, all of whom are located outside East Timor. Indonesia has refused to extradite them, and East Timor has not pursued extradition treaties with it or with other countries where the accused are likely to travel.

### ***Misguided prosecution strategy***

The SCU's investigation and prosecution strategy has been misguided, being simultaneously over- and under-inclusive. Although the SCU has the legal authority to reach all serious crimes committed in East Timor during the Indonesian occupation, a policy decision was made early on to prosecute only crimes that took place during 1999, the period during which the UN was present and its authority was attacked. But victims' groups in East Timor have roundly condemned this focus, observing that the approximately 1500 lives lost in 1999 constituted less than 1 percent of the death toll throughout the brutal Indonesian occupation. At the same time, the SCU has indicted literally hundreds of defendants, the majority of whom are accused of low-level offenses that fall far short of the threshold for crimes against humanity. These crimes, while serious, are essentially domestic crimes that should be prosecuted in the regular courts, and not the focus of international or hybrid courts. The sometimes harsh punishments handed down to Timorese for domestic crimes have triggered resentment among many locals and have reinforced the message that only the low level perpetrators—and only the Timorese—are being held accountable.

### ***Poor defense and procedures***

There is concern as to whether defendants have received fair trials. Poorly skilled defense and an inadequate number of defense counsel have apparently contributed to the record of 55 convictions and just three acquittals thus far. Judges have been unable to adequately protect defendants' rights. With a few notable exceptions, the judges—both internationals and Timorese alike—have shown an inability to effectively control the proceedings and a lack of professionalism in the courtroom.

### ***Lack of capacity building***

The SCU and the Special Panels have failed in the long-term capacity-building component of their mission. The Special Panels are located in Dili, yet the impact on local judges has been minimal; only the two East Timorese judges have gained valuable, daily experience during the past four years of operation. There are currently no Timorese lawyers within the SCU, despite the intent to phase in more Timorese and phase out internationals over time as locals gained experience and expertise.

### ***Other shortcomings***

Further, because the SCU is located within the domestic legal system, the General Prosecutor, a Timorese, has little choice but to follow the government's policy of prioritizing East Timor's economic relationship with Indonesia over the pursuit of justice. Thus, although in its daily operations, the SCU is essentially a UN institution, it cannot speak or act with the independence that a UN body should enjoy. The combination of



administrative mismanagement, rapid staff turnover, and wholly inadequate UN support has furthermore undermined the effectiveness of both the SCU and the Special Panels in countless ways, especially during the first two years of the SCU's operation.

These failures, however, do not justify prematurely closing down a UN-established court that has hundreds of indictments pending and has yet to deliver meaningful justice. To abandon the process now would set a terrible precedent and make an enduring negative political statement. We strongly recommend that a Commission give careful consideration to the development of a credible follow-on justice mechanism, as well as a rational completion strategy that uses the SCU's institutional knowledge and evidence as a foundation for future justice efforts.

### **Devising a Workable Mechanism for Justice: Obstacles and Goals**

Achieving justice for East Timor will not be an easy task. The Megawati government had little interest in supporting credible prosecutions of the Indonesian military officers most responsible for the violence. It remains to be seen whether the new government is committed to reforming Indonesia's judiciary and promoting the rule of law by holding legitimate trials for individuals accused of crimes against humanity. Meanwhile, the government of East Timor, citing the country's economic and military vulnerability, is unwilling to take a unified public position supporting international justice efforts. And international political will to pursue the issue is limited, with innumerable other human rights crises placing competing demands on international resources and attention.

Yet the situation is no longer simply about justice for East Timor. The promises made and broken over the past five years, as well as the distorted history of the UN's culpability and the inaccurate portrayal of the conflict, have put the credibility of the UN at issue.

Any follow-on justice efforts must account for the many logistical, political, and financial obstacles that East Timor presents. The solution must come from the international community, as the East Timor government will not and cannot take the lead on justice issues. Moreover, whatever strategy is adopted—inevitably some type of compromise—should not foreclose the possibility of implementing a better solution later. As intransigent as Indonesia appears now, its political reforms are relatively recent and the country has made real progress in areas such as free elections. It is possible that eventually Indonesia *will* extradite its indicted generals, or will seriously pursue domestic prosecutions. When the opportunity to prosecute arises, it is important that no blanket amnesty or immunity attach as a result of decisions made now.

In accordance with well-settled principles that protect human rights by combating impunity and provide the right to a remedy for victims of international crimes, we have identified, in consultation with Timorese and Indonesians, basic goals that can inform any future efforts to address the international crimes committed in East Timor.

## ***Justice Goals***

- Punishing those individuals most responsible for crimes against humanity, through both criminal and civil remedies;
- preventing those perpetrators from committing further abuses;
- deterring other potential abusers through ending impunity and building respect for human rights and the rule of law;
- providing reparations, including compensation to victims;
- correcting the historical record and rejecting Indonesia's official version of events;
- receiving information about the crimes, such as where remains are buried; and
- securing an official apology from Indonesia.

## ***Recommendations for achieving justice and accountability***

If the new government in Indonesia flouts its responsibilities, the process of devising a new justice mechanism will have to be designed to function without its cooperation. There are several future strategies a Commission should consider recommending, including:

- 1) Temporary extension of the SCU's mandate to enable a rational "completion strategy." During this period, the SCU should be removed from the East Timor justice system. This completion strategy should encompass decisions regarding the disposition of outstanding indictments as well as the secure transfer of evidence to international authorities, and possibly could encompass the transformation of the SCU into a new international justice mechanism.
- 2) An international civil compensation commission or court located outside East Timor. Such an entity would hold hearings (*in absentia* if necessary) to determine culpability for crimes against humanity, and would issue judgments enforceable through, for example, the freezing of defendants' overseas assets. Its mandate would ideally extend to crimes committed throughout the occupation, including those committed by resistance forces, and the East Timor government would neither be permitted to extinguish nor required to espouse its citizens' claims. Group claims or simplified fixed-sum individual claims might streamline the process.
- 3) An international truth commission. If adopted, it is essential that such a commission encompass some mechanism for accountability; it could, for example, be given the authority to order remedies such as asset freezes and travel bans. Community reconciliation processes could be employed for lower-level offenders.
- 4) An improved ad hoc justice process within Indonesia. Such a process would only be credible with a significant degree of international

participation and monitoring. Achieving genuine Indonesian cooperation with such an approach would require sustained international pressure.

- 5) An *ad hoc* international criminal tribunal. Because of resource constraints and political obstacles, such a tribunal would need to have a limited and clearly defined mandate: to try only a handful of those most responsible for crimes against humanity.
- 6) Removal of the perpetrators of the East Timor violence from their military positions in Indonesia and stripping them of their medals. This step is essential to ensure that crime is not rewarded and to prevent these individuals from repeating their crimes within Indonesia.
- 7) A full and genuine apology from the Indonesian government. Such an apology must encompass an accurate accounting of history, including the identification of burial sites.

Once it has completed its work, a UN Commission should make its report public (as well as a report summarizing the findings of the UN observers of the Jakarta trials), and have these materials translated into Bahasa Indonesia.

The above options, which we explore in considerable detail in the body of this report, are not mutually exclusive; indeed, some would plainly be inadequate on their own, and a Commission should consider a creative combination of approaches. As the Secretary-General's report on the rule of law and transitional justice emphasizes, "No single form of reparation is likely to be satisfactory to victims. Instead, appropriately conceived combinations of reparation measures will usually be required, as a complement to the proceedings of criminal tribunals and truth commissions."

Renewed commitments and efforts like the ones described above could do much to help the international community make up for its past failures to provide justice to the people of East Timor. No solution is easy, but it is essential to find remedies that work. The approaching deadlines for justice efforts in East Timor and Indonesia have put the UN's reputation and commitment to accountability for international crimes on the line. By thinking creatively about both criminal and civil justice mechanisms, the international community can overcome the obstacles that have hindered the justice process and help establish long-term peace and stability between East Timor and Indonesia.

## INTRODUCTION

This report assesses the progress and failures of efforts to bring to justice the perpetrators of serious crimes committed during the 24-year Indonesian occupation of and withdrawal from East Timor.<sup>1</sup> It also offers recommendations to redress current failures and reinvigorate the pursuit of justice and accountability in East Timor. Two main justice processes have attempted to remedy international crimes committed in East Timor. In Indonesia, the Ad Hoc Human Rights Court, established in 2000 under international pressure in the wake of the violence, has conducted ‘trials’ of 18 individuals. In East Timor, the United Nations began supporting and staffing a Serious Crimes Unit (SCU) in 2000 within the office of the East Timorese Prosecutor General, as well as Special Panels consisting of international and Timorese judges and housed within the East Timorese judicial system. Both processes have fundamentally failed.

The international community has come to a crucial juncture in deciding how it will continue to respond to the horrific violence and atrocities committed in East Timor and how it will mend broken promises. As of November 2004, the vast majority of the perpetrators of the East Timor crimes remain at large in Indonesia, with no prospect of being brought to justice unless serious new initiatives are undertaken. Indeed, the recent appeals court decisions issued in July 2004 and the Supreme Court decision issued in November 2004 in Indonesia reversed what little progress had been achieved in securing justice for East Timor. Furthermore, in May 2004, the UN Security Council passed Resolution 1543, which “reaffirms the fight against impunity,” yet also states that “the Serious Crimes Unit should complete all investigations by November 2004, and should conclude trials and other activities as soon as possible and no later than 20 May 2005.”

There is no official plan of action for dealing with the hundreds of outstanding indictments. The government of East Timor is currently considering providing amnesty to some or all of the alleged perpetrators and reducing the sentences of many of those already convicted, a proposal that has met stiff opposition in parliament as well as within East Timorese civil society. Meanwhile, in Indonesia, the few convictions that had been reached by the Ad Hoc Human Rights Court in Indonesia—indeed, *all* of the convictions of Indonesians and now one East Timorese—were reversed on appeal this July and November, respectively. Thus, without serious recommitment and reform, efforts for justice in East Timor undertaken over the past five years are likely to result in impunity for most of the guilty and serve a major blow to the credibility of the UN’s and the international community’s commitment to punish and deter crimes against humanity.

Although the international community has invested more resources and rhetoric in justice for East Timor than in many other human rights crises, the basic promises it made

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<sup>1</sup> Although East Timor officially changed its name to Timor-Leste on May 20, 2002, the day it became an independent country and also changed the official language of the country to Portuguese, East Timor is used throughout this report for ease, because it is still the name most commonly used by English speakers inside and outside the country, and the UN has retained the use of East Timor in the name of its mission. The use of East Timor instead of Timor-Leste is not intended to be disrespectful, and we acknowledge the right of democratically elected leaders to officially change the name of their country.

regarding an end to impunity have become hollow. As this report details, the two parallel justice processes have failed fundamentally to hold the architects of the atrocities accountable and to correct the historical record that Indonesian propaganda has long distorted. The international community must recognize these harsh realities, learn from the processes' shortcomings, and develop and support new mechanisms in order to achieve some meaningful measure of justice. To do less would be one more betrayal of the East Timorese people's interests by an international community that materially supported Indonesia's brutal occupation and catastrophically entrusted the job of securing East Timor's independence referendum to the same Indonesian authorities responsible for the deaths of hundreds of thousands during the occupation. Moreover, disengagement by the international community could allow military officers responsible for atrocities to secure impunity and weaken efforts to build effective human rights institutions and respect for the rule of law in Indonesia.

Finally, to abandon the justice process now would compromise the credibility of the United Nations and its commitment to ensure accountability and its ability to respond to international crimes. The UN deferred action on the creation of an international tribunal in 2000 because Indonesia promised to prosecute the perpetrators. The Secretary-General made clear that the UN would revisit this decision if the prosecutions and trials did not satisfy international standards.<sup>2</sup> The process has proven unsatisfactory by any measure, and the UN and the Secretary-General must stand by their commitments.

In September 2003 and June 2004, the Coalition for International Justice and the Open Society Justice Initiative, together with other NGOs,<sup>3</sup> called for the United Nations to establish an international Commission to evaluate the failures of the existing justice processes and recommend measures to remedy those failures. This report aims to assist UN efforts by laying the groundwork for a Commission's task, both in terms of assessing the past processes and setting forth possible new directions.

Any path to justice will encounter several obstacles, including Indonesia's insistence on shielding its officers from accountability, East Timor's desire to prioritize

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<sup>2</sup> Mark Riley and Marian Wilkinson, *UN Hedges on War Crimes*, Sydney Morning Herald, Jan. 29, 2000, p. 1; Lindsay Murdoch, *Generals Gun-shy of Justice*, Sydney Morning Herald, Dec. 16, 1999, p. 14; See also *Indonesian General Fails to Show Up for East Timor Grilling*, Deutsche Presse-Agentur, Dec. 22, 1999; *Bishop Wants Leader on Trial*, The Daily Telegraph, Oct. 29, 1999; *Annan Puts Howard on Mandatory Notice*, Australian Financial Review, Feb. 22, 2000, p. 5 (citing Secretary-General's statement that an international tribunal for East Timor would not be necessary "if Indonesia mounted a credible and transparent trial"); Matthew Moore et al., *World Urged to Act After Court Clears Indonesian Officers*, The Age (Melbourne), Aug. 17, 2002, p. 17 (citing statement of Ian Martin that the Secretary-General agreed in 1999 that an international tribunal should be established for East Timor if Indonesia proved incapable of holding genuine trials); *Three Indonesian Generals Named as Timor Suspects, Key Names Missing*, Sept. 1, 2000, available at [www.etan.org/et2000c/september/1-4/01three.htm](http://www.etan.org/et2000c/september/1-4/01three.htm) (stating that the UN High Commissioner for Human Rights "reiterated that the UN would call for an international war crimes tribunal if Jakarta failed to bring the perpetrators of the Timor violence to trial").

<sup>3</sup> These organizations included the International Center for Transitional Justice, Amnesty International, Human Rights Watch, and the International Federation for East Timor. Many other NGOs have also written separate letters seeking accountability for the East Timor crimes. Please note that the Sept. 2003 joint letter referred to in the text above was signed by CIJ and ICJI, whose signer is now with the Open Society Justice Initiative.

economics over justice in its relationship with Indonesia, and limited international political will and resources. In response to these challenges, we have sought to formulate recommendations that promote justice and accountability in a manner that is realistic and pragmatic, and take into account the preferences of East Timorese victims and the guiding principles on ending impunity.

A key goal of our study was to gather as much information as we could about the views of the Timorese, including specific groups such as the families of victims as well as government policymakers, so that our recommendations would reflect the desires of a majority of the victimized population. To that end, we relied largely on our own discussions with survivors, victims' advocacy groups and other civil society institutions, and also drew on a 2003 report summarizing focus group studies conducted by the International Center for Transitional Justice (ICTJ).<sup>4</sup>

We traveled in August and September 2004 to East Timor and Indonesia to meet with government officials, prosecutors and judges in both courts, and UN and other international observers, as well as victims' groups, local NGOs, and other representatives of civil society. While this report reflects solely our views, we developed our assessment and conclusions by listening to the perspectives and voices of these individuals and groups, all of whom offered valuable insight and gave generously of their time to meet with us.

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<sup>4</sup> Piers Pigou, *Crying Without Tears: In Pursuit of Justice and Reconciliation in Timor-Leste: Community Perspectives and Expectations* (International Center for Transitional Justice, August 2003).

## I. EAST TIMOR'S STRUGGLE FOR INDEPENDENCE

The Indonesian occupation of East Timor is a story of 24 years of uninterrupted brutality, starvation, upheaval, and suffering. The violence and destruction surrounding the independence referendum and Indonesian withdrawal in 1999 was widely publicized and internationally condemned. The outcry was a welcome change after decades of silence, but also worked to create the misimpression that bloodshed on that scale was something new in East Timor. In fact, the approximately 1500 Timorese murdered during 1999 represented less than 1 percent of the men, women, and children killed or starved to death during the 24 years of Indonesia's occupation and the conflict surrounding its invasion. Approximately one-third of East Timor's population, around 200,000 people, lost their lives during this period. Those who survived faced a variety of other devastating harms, including displacement from their homes through forced population resettlement programs, severe malnutrition, the attempted eradication of local culture through indoctrination programs and bans on the use of languages other than Bahasa Indonesia, physical abuse, rape, sexual slavery, forced labor, and involuntary sterilization.

A comprehensive accounting of this history is beyond the scope of this short report; we provide instead only a brief outline. Many authors, including those listed in the bibliography, have given thoughtful and detailed accounts; one particularly useful and highly regarded source, from which much of the following account is drawn, is John Taylor's *East Timor: The Price of Freedom* (2d ed. 1999). In addition, East Timor's Commission on Reception, Truth, and Reconciliation (Comissao de Acolhimento, Verdade, e Reconciliacao, or CAVR) has amassed, over the course of two years of hearings, the personal histories of thousands of individuals. Its final report is due to be released in early 2005.

### ***Portuguese Withdrawal and Indonesian Invasion***

East Timor's struggle for independence long predates the Indonesian occupation, as it suffered various forms of colonial rule under Portugal for hundreds of years. After a century of military conflict among the Portuguese, Dutch, and three Timorese kingdoms for control of Timor's valuable trading routes and sandalwood supply, the Dutch and the Portuguese finally divided the island into two in 1749, leaving Portugal with the eastern half. At first, Portugal's control was largely nominal, with the kingdoms and their local subdivisions dominating East Timorese life until the late nineteenth century, when Portugal imposed a new administrative structure as well as a forced labor program and brought in troops to quell Timorese resistance. Except during World War II, when it was used as an Allied base and later occupied by the Japanese, Portugal continued to occupy East Timor until the 1970s.<sup>5</sup>

In April 1974, the Portuguese military overthrew Lisbon's fascist regime, replacing it with one that, among other things, supported decolonization. Although no immediate steps were taken in that direction in Lisbon, in East Timor several pro-

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<sup>5</sup> For a description of the establishment and trajectory of Portuguese colonialism, see John Taylor, *East Timor: The Price of Freedom* (2d ed. 1999), p. 29.

independence political parties formed, including FRETILIN (Frente Revolucionaria de Timor-Leste Independente/The Revolutionary Front for an Independent East Timor, originally called ASDT, the Associação Social-Democrata Timorese/Timorese Association of Social Democrats). FRETILIN remains the dominant party today, and has consolidated its popularity in rural East Timor through a combination of pro-independence mobilization with health and literacy programs. Representing ASDT some 30 years ago, East Timor's current Foreign Minister, Jose Ramos-Horta, traveled to Indonesia and received written assurance from Indonesia's Foreign Minister Adam Malik that Indonesia supported Timorese independence and would not invade or interfere with East Timor.<sup>6</sup> Meanwhile, however, the Indonesian intelligence service was already developing plans for annexation. Within the Indonesian government, there had been internal pressures toward annexation of East Timor for years; these pressures intensified after the Portuguese coup. Three months after Malik gave the assurance to Ramos-Horta, the government came out in favor of integration of East Timor with Indonesia. President Suharto then appointed Ali Murtopo, an army intelligence officer who was one of the architects of the annexation plan, to represent Indonesia in its negotiations with Portugal concerning the Timor issue.<sup>7</sup> The Portuguese response to Indonesia's entreaties regarding integration was mixed; the government's official position remained in favor of a gradual process of increasing Timorese autonomy, beginning with federalization and transitioning toward independence, but it took few, if any, concrete steps toward that goal.<sup>8</sup>

In 1975, leaders of the right-wing East Timorese party UDT (União Democrática Timorese/Timor Democratic Union), which had declined considerably in popularity compared to the left-wing FRETILIN, abandoned the pro-independence coalition, and instead supported unification with Indonesia. That summer, UDT staged a coup against the Portuguese in Dili. FRETILIN's forces fought against the UDT, from which it had bitterly divided, and eventually took control of Dili, East Timor's largest city.<sup>9</sup> Some 500 UDT soldiers as well as 2500 refugees fled to the border with Indonesian West Timor, where they were forced to sign a petition demanding unification before crossing the border.<sup>10</sup> Indonesia responded to the coup by massing military forces near the border. Disguised as UDT troops, these forces conducted small-scale but violent incursions into East Timor during the fall of 1975. On November 28, FRETILIN declared the independence of East Timor. On December 8, 1975, Indonesian troops invaded Dili.

The invasion's violence was not limited to attacking FRETILIN fighters. To the contrary, Indonesian troops in Dili systematically "started killing everyone they could find."<sup>11</sup> Dozens of people were rounded up into groups and slaughtered in front of crowds who were ordered to count the bodies as they fell. The Chinese population was especially victimized, with about 500 killed in Dili in the first day of the invasion alone

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<sup>6</sup> Ibid.

<sup>7</sup> Ibid, pp. 29-32.

<sup>8</sup> Ibid, pp. 36-43.

<sup>9</sup> Ibid, p. 51.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid, p. 68.



and the entire Chinese population of Maubara and Liquiça wiped out.<sup>12</sup> The violence spread as Indonesian troops advanced into the interior of the country. According to John Taylor, it seemed “that entire villages were slaughtered for supporting FRETILIN. In the villages of Remexio and Aileu, south of Dili, everyone over the age of three was shot, since, according to the military, ‘they were infected with the seeds of FRETILIN.’”<sup>13</sup> Looting was rampant.

Indonesian troops met stiff resistance as they attempted to take over FRETILIN-dominated areas in the interior. Intense fighting and massacres of civilians continued throughout the remaining decade. Entire villages were burned and their inhabitants rounded up and executed.<sup>14</sup> As early as April 1976, it is estimated that upwards of 60,000 people, or 10 percent of the country’s population, had been killed. By late 1978, when a new census was conducted, over 100,000 had died—a figure that would reach 200,000 by the end of the occupation, roughly one third of the country’s population.<sup>15</sup> Many of those who survived fled occupied villages to the mountains, still controlled by FRETILIN.<sup>16</sup> Hundreds of thousands of others—indeed most of the country—were forced into military-controlled camps. Indonesia pursued a systematic program of “encirclement and annihilation.”<sup>17</sup> “Encirclement” referred to the capture of villages through a combination of bombing campaigns and land invasion. “Annihilation” referred to the total elimination of the village’s population, through a combination of mass execution, imprisonment, deportation, and forced resettlement into camps. Through this strategy, Indonesia gradually consolidated its control of the country, although pockets of resistance would persist throughout the occupation.

The horrific brutality of the Indonesian occupation was not confined to its first few years. Killings or disappearances of one or a few people were everyday occurrences throughout the occupation, and much larger massacres were not uncommon. For example, in Lacluta in September 1981, “at least 400 hundred people were killed, mostly

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<sup>12</sup> Ibid, pp. 69-70. See also Ben Kiernan, “War, Genocide, and Resistance in East Timor,” in *War and State Terrorism*, Mark Selden and Alvin So, eds. (Rowan and Littlefield, 2003), p. 211, 221, and 224, available at [http://www.yale.edu/gsp/east\\_timor/03-263\\_Ch\\_09.pdf](http://www.yale.edu/gsp/east_timor/03-263_Ch_09.pdf). On these pages, Kiernan observes that only a “few thousand” of Timor’s Chinese minority, who once numbered 20,000, were left in 1985, and describes the killings of the Chinese as genocide. See also Sonny Inbaraj, *East Timor’s Chinese Look Forward to Going Home*, Asia Times, March 13, 1999, available at <http://www.atimes.com/se-asia/AC13Ae02.html>. For a description of summary executions, particularly of Chinese Timorese, see UK Foreign & Commonwealth Office, *East Timor: Historical Background* (London: October 1999), p. 2, available at <http://www.fco.gov.uk/Files/kfile/etimor,0.pdf>.

<sup>13</sup> Taylor, p. 70; see also Kiernan, p. 211.

<sup>14</sup> See Peter F. Trotter, “Like Lambs to the Slaughter,” *New England International and Comparative Law Annual*, vol. 7, (2001), p.31, available at [http://www.nesl.edu/intljournal/vol7/vol72001\\_pg31.pdf](http://www.nesl.edu/intljournal/vol7/vol72001_pg31.pdf).

<sup>15</sup> See UNDP, *East Timor Human Development Report 2002*, available at <http://www.undp.east-timor.org/documentsreports/nhdr/annex%20-%20brief%20history%20of%20east%20Timor.pdf>, p. 71 (hereinafter: “UNDP Report”).

<sup>16</sup> See Kiernan, p. 210.

<sup>17</sup> Taylor, p. 85; see also UNICEF, *East Timorese Children Involved in Armed Conflict*, (October 2000-February 2001), p.5, available at [http://www.etan.org/etanpdf/pdf2/unicef\\_childsoldiers.pdf](http://www.etan.org/etanpdf/pdf2/unicef_childsoldiers.pdf) (hereinafter: “UNICEF Report”).

women and children.”<sup>18</sup> As an eyewitness reported to the Australian Senate, many of the children were killed by Indonesian soldiers who grabbed their legs, swung them around, and “smashed their heads against a rock.”<sup>19</sup> In August 1983, soldiers rounded up more than 60 men, women, and children in the village of Malim Luro, forced them to lie on the ground, and then crushed them with a bulldozer.<sup>20</sup> That same month, troops burned down the village of Kraras, killing around 100 people in their homes and forcing the rest of the villagers to flee to nearby Mount Bibileu, which the troops promptly surrounded and bombed. An estimated 500 more people were killed at the mountain, many of them having been rounded up and executed.<sup>21</sup> A massacre of more than 200 people at Santa Cruz Cemetery in Dili in 1991 was caught on camera by a Western journalist, triggering an outcry from the international community.<sup>22</sup>

Disappearances were also common, and often followed detention and interrogation by police. Many people were reportedly dumped into the sea from helicopters. Others were killed at particular sites chosen for mass executions, such as Quelicai and Areia Branca. For a period of time, the water near the latter was referred to as the “sea of blood.”<sup>23</sup>

The forced resettlement of the population resulted in famine that killed tens of thousands. Because people were not permitted to leave these controlled areas to farm, they had to subsist on small and comparatively infertile plots of land that could not produce a sufficient food supply, and many farmers were obliged to produce crops for export.<sup>24</sup> External food aid, meanwhile, was strictly rationed by the soldiers so as to enforce dependence, with much of it never being distributed.<sup>25</sup>

Forced labor also resulted in many deaths. In 1981, Indonesian soldiers conducted a “fence of legs” operation, in which at least 80,000 men and boys—more than a tenth of the country’s total population—were made to form two human chains extending the entire length of the western and eastern edges of the country; these chains were then required to walk toward one another, sweeping the countryside for pockets of resistance as they walked.<sup>26</sup> People they found, including women and children, were herded into the center of the country and slaughtered *en masse*. Those participating in the

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<sup>18</sup> Taylor, p. 101; see also Kiernan, p. 221; *Senate of Australia, Final Report on the Inquiry into East Timor*, Dec. 7, 2000, p. 85, available at [http://www.aph.gov.au/senate/committee/fadt\\_ctte/east\\_timor/report/c05.pdf](http://www.aph.gov.au/senate/committee/fadt_ctte/east_timor/report/c05.pdf) (hereinafter: Australian Senate Report).

<sup>19</sup> Taylor, p. 101.

<sup>20</sup> Taylor, p. 103; see also Kiernan, p. 221.

<sup>21</sup> Taylor, p. 102; see also Kiernan, p. 221; Australian Senate Report, p. 85.

<sup>22</sup> UNDP Report, p. 72; UNICEF Report, p. 8; Australian Senate Report, pp. 86-87; Trotter, p. 40.

<sup>23</sup> Taylor, p. 101.

<sup>24</sup> UNDP Report, p. 71; Taylor, pp. 92-98; Constancio Pinto & Matthew Jardine, *East Timor’s Unfinished Struggle: Inside the Timorese Resistance* (Boston 1997), p. 59; Trotter, p. 38; see also G.A. Res. 36/50 (Nov. 24, 1981), which expresses concern over famine in East Timor.

<sup>25</sup> Taylor, p. 98.

<sup>26</sup> UNICEF Report, p. 6; Taylor, pp. 117-119; Pinto & Jardine, pp. 84-85.

operation had been given no warning or opportunity to bring food or medicine and many died of starvation or disease along the way.<sup>27</sup>

The occupation eventually resulted in the outright killing or starvation of about a third of the East Timorese population and left virtually no family untouched. Those who survived were subjected to a range of horrific human rights violations. Torture and arbitrary imprisonment were common.<sup>28</sup> The population lived under steady surveillance and in perpetual fear. Indonesia instituted a program to eradicate East Timorese culture that barred the use of languages other than Bahasa Indonesia, and promoted the Indonesian national ideology of *Pancasila*.<sup>29</sup> Rape was frequent, and in at least one village, Mauxiga, CAVR has learned that all of the men were disappeared and the women kept as sex slaves.<sup>30</sup> Pursuant to a population control program, women were forced to be injected with the contraceptive Depo-Provera, and were in some cases forcibly surgically sterilized.<sup>31</sup>

FRETILIN, which continued to control large areas of the island's mountainous interior, also committed its own serious human rights abuses during the occupation. The worst single event was the mass execution of approximately 150 UDT and Apodeti political prisoners just after the Indonesian invasion in December 1975.<sup>32</sup> In addition, it conducted a series of internal purges during the early years of the occupation, in which dissidents within the party were murdered. Prime Minister Mari Alkatiri recently spoke at a public hearing of the CAVR and accepted, on the government's behalf, collective responsibility for the FRETILIN crimes; he estimated that in total approximately 350 people were killed, although some estimates have ranged higher.

### ***International culpability***

The international community bears a special responsibility to seek justice for the atrocities committed in East Timor due to its complacency as abuses occurred and the various roles that many nations played in facilitating the violence. For example, Portugal, which had exploited East Timor's resources for centuries, abruptly left it defenseless against Indonesian invasion in 1975. While stating a policy of facilitating East Timorese self-determination, Portugal did nothing to achieve that goal. The United States was told of the oncoming invasion but turned a blind eye to it. Indeed, the invasion was reportedly delayed for a day with U.S. knowledge so as to avoid causing embarrassment to President Ford, who was visiting Jakarta at the time.<sup>33</sup> Australia,

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<sup>27</sup> Taylor, pp. 117-119; Pinto & Jardine, pp. 84-85.

<sup>28</sup> See, e.g., Australian Senate Report, pp. 88-90, which cites Yayasan HAK and Amnesty International reports; Trotter, pp. 39-40.

<sup>29</sup> See Ben Saul, *Was the Conflict in East Timor 'Genocide' and Why Does It Matter?*, 2 Melb. J. Int'l L. 477, pp. 512-515 (2001); Taylor, pp. 128-29.

<sup>30</sup> Interview with Patrick Burgess, Aug. 31, 2004; see also JSMP Report on CAVR, Women and Conflict Public Hearing, Apr. 28-29, 2003, available at [http://www.jsmp.minihub.org/News/6\\_05\\_03.htm](http://www.jsmp.minihub.org/News/6_05_03.htm) (describing testimony regarding Mauxiga as well as other sexual crimes against women).

<sup>31</sup> Taylor, pp. 158-160; Trotter, p. 38; Saul, p. 514.

<sup>32</sup> See Kiernan, p. 207, which states that approximately 80 Apodeti members and 70 UDT members were murdered.

<sup>33</sup> For more information on these events refer to The National Security Archives, <http://www.gwu.edu/~nsarchiv/> (last visited Sept. 28, 2004), which released many previously classified

driven mostly by its interest in the rich underwater oil deposits in the Timor Gap between the two countries, became, in 1978, the only country in the world to recognize Indonesia's authority over East Timor.<sup>34</sup> The Soviet Union and numerous Asian, African, and Latin American states regularly voted with Indonesia against General Assembly resolutions supporting Timorese self-determination. These resolutions nonetheless passed each year through 1982, after which they were not resubmitted for a vote.<sup>35</sup> As the invasion and occupation progressed and reports of atrocities reached other countries, officials in many of the world's most powerful nations ignored them, choosing instead to accept the Indonesian government's propagandistic accounts of the conflict.

International complicity went beyond mere inaction and diplomatic support. Many countries affirmatively supported Indonesia's operations in East Timor, primarily through military assistance and equipment sales, even while ostensibly denouncing the violence. Indeed, the Indonesian invasion and occupation was dependent on foreign military equipment.<sup>36</sup>

### ***The transition to independence and the events of 1999***

The Southeast Asian economic crisis of 1997-98 sent Indonesia's economy reeling, contributing to the downfall of the Suharto regime that had dominated Indonesian politics for 32 years. After Suharto's resignation in May 1998, a political window was created for East Timorese independence, and protests and discussion forums took place in Dili and Jakarta. The newly appointed president, Bucharuddin Jusuf Habibie, believed that the occupation was a drain on Indonesia's military and hurt its international standing. He surprised many though by announcing in June 1998 that East Timor would be granted limited autonomy within Indonesia. Independence leaders rejected this proposal, however, and the Indonesian government, after conducting negotiations with Portugal and the UN, then announced in January 1999 that a referendum would be held on the autonomy proposal, with independence as an alternative.

Even while these positive steps toward East Timorese independence were underway, the Indonesian military was stepping up its operations and consolidating its

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documents in December 2001 relating to discussions between Indonesian President Suharto, President Ford and Secretary of State Henry Kissinger in which the imminent attack on East Timor was discussed. See also Allan Nairn's Foreword, in Constancio Pinto & Matthew Jardine, *East Timor's Unfinished Struggle: Inside the Timorese Resistance* (Boston 1997), pp. xiii-xiv, xxiv-xxv, stating that Ford and Kissinger green-lighted the invasion. See also Matthew Jardine's Introduction, in Pinto & Jardine, p. 22, which cites a statement of U.S. State Department; Kiernan, *supra*, p. 200, which quotes Ford as having said to Suharto, regarding the imminent invasion, "We will understand and will not press you on this issue"; p. 204, explaining that Kissinger considered FRETILIN a communist threat.

<sup>34</sup> Taylor, p. 75.

<sup>35</sup> *Ibid.*, p. 177.

<sup>36</sup> According to John Taylor, during the initial invasion, approximately 90 percent of the military equipment used was reportedly supplied by U.S. companies, but during the course of the occupation, equipment came from a number of countries: United States companies sold the Indonesian military jets, bombers, boats, and helicopters, while at the same time the government provided military training to Indonesian forces; Australia provided jets and boats; the United Kingdom provided planes and frigates; France provided helicopters; West Germany provided submarines; and further equipment came from Malaysia, the Netherlands, Taiwan, South Korea, and other countries. Taylor, p. 84, 134, 175, and 203.

control; Indonesian special forces (Kopassus) recruited East Timorese to join newly formed militias, with the objective of creating sufficient unrest and violence within East Timor to greatly deter an independence vote. The militias began operations in January 1999, which were initially limited to intimidation efforts. In February, three pro-independence demonstrators were shot and killed in Dili. The violence escalated in April. In the town of Liquiça, militias and Indonesian soldiers conducted house to house searches to find and kill independence supporters. Thousands of East Timorese civilians fled their homes, and hundreds took shelter in Liquiça's church. On April 7, the church was attacked, and more than 50 civilians were murdered.<sup>37</sup> On April 17, a militia rampage in Dili killed 17 people, while others were killed pursuant to a month long militia campaign in Ermera.<sup>38</sup> On April 21, while General Wiranto was in Dili supervising the signing of a purported peace accord, dozens were killed in Suai.<sup>39</sup>

Notwithstanding these ongoing atrocities, the UN brokered one of three agreements on May 5, 1999, in New York, in which it entrusted the job of providing security leading up to and during the referendum to Indonesian authorities. This decision was, predictably, catastrophic.<sup>40</sup> Militia violence caused the repeated postponement of the referendum, which was eventually held on August 30. Turnout was near-perfect: almost 99 percent of registered voters went to the polls despite intimidation efforts, and 78.5 percent of the population rejected Indonesia's autonomy proposal, amounting to a vote for independence.

The soldiers and militias then made good on militia leader Eurico Guterres' earlier public pledge that, if East Timor chose independence, it would become a "sea of fire."<sup>41</sup> Together, Indonesian soldiers and East Timorese militias conducted a scorched earth policy, burning virtually all the buildings in Dili and other towns, killing hundreds, and committing widespread rape and other acts of violence.<sup>42</sup> Dozens who sought refuge in a church in Suai and at Bishop Belo's house in Dili were massacred, as were priests and nuns. The violence drove hundreds of thousands from their homes: approximately 150,000 crossed the border into West Timor, where about 25,000 remain in camps today, and hundreds of thousands more fled into hiding in the mountains. FRETILIN forces, at the time led by current President Xanana Gusmao, provided virtually no resistance and remained in their military encampments because Gusmao believed their participation would escalate the violence and discourage international assistance.

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<sup>37</sup> See International Commission of Inquiry Report, paras. 37-46, which describes events in Liquiça; Taylor, p. xx.

<sup>38</sup> See International Commission of Inquiry Report, paras. 47-48, which describes Dili killings at the house of Manual Carrascalao and elsewhere; Taylor, p. xxi, which describes Ermera campaign.

<sup>39</sup> Taylor, pp. 224-25.

<sup>40</sup> See Trotter, p. 41, which states that "the fox was clearly in the hen house."

<sup>41</sup> Taylor, p. xxiii. Similarly, Ben Kiernan reports that a "May 1999 Indonesian army document ordered that 'massacres should be carried out from village to village after the announcement of the ballot if the pro-independence supporters win.'" Kiernan, p. 225.

<sup>42</sup> See International Commission of Inquiry Report, para. 35, which gives examples of rape and other terrible acts of violence; UNICEF Report, pp. 12-13, which provides a general recounting of these events; and Taylor, pp. xxiii-xxii.

The UN, which had brought in a civilian support mission in June, evacuated on September 10, 1999. Several dozen of its staff refused to leave because they believed the hundreds of displaced persons who had taken shelter in the UN compound would be slaughtered. They were eventually able to negotiate for the safety of those sheltered in the compound, and left several days later.<sup>43</sup> Virtually all of the remaining foreigners in East Timor, including journalists, solidarity activists, relief workers, and diplomatic staff, were evacuated by plane to Australia.<sup>44</sup> The militias and soldiers were fairly careful not to kill foreigners<sup>45</sup> (although five of the UN's local staff were killed, as was a Dutch journalist, reportedly murdered by Indonesian soldiers), but by this point, finally, the world media was following the East Timor situation closely. In response to the resulting international outcry, the UN sent in an Australian-led military force to East Timor on September 21, 1999. Facing intense international diplomatic pressure and the threat of economic reprisals, including the cutoff of economic aid and the imposition of sanctions, Indonesia ceded control of East Timor to the UN on September 27, and withdrew its remaining troops in October. By that time, it was estimated that well over a thousand civilians had been killed in 1999 alone.

The UN Transitional Administration in East Timor (UNTAET) governed the country until the transfer of sovereignty to the new East Timorese government on May 20, 2002. Today there remains a reduced UN Mission of Support for East Timor (UNMISSET), but it will further decrease its presence in 2005. The Serious Crimes Unit and Special Panels began operation during the UNTAET period and continue with UNMISSET support, but are currently scheduled to close down operations by May 20, 2005.

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<sup>43</sup> See Taylor, pp. xxvi-xxvii.

<sup>44</sup> Interview with Charlie Scheiner, Sept. 3, 2004 in which he describes the evacuation process and decision-making among foreign solidarity group members then present in Dili.

<sup>45</sup> Ibid.

## II. THE INDONESIAN AD HOC HUMAN RIGHTS COURT

### Background

In the immediate wake of the 1999 violence, there was extensive international pressure on Indonesia to bring those responsible for the atrocities, including high-level military officers, to justice. The International Commission of Inquiry appointed by the UN High Commissioner on Human Rights, in a report presented to the Security Council on January 31, 2000, found that the Indonesian military was responsible for serious human rights violations and recommended the establishment of an ad hoc international criminal tribunal.<sup>46</sup> Meanwhile, Indonesia's own National Human Rights Commission (Komnas HAM) had also appointed a special commission of inquiry (KPP HAM). The initial report of KPP HAM, also issued on January 31, 2000, similarly found Indonesian military officials responsible for crimes against humanity, and identified 33 individual perpetrators, including several high-ranking military officials.

The Indonesian government, to stave off growing pressure for an international tribunal, indicated it was capable of prosecuting its own generals, and made it clear that it preferred this option to the establishment of an international court, with which Indonesia would refuse to cooperate. The UN tentatively agreed to Indonesia's proposal, but Secretary-General Kofi Annan stated that the Security Council reserved the right to pursue further justice efforts in the event the Indonesian trials did not satisfy international standards.<sup>47</sup> Expressing concern that Indonesia lacked the political will to hold legitimate trials, the Secretary of Komnas HAM, Asmara Nababan, stated on Dutch radio in April 2000 that it would be "better to set up an international tribunal. It is the only way for justice to be done."<sup>48</sup>

Nonetheless, Indonesian Law 26/2000 established the permanent human rights courts in Jakarta, Surabaya, Medan, and Makassar, with jurisdiction over events taking place after the law's passage, and also allowed "ad hoc courts" with retroactive jurisdiction to be created by presidential decree. The court in Jakarta that heard the East Timor cases is an ad hoc court, but it operates under the same procedure, legal mandate, and institutional structure as do the permanent human rights courts, which heard their first cases (not involving East Timor) in 2004. Law 26/2000 roughly parallels the substantive legal standards of the Rome Statute of the International Criminal Court, and extends to genocide and crimes against humanity. Crimes against humanity are defined to include certain specific acts—including murder, enforced eviction or movement of civilians, torture, rape, sexual slavery, forced sterilization, persecution, and

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<sup>46</sup> See S/2000/59.

<sup>47</sup> See Secretary-General Kofi Annan, Letter of January 31, 2000, to General Assembly, A/54/726, S/2000/59, available at [http://www.unhcr.ch/huridocda/huridocda.nsf/\(Symbol\)/A.54.726,+S.2000.59.En?OpenDocument](http://www.unhcr.ch/huridocda/huridocda.nsf/(Symbol)/A.54.726,+S.2000.59.En?OpenDocument), which states that the Commission of Inquiry's recommendation of an international tribunal "merits careful consideration," that "further steps" might still be taken, and that "I will closely monitor progress towards a credible response in accordance with international human rights principles."

<sup>48</sup> See East Timor Observatory, *Indonesia Delays East Timor Atrocities Trials*, January 25, 2002, available at <http://www.pcug.org.au/~wildwood/02jandelays.htm>.

disappearances—when “committed as part of a widespread or systematic attack directed against a civilian population.”<sup>49</sup> The law also expressly incorporates the concept of command responsibility, making superior officers legally liable for crimes against humanity if they knew or should have known about them and failed to act to stop them.<sup>50</sup> Penalties for various offenses are specified in the statute and range upward from five years.

With respect to East Timor, the Ad Hoc Human Rights Court’s jurisdiction was initially restricted to events that occurred after August 1999, but as a result of substantial international pressure, the Attorney General’s office announced its intent to pursue five cases: four massacres that took place in April and September 1999, as well as the murder of Dutch journalist Sander Thoenes. Thereafter, however, a presidential decree was issued that established the Ad Hoc Human Rights Court with retroactive jurisdiction over events in East Timor, No. 53/2001, and proceeded to limit the court’s jurisdiction to violations of Law 26/2000 that occurred after the August 30, 1999, independence referendum, which excluded three of the five cases the Attorney General’s office had stated that it would pursue. After an international outcry,<sup>51</sup> the government modified the decree, although the new decree, No. 96/2001, still imposed strict geographic and temporal limitations: the court may hear cases concerning only those crimes committed in Suai, Liquiça, and Dili in April and September 1999, roughly tracking the attorney general’s previous announcement.<sup>52</sup> In addition to the ad hoc court for East Timor, another ad hoc court was created by presidential decree, covering a massacre that took place in Indonesia in 1984 at a mosque in the Tanjung Priok area of Jakarta.

As judicial reform expert Greg Churchill explained, the creation of a specialized court for human rights—in both its ad hoc and permanent incarnations—is part of a broader process of increasing specialization in the Indonesian judicial system.<sup>53</sup> Indonesia’s Commercial Court, established in 1998 as a response to an anticipated flood of bankruptcy cases following the economic crisis, served as a model for the other specialized courts, to which new anticorruption, tax, and labor courts will soon reportedly be added. Many of the innovative policy reforms implemented in the Human Rights Court were pioneered in the Commercial Court—for example, the use of ad hoc judges. Traditionally, Indonesian judges, like those in many civil law countries, are part of a career judiciary: after law school, they enter service as a law clerk or assistant and work their way up through the system, with the hope of eventually becoming a Supreme Court justice (there are 51 justices). Panels in the specialized courts, on the other hand, are made up of a combination of career and “ad hoc” judges, i.e., those appointed at some later stage of their careers. They are academics rather than practicing lawyers; by regulation, the Supreme Court has provided that ad hoc judges must be members of law faculties.

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<sup>49</sup> Law 26/2000, art. 9.

<sup>50</sup> *Ibid.*, art. 42.

<sup>51</sup> See, e.g., Amnesty International, *One Step Forward, Two Steps Back*, Press Release, April 25, 2001, available at <http://www.globalpolicy.org/wldcourt/tribunal/2001/0425etim.htm>.

<sup>52</sup> See East Timor Observatory, *Indonesia Delays East Timor Atrocities Trials*, January 25, 2002, available at <http://www.pcug.org.au/~wildwood/02jandelays.htm> (setting forth timeline).

<sup>53</sup> Interview, Aug. 31, 2004.



In the Human Rights Court, each trial is heard before a panel of five judges; appeals are heard by a panel of judges on the Court of Appeals and thereafter by an 11-justice panel of the Supreme Court. The appellate and Supreme Court judges are also specially appointed to hear human rights cases, although those cases constitute only a small portion of their docket.

### **Prosecution – Unable and Unwilling**

The initial UN decision to defer action on an international tribunal until Indonesia had had a chance to try the alleged perpetrators—although risky in light of Indonesia's record in East Timor, including its total violation of its obligations under the security agreement of May 5, 1999—was somewhat understandable. It avoided the political difficulties and costs associated with establishing a large ad hoc international tribunal such as those for Rwanda and former Yugoslavia, and it gave the world's fourth-largest country, then in the early stages of democratization, an incentive to develop an effective human rights institution. In addition, the willingness of Komnas HAM, the government's human rights body, to issue a comprehensive, hard-hitting, and impartial report in which it named high-ranking generals as perpetrators was an encouraging sign, and Indonesia, unlike any external body, at least had access to and the ability to arrest the accused.

At this point, however, the international community must recognize that the experiment of allowing the Indonesian government to conduct its own trials has been a failure, both in terms of achieving justice for victims in East Timor and in terms of developing respect for the rule of law in Indonesia. In the absence of sustained international political pressure, Indonesia has repeatedly forestalled justice efforts by demanding more time for a process it had no intention of seriously carrying out.

Of the 33 individual perpetrators named in the initial Komnas HAM report, many of the highest ranking officers were not charged. Of the 18 who were indicted, 12 were acquitted at the trial stage, four had their convictions reversed in the July 2004 decisions of the court of appeal and one, Abilio Soares, the last governor of East Timor and one of two East Timorese charged, had his conviction overturned by the Supreme Court on November 5, 2004. Thus, the sole conviction that stands today is that of Eurico Guterres, an East Timorese militia leader. His appeal is currently before the Supreme Court, and many expect his conviction to be reversed. In the meantime, he remains free pending the final appeal, and as recently as 2003 reportedly trained militias in Papua for the purpose of quelling a longstanding independence movement there.<sup>54</sup>

In short, the Indonesian authorities and their highest-ranking proxies have enjoyed complete impunity. A criminal justice system cannot be measured only by its conviction rate, of course. But the consensus of informed observers is that the process has been a failure, marred in part by prosecutorial and judicial incapacity, but primarily by lack of political will and systematic military intimidation of participants.

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<sup>54</sup> See, e.g., Franciscans International, *Statement at UN Commission on Human Rights*, April 19, 2004, available at <http://www.pcug.org.au/~wildwood/02jandelay.htm>.

### *Prosecutorial incapacity*

Although the problems in the ad hoc court process have been myriad, most local and international observers place most of the blame for its failure on the Attorney General's office. There, prosecutors have shown little capacity and political will to pursue prosecutions vigorously.

First, the contents of the indictments and the evidence introduced at trial revealed that the prosecutors were almost completely unfamiliar with—or else willfully disregarded—basic international law concepts that are essential to proving a case of crimes against humanity. For example, the indictments and evidence focused narrowly on particular incidents, without placing them in the broader context of Indonesia's orchestrated campaign to terrorize the population and its subsequent scorched earth policy. Without this context, it is difficult to demonstrate that a given crime occurred pursuant to a “widespread or systematic attack on a civilian population.” This narrowness of focus is in part linked to the geographic and temporal limitations put in place by the second presidential decree, which excluded many major crimes from the court's jurisdiction and made it more difficult to prove that those that remained constituted crimes against humanity. Even with such jurisdictional limitations, however, nothing prevented the prosecutors from introducing evidence of other relevant incidents in order to demonstrate a pattern; they only were prevented from *charging* the defendants with those crimes. Prosecutors also neglected to introduce and establish a pattern using the substantial number of incidents that existed even within the temporal and geographic limitations.

Similarly, prosecutors were not only unfamiliar with but also reluctant to pursue individual and superior responsibility for the crimes. According to Greg Churchill, there was a “resistance to concepts of command responsibility” that was linked to a fundamental lack of political will by the Attorney General's office to charge high-level military officers, a problem discussed further below.<sup>55</sup>

A second problem was a lack of trial skills and preparation on the part of the lawyers, including those who argued the cases at trial. In general, those who prosecuted the cases had not done the preparatory work. Although that arrangement is routine in many law offices around the world, trial lawyers participating in the ad hoc court would reportedly simply glance over the materials prior to trial.<sup>56</sup> Most of the observers with whom we spoke acknowledged that this practice is a problem that pervades the Indonesian court system generally, but it exacerbated the difficulties experienced by trial prosecutors in the East Timor cases, since the cases were exceedingly complex and concerned unfamiliar crimes.

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<sup>55</sup> Interview, Aug. 24, 2004.

<sup>56</sup> *Ibid.*

### ***Lack of political will***

Identified by most observers as the greatest problem plaguing the Ad Hoc Human Rights Court, the lack of political will to prosecute the offenders appears to start with the President and permeate throughout the office of the Attorney General. Several specific failings reflect this attitude. First, many of the highest-ranking Indonesian military officers implicated by the Komnas HAM report were never charged, despite the availability of ample evidence of their culpability. Moreover, none of the officers identified as culpable have been stripped of their army posts, and many have been promoted. General Wiranto, the highest-level individual charged by the SCU, was the nominee of the dominant Golkar party in the 2004 presidential election, and although missing the runoff, won about 25 percent of the vote. Impunity has thus gone beyond a mere lack of criminal justice efforts. Apart from some degree of damage to Wiranto's presidential prospects, these generals have faced *no* significant negative consequences for their actions at all. In fact, some have been promoted and allowed to repeat their crimes elsewhere: in addition to "supervising" Eurico Guterres' activities in Papua, for example, General Adam Damiri was promoted and became involved in directing the offensive in Aceh.<sup>57</sup> General Suhartono Suratman was also promoted and is believed to have "aided the Indonesian military in drafting the martial law decree for Aceh and [at least as of October 2003] to have an active role in the running of military operations in the province."<sup>58</sup> Prosecutors told us that they decided whom to prosecute based on the sufficiency of the evidence given to them by Komnas HAM; but it is a suspicious coincidence, at least, that they decided they had insufficient evidence against the highest level officers accused of crimes. Moreover, as discussed below, prosecutors chose not to seek out more evidence through further investigation, although they could have done so.

Second, the prosecutors were halfhearted in seeking evidence and introducing it in court. Notably, prosecutors put forward only a fraction of the evidence collected by Komnas HAM. Komnas HAM commissioners had traveled to East Timor several times, including during the fall of 1999, to collect witness statements and other critical pieces of information, including evidence concerning the military's operations and effective control over the militias. Although turned over directly to the prosecutors' office, little evidence made it into court. One notable example is the so-called "Garnadi document," a letter from Brigadier General Garnadi in July 1999 suggesting that a scorched earth policy be pursued if the referendum results were unfavorable.<sup>59</sup>

Asmara Nababan, who was Secretary-General of Komnas HAM at the time of its East Timor inquiry, told us he believed that had the documents and other information the commissioners collected been introduced, it would have been sufficient to establish responsibility for crimes against humanity against each of the perpetrators they identified.

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<sup>57</sup> Human Rights Watch, *Indonesia: Transfer Convicted General From Aceh*, Aug. 5, 2003, available at <http://www.hrw.org/press/2003/08/indonesia080503.htm>.

<sup>58</sup> Human Rights Watch, *Aceh Under Martial Law: Can These Men be Trusted to Prosecute This War?*, October 15, 2003, available at <http://hrw.org/backgrounder/asia/indonesia1003.htm>.

<sup>59</sup> See Bernd Hausler, *Justice for the Victims: A Legal Opinion on the Indonesian Human Rights Trials Concerning the Crimes Committed in East Timor in 1999*, p. 12 (Apr. 2003, translated by Watch Indonesia! Mar. 2004).

He emphasized that what Komnas HAM collected was a small fraction of what might have been available had the commission had more time, resources, and authority.

Notably, the commission had no power to subpoena evidence and witnesses, a power that would have been very useful in obtaining internal TNI documents and testimony from soldiers. The Attorney General's office could serve subpoenas and had the authority to send cases back to Komnas HAM for further investigation and collection of evidence, but apparently never used either of these powers. Lead human rights prosecutor I Ketut Murtika described a close working relationship with Komnas HAM's commissioners,<sup>60</sup> but according to the commissioners with whom we spoke, the prosecutors never took advantage of that relationship.

Nor did the prosecutors cooperate and share information with the Serious Crimes Unit in East Timor. Prosecutors could have also had access to the thousands of witness statements collected by the CAVR, but reportedly never asked for them. Moreover, the Indonesian prosecutors failed to respond to the requests for information they received from the CAVR and SCU.<sup>61</sup> Indeed, SCU investigators who traveled to Jakarta to interview witnesses were, with few exceptions, denied access to them, and they also were not allowed to interview witnesses in the refugee camps in West Timor.

Third, both the charges issued and the statements made by prosecutors in court indicated that the Attorney General's office shared the military's distorted and self-serving view of the East Timor violence: that it was a civil conflict that got out of hand, and that certain soldiers might have committed regrettable acts, but that such events were an inevitable byproduct of war.<sup>62</sup> According to Indonesian human rights advocate Hilmar Farid, "the ad hoc court is designed to legitimize the army's view that this was a civil war, not a crime against humanity, or a military operation—just an unfortunate event."<sup>63</sup>

The view of the conflict advanced in the Jakarta trials contravenes that of outside observers, yet it is the prevailing understanding of the East Timor conflict within Indonesia, where the government's account is largely accepted. Part of this official account blames the United Nations for the 1999 violence. Most recently, in a brief submitted by his counsel to the Special Panels in East Timor, General Wiranto contended that the United Nations' "deceit" was the trigger of the violence. That view was never contested by the government of Indonesia. As Secretary-General Kofi Annan acknowledged, this misrepresentation "cannot be tolerated."<sup>64</sup>

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<sup>60</sup> Interview, Aug. 25, 2004.

<sup>61</sup> Interview with Hilmar Farid, Aug. 26, 2004.

<sup>62</sup> See, e.g., 'I Helped Avert Civil War in Timor Leste,' Says Wiranto, *The Straits Times* (Singapore), Feb. 14, 2003.

<sup>63</sup> Interview, Aug. 26, 2004.

<sup>64</sup> Letter of Secretary-General to Juan Mendez, ICTJ, July 22, 2004, one of the signers of the letter to the Secretary-General urged him to appoint a commission to remedy the crimes committed in East Timor. See also UN News Centre, "Annan Speaks Out Against Allegations of Irregularities in UN-backed East Timor Vote."

Fourth, the bizarre sequence of events in the trial of General Adam Damiri seriously underscores the process's lack of rigor and credibility. In its closing statement, the prosecution asked the Ad Hoc Human Rights Court to dismiss the charges against Damiri, the highest-ranking military officer charged, contending that the evidence they presented was insufficient to convict him. The judges, however, refused to do so, deeming the grounds for the request "inaccurate and inconsistent" and declaring that the evidence introduced had demonstrated his guilt and the existence of "a repeated pattern of attacks."<sup>65</sup> Damiri was convicted by the trial chamber and given a three-year sentence. The prosecutors then appealed the conviction, which was reversed by the appeals chamber in a decision that, as of this writing, has not been released to the public.

Although a prosecutor is ethically obligated to not pursue a case if there is insufficient evidence of guilt, both the trial court's ruling and the assessments of many observers indicate that in this case the request was a dereliction of duty; to the extent evidence against Damiri was lacking, it was purportedly because the prosecutors failed to introduce it and to press their case vigorously.<sup>66</sup> Mark Cammack, a UN observer of the trials, praised the independence and courage of the trial judges who convicted Damiri, saying that even though much of the testimony presented by the prosecution at Damiri's trial was exculpatory, the judges legitimately found that the inculpatory testimony of victim-witnesses and others was more credible than the testimony of witnesses from the Indonesian military or civil administration.

### ***Judicial incapacity and court administration***

Because the prosecutors presented such poor cases, it is difficult to assess the capacity and performance of the judges. In the few cases in which convictions were achieved at the trial level, the courage of a few judges to hold TNI officials accountable has been widely credited—especially in the Damiri case.<sup>67</sup> And while the recent decisions by the Appeals Court and Supreme Court overturning all but one conviction has been widely decried, most observers privately concede that it is possible that the decisions were correct, at least for some of the defendants. The judgments have not been released to the public, so their rationale cannot be assessed, but it stands to reason that if the evidence that the reluctant prosecutors chose to introduce was inadequate as to certain crucial elements of the offenses, conviction might well have been in error.

Based on the assessments of observers of the trials, the judges seem to have varied considerably in their general competence and in their level of preparation for cases, which involved applying complex concepts of international criminal law. Agung Yudhawiranata, East Timor project coordinator for the NGO Elsam, which monitored the trials, says that the issues with the judges, in contrast to those in the prosecutor's office, relate more to capacity than to political will; he believes that Indonesian judges in general

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<sup>65</sup> Verdict as quoted in Jakarta Post, Aug. 6, 2003.

<sup>66</sup> See, e.g., David Cohen, *Intended to Fail: The Trials Before The Ad Hoc Human Rights Court In Jakarta*, pp. 16-19 (2003). Cohen's account criticizes both the prosecution's weak efforts to introduce evidence in the Damiri case and its erroneous legal and factual assessments in its closing statement arguing for acquittal.

<sup>67</sup> Cohen, p. 19.

try to follow the law.<sup>68</sup> On balance, the “ad hoc” judges from international law backgrounds were better prepared than the members of the career judiciary, though there are exceptions. One judge told us that the number of judges at the trial, appeals, and Supreme Court stage who are willing to stand up to the military is quite few; on most panels, they are outvoted. In general, however, the ad hoc judges have more public trust than the career judiciary, largely because in the judiciary, extortion has reportedly been routine. Observers told us that extortion has tended to be less oriented toward enriching judges personally than toward financing the courts as an institution; funds exacted from parties in exchange for favorable rulings have been used to pay for court supplies and infrastructure.

The career judges have typically lacked knowledge and, in many cases, motivation—a problem that is partly structural, and is reflected also in the longer-term experience of the Commercial Court. Serving in a specialized court can be a detour from career advancement in the judiciary, according to judicial reform expert Zacky Husein.<sup>69</sup> There is little reward offered to career judges for increased accumulation of international law knowledge, since most judges will soon be mainstreamed back into the ordinary courts where they will never hear human rights cases. Another aspect of the structural problem is that career judges were, until April 2004, employed under the administrative auspices of the Ministry of Justice—which paid their salaries, for example—rather than that of the Supreme Court. This impaired judicial independence from the government, a problem that has pervaded Indonesia’s judicial system. Moreover, the Ministry’s poor administration and funding has apparently resulted in judges not getting paid. Some judges therefore did not show up at trials, causing delays.

Resource shortages in the courts are another problem that has plagued the ad hoc courts. The courts have limited access to the Internet and other legal materials, making research in human rights cases very difficult. Judges cannot, for example, without adequate technology, access the rulings of the Yugoslav and Rwanda Tribunals online. Even if they could, most Indonesian judges could not read them because the jurisprudence of the international tribunals and a majority of other international legal materials are not available in Bahasa Indonesia.

Another concern in the East Timor cases has been the issuance of lenient sentences below the legal minimum. Law 26/2000 provides various sentences guidelines for different crimes, with a minimum sentence of five years’ imprisonment for the least serious crimes and ten years or more for others. But in the cases of both Abilio Soares and Adam Damiri, three-year sentences were issued at the trial court level.<sup>70</sup> An Ad Hoc

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<sup>68</sup> Interview, Aug. 26, 2004.

<sup>69</sup> Interview, Aug. 27, 2004.

<sup>70</sup> Sukma Loppies et al, *High Court Releases Adam Damiri From Human Rights Violations Charges*, Tempo Interactive, Aug. 6, 2004, at <http://www.tempointeractive.com/hg/nasional/2004/08/06/brk.20040806-06.uk.html>; Peter Symonds, *Indonesian Court Acquits Military of East Timor Atrocities*, World Socialist Web Site, Aug. 29, 2002, <http://www.wsws.org/articles/2002/aug2002/indo-a29.shtml>.

Human Rights Court judge told us that these sentences were widely criticized as being the product of a compromise with no legal basis, the result of judges' balancing of countervailing pressures to convict and to acquit.

Lack of transparency in the courts, including the practice of unpublished opinions, is not only a barrier to the assessment of the judicial process, but it may also hinder the fairness and efficacy of the Ad Hoc Human Rights Court. In Indonesia's civil law system, case law does not create binding precedent, even for lower courts. Because courts are merely arbiters of disputes between parties and not makers of law, public release of opinions is deemed unnecessary. The Supreme Court has recently begun to publish 20 of its opinions each year, as helpful models rather than binding precedents for lower courts, but none have been human rights cases. Dissents are also a new development, with one of the first being issued by Supreme Court Justice Artidjo Alkostar, who dissented from the Ad Hoc Human Right Court's decision upholding an acquittal of several officers in one of the East Timor cases. When the first group of ad hoc judges was appointed, they insisted on the right to dissent, fearing that on panels in which they were outnumbered by career judges they might otherwise often be forced to join decisions with which they disagreed.

A refusal to make opinions available publicly can be damaging in cases, like those concerning East Timor, which have great national and international importance. Quite apart from any notion of precedent, the international community needs to know the rationales underlying the various court decisions in order to fairly assess whether Indonesia has met its obligations under international law. The East Timorese people need to know the rationales in order to determine whether the historical record has been set straight and because, as victims, they are directly affected by the proceedings. And the Indonesian public needs to know the rationales as well as the factual findings in order to understand what happened in East Timor, and in order to understand and criticize the functioning of the judicial system when appropriate

The UN has unfortunately compounded the problem of lack of transparency in the East Timor cases by not releasing to the public the reports of its observers, who sat in on the trials. Mark Cammack, the first UN observer, told us the reports were designed as advisory documents for UN policymakers and were not written with a public audience in mind. However, *some* public version of the observers' findings, even if not the reports as initially drafted, should be released and translated into Bahasa Indonesia. Numerous NGO representatives have expressed strong interest in having access to the observer's findings, which could be a valuable resource, both internationally and in East Timor and Indonesia.

### ***Intimidation and witness protection***

During the East Timor trials, the courtroom was usually packed with uniformed and armed military officers, often quite senior, visibly and vocally supporting the defendants. Their presence—ranging in number from 100 to 200, according to Zainal, one of Elsam's monitors—was extremely intimidating to witnesses, especially victims from East Timor, for whom those uniforms were closely associated with horrific

violence. The crowd of armed military personnel, which was the product of an organized military effort, was also designed to intimidate the judges, prosecutors, and defense attorneys. The officers displayed a lack of respect for the court's authority; many observers noted that they wore their hats in the courtroom, a mark of disrespect in Indonesian courtrooms as much as Western ones, and one judge who asked an officer to remove his hat was met with profanity in response. The crowd often created commotions, even yelling at judges in response to adverse verdicts such as Damiri's after which a death threat was reportedly shouted at Judge Rudi Rizki.<sup>71</sup> The effort at intimidation went beyond mere courtroom presence. Prosecutors told us that they received calls advising them to take out life insurance. Because of these scare tactics, prosecutor Widodo Supriyadi noted that "very few people want to do this job."<sup>72</sup> Under such threatening conditions, a lack of enthusiasm for vigorous prosecution is more understandable.

During the East Timor trials, no effective system of witness protection was in place, either inside or outside the courtroom. As a result, prosecutors told us that they were unable to persuade critical witnesses from East Timor to testify before the court in Indonesia. According to prosecutor Muhammed Yusuf, "most of the witnesses are afraid to speak freely and to come before the courts. In East Timor, people answered summons by saying, 'If you provide UN police to protect us, we'll come.'"<sup>73</sup> Others, including one Ad Hoc Human Rights Court judge, questioned the genuineness of prosecutors' efforts to get witnesses to come. In any event, because few victim-witnesses came from East Timor, prosecutors relied largely on hearsay or affidavit evidence, which is said to carry less weight than live testimony under Indonesian law. Victims were far outnumbered by defense witnesses, mostly soldiers.

### **Assessment and Prospects for the Future**

The East Timor trials were the first test of a brand new system, and, partly in response to problems that emerged in the first cases, there have been limited but noticeable improvements since the trials began in the capacity of the prosecutor's office and the judiciary. First, a specialized human rights division was created within the Attorney General's office, with certain prosecutors assigned to prosecute human rights cases full-time; in contrast, the prosecutors who handled the East Timor cases had no previous human rights experience. That specialization will make the task of training prosecutors in international law much more manageable. The prosecutors have done some work with advisers from the ICTY and the ICC, for example, and a few have joined in judicial training programs.

Second, a number of the judges on the Ad Hoc Human Rights Court have now participated in training programs in international human rights law. These courses have not been very extensive in scope, but have focused simply on teaching basic concepts. For example, a delegation of 16 judges and Supreme Court Justices, led by Chief Justice

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<sup>71</sup> Interview, Aug. 25, 2004.

<sup>72</sup> Cohen, p. 19.

<sup>73</sup> Interview, Aug. 25, 2004.



Bagir Manau, traveled to Denmark for a two-week course by the Danish Institute for Human Rights; there have also been some training sessions run by the East-West Center and the Berkeley War Crimes Center. Within Indonesia, workshops are scheduled, and some have already been held, in the four cities where the Permanent Human Rights Court sits.

Much more remains to be done, however. In addition to training, there is also a great need for basic resources like computers, Internet access, and international legal materials. Change within the Ad Hoc and Permanent Human Rights Courts will also be affected by broader structural changes in Indonesia's judicial system. One such change has occurred already, namely the "one roof" policy that put the court within the administrative control of the Supreme Court rather than the Ministry of Justice. As for the future, it is not clear yet whether the movement toward increased judicial specialization is permanent. As judicial reform analyst Zacky Husein explained, specialization has costs for the judiciary: it creates added institutions within the system that need to be funded, staffed, and housed, and, as noted above, placement on specialized courts has not been welcomed by many career judges.<sup>74</sup> The Human Rights Courts were created by statute, so they cannot be eliminated by the Supreme Court without a further act of Parliament, but there is no guarantee that this will never happen.

Furthermore, even while capacity is slowly growing, it is too early to tell whether political will to prosecute those responsible for the East Timor violence will change under the new administration. As noted by Agung Yudhawanata of Elsam, "lack of capacity is an easier problem to fix than lack of political will."<sup>75</sup> Lack of political will on the part of the prosecution is not simply a problem with the individual prosecutors; it comes from the top. The Attorney General sits in the Cabinet along with the head of the military, and the Ministry of Justice is historically closely tied to the military. According to Agung, the relationship between the two institutions is "like brother and sister—you can't prosecute your brother or sister without subjectivity."<sup>76</sup> Similarly, one leading human rights activist states that the "biggest problem in the East Timor cases is lack of will from the highest levels of the government."<sup>77</sup> The Attorney General answers to the President, and during her presidency from July 2001 to September 2004, President Megawati was largely incapable of escaping the military's grip on Indonesian politics. Indeed, since she had run unsuccessfully for the presidency on a platform designed in part to mobilize nationalist sentiment against President Habibie and Timorese independence, and later gained power partly by winning powerful institutional support from the military, it is unsurprising that she did not favor the aggressive pursuit of justice. This reluctance to confront the military persists despite the fact that Megawati's own supporters had in the past been victims of killings and disappearances.

The military background of Megawati's successor, Susilo Bambang Yudhoyono, may make him a President more capable of standing up to the generals. The recent

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<sup>74</sup> Interview, Aug. 27, 2004.

<sup>75</sup> Interview, Aug. 26, 2004.

<sup>76</sup> Ibid.

<sup>77</sup> Interview, Aug. 26, 2004.

reaction of his newly appointed Attorney General, Abdul Rahman Saleh, to the Supreme Court's decision reversing Abilio Soares' conviction suggests that the new President's administration may do just that. Four days after the Supreme Court decision, Attorney General Saleh, indicated "there is a possibility that the cases will be reopened" and that new cases and suspects could be named for crimes committed in East Timor.<sup>78</sup> Lack of will in Parliament, however, could be a problem, and as one longtime diplomatic observer told us, the foreign ministry has an entrenched position that is hostile to justice. A human rights advocate told us that despite the advent of direct elections, there has been very little change in the composition of the main institutions of government, from Parliament to the TNI itself. "Confronting human rights abuses depends on the will of the parliament, and the structure of the parliament is the same," he said, noting that it is still dominated by the Suharto-era parties Golkar and PDIP (The Indonesian Party of Struggle).<sup>79</sup>

Another aspect of the problem of political will is cultural—generally, within the Attorney General's office and in Indonesian society as a whole. The culture of the Attorney General's office has tended to be deeply militaristic, seemingly a byproduct of the fact that past attorney generals have often been military officers. Prosecutors dress in uniforms that closely resemble military uniforms. Junior attorneys stand at attention and salute their superiors. The prosecutor's office is one of the few branches of Indonesian civilian government that observes these rituals. Most prosecutors greatly respect the military as an institution, which makes it difficult for them to accept the notion of institutional responsibility for horrific acts. They may also admire the very individuals they have to prosecute. And they were friendly with many of them as well; as one observer noted, "there may not have been corruption exactly, but these people knew each other." Greg Churchill gave a similar assessment: "Whether there was a conspiracy or not, the military officers could be confident, with a wink and a nod, that the prosecutors wouldn't do them in."<sup>80</sup> Head prosecutor I Ketut Murtika denied that his office had succumbed to political pressure from the military, but conceded that the military had attempted to exert influence on prosecutors.<sup>81</sup>

It is possible that this situation will continue unless there is a significant increase in public pressure for reform. So far this pressure is lacking because the military is an exceedingly powerful institution in Indonesian society. In Javanese culture, authority and strength are greatly valued, and the military has both. It is widely respected and even admired by the public at large, in part, according to Rudi Marpaung of the Indonesian NGO Imparsial, because it is viewed as a solver of problems.<sup>82</sup> Moreover, there is no institutional mechanism for enforcing civilian control of the military. A very large part of the armed forces' financing is off-budget—that is, it finances itself through the control of a variety of legal and illegal enterprises, such as logging, drug smuggling, and

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<sup>78</sup> See e.g., M. Taufiqurrahman, *Reopening Timor-Leste Cases Possible, says AGO*, The Jakarta Post, Nov. 10, 2004.

<sup>79</sup> Interview, Aug. 26, 2004.

<sup>80</sup> Interview, Aug. 24, 2004.

<sup>81</sup> Interview, Aug. 25, 2004.

<sup>82</sup> Interview, Aug. 28, 2004.

exploitation of Indonesia's ample oil supply.<sup>83</sup> As Asmara Nababan noted, TNI is like "a state within a state," a virtually sovereign entity that is beholden to no one.<sup>84</sup> According to Nababan, the government is genuinely afraid that it might get overthrown if it pushes the military too far. Thus, a "big, big question for activists" is to find ways of pushing for justice without raising too much risk of a backlash.<sup>85</sup>

That said, the military and government in the post-Suharto era, do at least respond to local public opinion, and a significant minority that resents and speaks out against the special treatment given to military officers may be emerging. According to Kamala Charakirandra of the National Commission on Violence Against Women, "there is enough of a critical mass of people who believe there is something systematic occurring with the military's abuses of human rights . . . If there is any international support, even among civil society, to build up this more systemic view, this will really help."<sup>86</sup>

With the exception of a few activists, most Indonesians who care about human rights specify that East Timor is not a high priority. There are two main obstacles to the development of effective public pressure for investigating military abuses within East Timor. The first of these is nationalist sentiment. Even though many sympathize with the suffering of victims there, most Indonesians still harbor resentment about the loss of East Timor and believe that President Habibie made a mistake in permitting a vote on independence. Indonesia invested a great deal of money in its operations in East Timor, and thousands of its soldiers died there; to most Indonesians, independence meant all of those costs were wasted, and the fact that some 80 percent of the infrastructure Indonesia built was then destroyed by its own authorities during the 1999 scorched earth campaign does not appear to diminish the force of this view.

A second obstacle is remoteness. When East Timor gained its independence, most Indonesian's paid less attention to it. Justice concerns for East Timor diminished as well, particularly when considering the many atrocities committed within Indonesia itself by the same military. By far the worst of these were those committed between 1965 and 1967, when an estimated three million Indonesians died. Events such as the Tanjung Priok massacre of 1984 have captured people's attention as well. Tanjung Priok was the main reason for public support for the creation of a human rights court. As several human rights advocates noted in interviews, an attack on a mosque right in Jakarta hit much closer to home than attacks committed against East Timor's largely Catholic and culturally and ethnically distinct population. And current abuses in Aceh and Papua, although geographically distant from most Indonesians, have nonetheless captured considerable attention and pushed East Timor further aside.

A number of Indonesian human rights advocates offered the same assessment: To the extent that Indonesians care about the justice failures in the East Timor cases, it is not because of sympathy for the Timorese specifically, but because of a growing resentment

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<sup>83</sup> Interview with Asmara Nababan, Aug. 26, 2004.

<sup>84</sup> Interview, Aug. 26, 2004.

<sup>85</sup> Ibid.

<sup>86</sup> Interview, Aug. 25, 2004.

about military officers being treated as a special class of citizen above the law. As Komnas HAM Commissioner Enny Soepraapto explained, this resentment is prompting people to have “doubts about the credibility of the justice system.”<sup>87</sup> The prosecution’s request for acquittal in the Damiri case, for example, was viewed as a scandal by many.

The international community can use the East Timor trials to demonstrate that sham trials do not build a culture of respect for human rights and the rule of law. There are clear linkages between justice failures in the East Timor cases and the dangers of military impunity generally—for example, the fact that similar problems have plagued the Tanjung Priok trials, or the fact that some of those accused of crimes in East Timor are now free and committing further abuses in Aceh and Papua.<sup>88</sup> Alex Irwan, of the NGO TIFA, thus argues that it is important to link the East Timor abuses and impunity to crimes committed in Indonesia in Aceh and Papua, situations presently dominating the news.<sup>89</sup> As those cases before the human rights court have shown, impunity for the military, including for atrocities committed in Indonesia, is endemic, permeating the entire justice process. There is a clear negative impact on judicial and rule of law reform when high level perpetrators are able to escape accountability for their crimes.

There is a counterargument to linking East Timor crimes with those committed in Aceh and Papua. Sidney Jones of the International Crisis Group suggests that tying a campaign for justice for East Timor to the current situations in the provinces of Aceh and West Papua risks playing into nationalist fears—within the military, government, and among the public—that East Timor’s independence sets a precedent for separatist movements in those provinces, and that if Indonesia succumbs to international pressure on justice for East Timor, it will simply embolden separatists elsewhere.<sup>90</sup> Those pushing for justice will therefore have to frame their case carefully, emphasizing the distinction between opposition to human rights abuses in Aceh and West Papua and support for those regions’ independence. One can believe that the architects of the atrocities in East Timor should not be permitted to repeat their crimes *anywhere*, or that those atrocities should put Indonesians on guard against the murder of civilians or the use of similar tactics as a means of quelling resistance elsewhere, without taking a stance on the validity of any particular region’s claim to independence. And, as one judge of the Ad Hoc Human Rights Court pleaded, “I and the other judges who support justice need support from the international community. On East Timor and on Tanjung Priok, the military is laughing at us.”<sup>91</sup>

After the Ad Hoc Human Rights Court’s first acquittals in 2002, which were broadly criticized, the Prime Minister of East Timor, Mari Alkatiri, stated that his government would likely ask the Secretary-General to establish an international criminal

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<sup>87</sup> Interview, Aug. 25, 2004.

<sup>88</sup> Kamala Charakirandra, Interview, Aug. 26, 2004.

<sup>89</sup> Interview, Aug. 24, 2004.

<sup>90</sup> Interview, Sept. 8, 2004.

<sup>91</sup> Interview, Aug. 25, 2004.

tribunal to adjudicate the crimes.<sup>92</sup> Instead, yet more time was given to Indonesia to take the cases through the appeals process.

Simply waiting for Indonesia to legitimately try its officers is no longer a viable option, unless the new government sends clear signals that it intends to end impunity for the East Timor crimes and hold new, fair, and credible trials with international involvement. The appeals process has effectively ended. And there is no realistic expectation that the truth commission Indonesia plans to establish will even *address* the East Timor atrocities, much less provide effective justice for them. Legislation passed in September 2004 calling for the establishment of such a commission has been roundly criticized by human rights observers,<sup>93</sup> as it would not provide criminal accountability for the perpetrators, and does not specifically address the East Timor situation. Thus, a remedy will need to be found outside of Indonesia unless the new government indicates its firm commitment to hold those most responsible accountable along the lines discussed below.

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<sup>92</sup> See e.g., Jill Joliffe, *East Timor May Turn to UN After Jakarta War Crimes Fiasco*, Sydney Morning Herald, August 29, 2002, p. 9.

<sup>93</sup> See, e.g., Howard Varney, *Comment on Indonesian Truth and Reconciliation Bill* (draft paper of August 23, 2004, on file with authors).

### III. THE SERIOUS CRIMES UNIT AND SPECIAL PANELS

#### Background

In parallel to the Ad Hoc Human Rights Court trials in Indonesia, the United Nations Transitional Administration in East Timor (UNTAET) in 2000 established a Serious Crimes Unit (SCU) within its prosecutor's office. The SCU's mandate is to investigate and prosecute certain "serious crimes," defined to include the international crimes of genocide, crimes against humanity, and war crimes, as well as certain domestic crimes of murder, torture, and sexual offenses. The domestic legal system has concurrent jurisdiction over murder, torture, and sexual offenses committed at all times other than between January 1, 1999 and October 25, 1999; the SCU's jurisdiction is *exclusive* over those crimes if committed during that part of 1999 and over the other crimes within its mandate no matter when they were committed. The *scope* of the SCU's jurisdiction—and, likewise, that of the Special Panels before which the SCU brings cases—is not temporally limited. However, as a policy matter, the SCU has limited its focus to crimes committed during 1999, a decision discussed further below. The SCU was and remains staffed primarily by foreign UN employees, but the Prosecutor General to whom it ultimately reports, Longhuinos Monteiro, is an East Timorese official. When UNTAET transferred sovereignty to the new government of East Timor in May 2002, the SCU was placed under the political control of the Timorese government.

The UN supported the establishment of Special Panels of judges to hear the cases brought by the SCU. The Special Panels operate within the Timorese judicial system, but the regulations that created them require that the panels be comprised of both East Timorese and international judges. Two international judges sit on each panel, who are UN employees; each of the two panels has one Timorese judge.

In May 2004, UN Security Council Resolution 1543 declared that the SCU "should complete all investigations by November 2004" and that the Special Panels "should conclude trials and other activities as soon as possible and no later than 20 May 2005." These are very short deadlines, particularly when compared to the number of years the Security Council has given the ICTY and ICTR to end their trials and responsibly wrap up their work. The Special Panels deadlines are fast approaching, and assuming the UN sticks to them, it will leave behind a process that is grossly incomplete and which has failed fundamentally to bring justice to East Timor. Of the 373 defendants the SCU has indicted, 279 remain at large in Indonesia. It is important to formulate a completion strategy and devise a plan for how to deal with outstanding indictments when the UN pulls out. Prosecutors estimate that one or two more indictments will be filed before the November deadline passes.

The East Timor government has debated the possibility of amnesty for some or all of those charged; an amnesty bill hotly debated last spring in Parliament has yet to be passed. The proposed bill would have reduced the sentences for those already convicted, no matter what their offense, and granted blanket amnesty to those convicted of nonviolent offenses. Amnesty is being considered in part as a means of enticing

Timorese refugees currently living in camps in West Timor to return to their communities. Many of those are people who participated as militias, and they fear both criminal prosecution and private retaliation. Even if no version of this bill passes, the East Timor government, at least if its current views hold, would probably lack the political will to pursue prosecutions even if perpetrators were eventually arrested inside or outside Indonesia and transferred to East Timor.

Parallel to the criminal justice process for serious crimes in East Timor, a Commission for Reception, Truth, and Reconciliation (CAVR) has been established. CAVR is a Timorese government institution, and its commissioners are all Timorese, although a handful of UN-funded international advisers have been heavily influential in its operations. Unlike the SCU and Special Panels, its focus is on the entire period of the Indonesian occupation. While its Truth Division documents *all* crimes committed during that period, its Reconciliation Division does not address the “serious crimes” for which the SCU has exclusive jurisdiction. The Commission’s Truth Division has taken thousands of witness statements detailing individuals’ experiences with violence and other abuses during the occupation, including those committed by resistance forces. It has also held public hearings, which were attended by hundreds and which have been broadcast on television and radio throughout the country. About 70 percent of the population has either radio or TV access, though some more remote areas do not have either. The Reconciliation Division employs traditional Timorese dispute resolution mechanisms in order to enable those who have committed non-“serious” offenses to reintegrate with their communities. Offenders are required to admit their crimes and accept responsibility. To receive “forgiveness,” usually conferred pursuant to a traditional ceremony, they must offer some kind of restitution to their victims, often in the form of some type of service.

### **Prosecution Obstacles and Deficiencies**

The serious crimes process in Dili was not “intended to fail” in the sense that the Jakarta trials were, but it has largely failed nonetheless.<sup>94</sup> The SCU has been unable to arrest most of those indicted; it has focused on too wide a range of crimes committed during too narrow a time period; and it has not built capacity in the Timorese justice system or of local Timorese. Moreover, the SCU’s efforts have been hampered by a combination of lack of resources and support, ineffective administration, and poor communications within the unit. The UN’s unwillingness to provide sufficient financial and other support early on and throughout the process, as well as poor administration and personnel choices, also undermined the SCU and greatly contributed to its inability to effectively carry out its mandate. Inadequate representation of defendants has also contributed to the failure of the process.

#### ***Wrong focus***

One serious problem is that the SCU’s focus has been simultaneously over- and under-inclusive, attempting to reach too many crimes committed within too short a period

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<sup>94</sup> The quotation is from the title of David Cohen’s report, *supra*.

of time. The SCU's jurisdictional mandate is not limited to 1999, but rather extends to all serious crimes committed in East Timor during the entire duration of the Indonesian occupation. At one point, the SCU considered pursuing certain pre-1999 cases for crimes against humanity, and undertook the initial stages of investigation of the 1991 Santa Cruz massacre, but never got close to issuing indictments. Instead, a policy decision was reached early in the SCU's tenure to prosecute only crimes that took place during 1999. Since that early decision was reached, it has never been seriously reconsidered, even after the SCU completed its investigation and indictments of its top 10 "priority cases" from 1999.

The focus on 1999, at least as a starting point, was in a certain sense understandable. The 1999 violence received much more international attention while it was happening than preceding atrocities during the invasion and occupation for at least two reasons. First, the UN ran the popular consultation in 1999, and the international community justifiably felt that the UN's authority had literally been attacked. Indonesia blatantly violated the terms of the May 5, 1999 security agreement, and furthermore, it physically attacked the UN's facilities in Dili and elsewhere, forcing their evacuation and killing five members of the UN staff. Second, the 1999 referendum attracted a considerable foreign media presence in East Timor as well as a number of foreign activists who were members of solidarity networks. As a result, it was impossible for the world to ignore what was happening: graphic pictures and reports were broadcast throughout the world every day, at least until the journalists and activists themselves had to be evacuated. And as Cecilio Caminha Freitas of East Timor People's Action observed, as a practical matter, prosecuting the 1999 crimes was easiest, since they were recent and evidence was more readily available.<sup>95</sup> Furthermore, the SCU's limited resources have constrained its ability to thoroughly investigate older cases.

Nonetheless, victims' groups and other justice advocates in East Timor have widely condemned this focus, observing that the some 1500 lives lost in 1999 constituted less than 1 percent of the total death toll from violence and famine throughout the occupation. As CAVR's Patrick Burgess—whose organization has documented crimes from the entire period—noted that 1999 was "the tail of the animal."<sup>96</sup> The fact that the international community paid little attention to these longer-term horrors while they were happening is no reason to perpetuate that case of willful ignorance. Many of the atrocities that took place from 1974 onward were major events with hundreds of witnesses, many of whom are still available, and many of the perpetrators are still alive and at large. And the international community, as discussed above, bears considerable responsibility in facilitating or ignoring the crimes. Notably, we found that the sentiment that pre-1999 crimes equally merit justice efforts was shared even by those who lost family members in the 1999 attacks—for example, members of a victims' advocacy group in Liquiça.

Furthermore, the SCU's exclusive focus on 1999 cannot be defended as a necessary choice in the face of limited resources, because its approach has been

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<sup>95</sup> Interview, Sept. 1, 2004.

<sup>96</sup> Interview, Aug. 31, 2004.



astonishingly expansive in another sense: it has indicted literally hundreds of defendants, the great majority of whom have been low-level perpetrators whose offenses fall far short of the threshold for crimes against humanity. Technically, the SCU's mandate to address "serious crimes" extends beyond violations of international law; thus, in contrast to the situation in the Jakarta court, such crimes as individual murders and rapes can be prosecuted even without a showing that they are linked to a broader pattern of widespread or systematic attacks. The SCU has stretched even this broad mandate beyond recognition, however. For example, informed observers told us that individual beatings that might properly be charged as simple or aggravated assault have been charged as "torture," while abductions have been charged as "persecution," a crime against humanity.

Close observers of the process, including SCU staff, gave us three primary reasons for this broad approach. First, after finishing investigating and indicting its first 10 priority cases, individuals within the SCU wanted to justify the unit's continued existence, so they took on the massive task of trying to prosecute the 1999 crimes comprehensively. This has had some public support, as some insist that all 1500 murders committed in 1999 be prosecuted by the SCU. Second, communities applied heavy pressure for prosecution in some cases, such that prosecutors feared that some of the low-level perpetrators would be targeted by vigilante violence if they were not formally charged in the courts; some of those cases have not actually been pursued toward trial, with the idea being that the indictment is enough to appease the public. Since the SCU has exclusive authority to prosecute the serious crimes of murder, torture, and rape committed in 1999, community members rightly feared that perpetrators would escape justice if the SCU did not take up the cases, as, absent a legislative amendment, the ordinary courts of East Timor would have no jurisdiction over these crimes. Third, there was pressure to demonstrate the success of the serious crimes process by achieving a large number of convictions—now, at 55, higher than the number reached at any other international or hybrid tribunal.

None of those explanations is convincing: the first is self-serving and unrealistic, the second could have been resolved through other means such as amending the regulations to allow for domestic prosecution, and the third is based on the fallacy that an international or hybrid tribunal's effectiveness can be measured by sheer number of convictions. Regardless of whether it is technically permitted under the law, for a UN-run and funded tribunal to address comprehensively what are essentially domestic crimes is a gross misallocation of resources and a misguided approach in terms of achieving justice for the most responsible perpetrators. Every act of violence committed in East Timor is deplorable, and every victim deserves justice. However, crimes not rising to the level of violations of international law should be pursued by the domestic legal system. Sending in and paying internationals to prosecute so-called 'ordinary' crimes that can and should be prosecuted domestically, while a large number of more culpable perpetrators go unpunished, cannot be justified.

Furthermore, the SCU's broad focus has undermined the credibility of the process and the public perception that justice is being achieved. Juxtaposed against the total

impunity enjoyed by Indonesian generals who committed the worst atrocities—both during and before 1999—the sometimes harsh punishments handed down by the Special Panels to lower level East Timorese defendants for comparatively minor crimes trigger understandable resentment among many Timorese. To much of the public, the trials have only served to hammer home the message that only the lowest level perpetrators—and only the Timorese—are held accountable. As victims’ advocate Eliza Dos Santos said, “The process as it is only gets the hands and feet, not the whole body of the organization.” As she further explained, the fact that only Timorese have been put in prison distorts history by suggesting that only Timorese are responsible.<sup>97</sup>

The SCU’s initial approach of identifying 10 priority cases within 1999 was commendable, although it should have indicted far fewer individuals for each of those incidents (it indicted 183 persons total in the 10 cases) and instead focused on those bearing the greatest responsibility, as the Secretary-General had recommended in his April 2002 report to the Security Council.<sup>98</sup> The SCU began to shift its focus and in February 2003, issued an indictment against the highest level Indonesians, including General Wiranto, General Zacky Anwar Makarim and others; it also issued an indictment focused on TNI and militia members. The UN, instead of welcoming the high-level indictment, tried to distance itself from the SCU, a reaction that surprised many in the SCU and those following the justice process, as discussed further below.

After it finished pursuing the 10 priority cases, however (mostly limited to investigating and indicting, not preparing for trial, since 168 of the accused were beyond its reach in Indonesia), we believe that the SCU should not have moved on to other 1999 cases. Instead, it should have identified another set of priority cases stemming from major atrocities committed before 1999, such as, for example, the massacres at Santa Cruz Cemetery in 1991; in Malim Luro, Kraras, and Mount Bibileu in 1983; in Lacluta in 1981; and in Dili on the day of the invasion; as well as the “fence of legs” operation previously mentioned. Priority cases might also have included the highest-level architects of the overall policy of encirclement and annihilation. A preferable alternative to the SCU’s strategy would have been for it to simply stop issuing indictments altogether. That approach would have dramatically called international attention to the fact that the most culpable perpetrators were beyond the reach of the serious crimes process, and forced the international community to confront its failure. It is somewhat understandable that the SCU would focus on cases in which it could get custody over the accused (i.e., East Timorese located in East Timor) instead of focusing on more cases where unattainable Indonesians again would be the primary indictees. Yet it has been easier to ignore the fact that the highest level accused are not on trial when the SCU has been busy investigating, indicting, and trying cases against low-level East Timorese.

Despite the criticisms, it must be emphasized that many members of the SCU and Special Panels have made sacrifices and labored heroically to overcome obstacles and bring justice to the people of East Timor. We disagree with parts of their focus—and we stress that international and hybrid courts should be limited to prosecuting only those

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<sup>97</sup> Interview, Sept. 3, 2004.

<sup>98</sup> U.N. SCOR, S/2002/432.

holding the greatest responsibility or committing the most egregious offenses—but we do applaud the actions of many to investigate and indict high-level officials.

### *Lack of access to defendants*

The most glaring and debilitating problem with the serious crimes process, and a main reason there remain so many outstanding indictments, is that it has been unable to reach the great majority of the perpetrators who lie within the safe confines of Indonesia, including just over the border in West Timor. This is also the reason that all of those tried have been Timorese, while members of the Indonesian military—including those with the highest degree of responsibility for the crimes—have escaped justice. Although some East Timorese committed serious crimes and deserve prosecution, this gross disparity of treatment—especially viewed in light of the Jakarta trials, in which the only standing conviction is that of one Timorese militia leader—has angered many victims and their advocates within the NGO community in East Timor.

This problem in large part cannot be blamed on the staff of the SCU or the Special Panels. It is primarily a structural problem that was built into the process from its inception. As was clear from the early days of the SCU's formation, the chance of extradition of perpetrators from Indonesia was minimal without substantial international pressure and, barring a significant or long-term change in the Indonesian government, will remain so. Such political pressure was never applied, despite the signing of a Memorandum of Understanding between the UN's Transitional Administrator for East Timor and the Attorney General of Indonesia that obligated the parties to cooperate to ensure effective prosecution, including via transfer of persons.<sup>99</sup>

Furthermore, even if those indicted travel to other countries and are arrested there, East Timor currently lacks the extradition treaties that would enable them to be sent to the Special Panels for trials. It is doubtful many of the Southeast Asian countries to which travel is most likely would be willing to enter such treaties with East Timor because of their close relationship with Indonesia. Nevertheless, neighboring countries and other states should be encouraged to consider such treaties.

The problem of lack of access to perpetrators has been exacerbated by reluctance in issuing international arrest warrants for those indicted and in submitting those warrants to Interpol. Thus far, 77 of the 165 arrest warrants issued are on record with Interpol; General Wiranto's is not among them. With regard to many of the highest-level commanders, the East Timor government has blocked submission of those warrants to Interpol. The most notable such case is that of Wiranto. The Prosecutor General initially sought an arrest warrant against Wiranto in early 2003 and 2004,<sup>100</sup> but eventually

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<sup>99</sup> Memorandum of Understanding of April 5-6, 2000 Concerning Cooperation in Legal, Judicial, and Human Rights Related Matters, available at <http://www.etan.org/et2000c/december/10-16/14mou.htm>.

<sup>100</sup> See especially Longuinhos Monteiro's remarks stating that it was the UN which blocked the arrest warrant of Wiranto and emphasizing that "There are no legal obstacles, only political obstacles, both in Indonesia and East Timor." Jill Jolliffe, *UN 'blocking arrest of Wiranto'*, Sydney Morning Herald, Jan. 14, 2004.

changed course, apparently as a result of a change in government policy,<sup>101</sup> though neither the request nor the indictment was formally withdrawn. When it became clear in May 2004 that the East Timor government was interested in pursuing a rapprochement with Wiranto, by then a presidential candidate, that might jeopardize the case against him, Judge Philip Rapoza, one of the international members of the Special Panels, acted quickly to issue the arrest warrant. The surprised Prosecutor General decried Rapoza's action and announced that he would not, for the indefinite future, refer the warrant to Interpol. The Prosecutor General has increasingly been under pressure by the President and Foreign Minister of East Timor, who vocally opposed the Wiranto indictment, claiming that it harms East Timor's relationship with Indonesia, upon which it is dependent economically and vulnerable militarily.

The increasingly strange events in the Wiranto case are indicative of a lack of political will on the part of the Timorese government to pursue prosecutions, as discussed below. In late May 2004, two weeks after the arrest warrant against Wiranto was issued, President Xanana Gusmao traveled to Bali and met with Wiranto himself. News cameras captured the image of the two men laughing and hugging, and Xanana referred to Wiranto as his "dear friend." These photographs horrified many East Timorese, who hold Wiranto ultimately responsible for the 1999 campaigns of terror. Foreign Minister Jose Ramos-Horta himself criticized the meeting publicly, and Xanana was met on his return to the airport with a group of angry protesters, an extraordinary event given his revered status as a hero of the resistance.

The Wiranto case also demonstrates a lack of political will at the international level. The UN attempted to distance itself from the SCU after it issued indictments in February 2003 against General Wiranto and seven other high level accused. After it was announced that the UN-established and supported SCU had indicted Wiranto and others, the UN spokesperson stressed publicly that "[c]ontrary to published reports, Timor-Leste, and not the UN, has indicted former Indonesian military chief General Wiranto for his role in the violence surrounding the 1999 consultation on East Timorese independence."<sup>102</sup> Further, Siri Frigaard, who headed the SCU at the time, was reportedly directed by UN headquarters to take the UN logo off the indictment papers, after they had already been issued and confirmed. She refused.<sup>103</sup> While the UN later issued a clarification, the episode added to the impression that UN headquarters disapproved of the indictment. These events were especially disappointing in light of the Secretary General's earlier declaration that the highest level accused should face trial.<sup>104</sup> And in his 2004 report on East Timor, the Secretary-General again insisted that the accused be brought to justice.<sup>105</sup>

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<sup>101</sup> See, for example, statement by President Xanana Gusmao that the indictment of Wiranto was a mistake and would harm relationships between East Timor and Indonesia. He said he would seek a solution, since "relations with Indonesia are of extreme importance, not only for current stability, but for the future of the country." UN Wire, *East Timor: Serious Crimes Unit Indicts 48 More Suspects*, March 1, 2003.

<sup>102</sup> UN News Centre, *Timor-Leste, not UN, indicts Indonesian general for war crimes*, Feb. 26, 2003.

<sup>103</sup> See, e.g., Jill Jolliffe, *Timor PM Slams UN on War Criminals*, Asia Times, May 15, 2003.

<sup>104</sup> In April 2002, the Secretary-General in his report on East Timor to the Security Council stated that the Serious Crimes Unit was to "focus its investigations on ten priority cases and on those persons who

***Adequacy of counsel and procedural protections for defendants.***

Another major problem with the serious crimes process in East Timor is that defendants may not have received fair trials. Convictions in the absence of a fair process not only violate the rights of defendants, but also undermine public confidence in the justice system and respect for the rule of law.

The most serious deficiencies have been in the quality of defense counsel, primarily East Timorese but also internationals, who have been unprepared, substantially less skilled and experienced than their adversaries, and untrained in international law. This imbalance in the playing field has likely contributed to the record so far of 55 convictions and just three acquittals. While it is impossible to pinpoint which, if any, defendants would have been acquitted with better representation, the lack of adequate counsel clearly hurts the credibility of all of the trials. In some cases, failures have been glaring; one commentator stated that “no defense witnesses were called in the first 14 cases prosecuted,” and defendants are often detained for lengthy periods before trial.<sup>106</sup> In the first cases heard by the Special Panels, the defense counsel were largely local Timorese lawyers. In an attempt to respond to their incapacity and inexperience in handling complicated international criminal law cases, international defense lawyers have more recently been brought in to replace them. While one judge told us that this change improved the situation, other observers disagreed, noting that the international counsel varied considerably in quality, with some even worse than the Timorese they replaced.

In addition to problems with qualifications, defense counsel are also too few in number, with harmful consequences. First, co-defendants with conflicting interests are often represented by the same counsel, sometimes in the same case. Second, defendants generally cannot get a new lawyer on appeal, which may be one reason no appeal has yet been filed alleging inadequacy of counsel. While in some legal systems attorneys occasionally will argue their own incompetence, as they may be ethically bound to do under some circumstances, this has yet to happen in East Timor. Thus, the court has not had the opportunity to judge whether these deficiencies and conflicts of interests have been sufficiently severe as to deprive defendants of their right to adequate counsel under international law and the East Timor constitution, and/or to affect the outcome of the proceedings.

Nor have the judges, for the most part, been able to fill in the gap in protecting defendants' rights. While a few judges have been widely praised, most have been criticized by observers and participants in the process for an inability to control the proceedings and maintain high courtroom procedure standards. Many judges have also shown a basic lack of professionalism. Incidents of international judges engaging in

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organized, ordered, instigated or otherwise aided in the planning, preparation and execution of the crimes.” U.N. SCOR, S/2002/432, at 12 (April 17, 2002).

<sup>105</sup> S/2004/669, para. 18.

<sup>106</sup> Suzanne Katzenstein, *Hybrid Tribunal: Searching for Justice in East Timor*, 16 Harvard Human Rights Journal 245, p. 253 (2003).

“screaming matches” with one another on the bench have been reported, and some of the judgments handed down by the court lack sufficient reasoning and analysis.<sup>107</sup>

### ***Lack of capacity building***

Additionally, the SCU and the Special Panels have almost totally failed to assist in building capacity within the Timorese justice system, an express component of their mission. There are currently no Timorese lawyers within the SCU; there are just two Timorese judges; and the Timorese defense lawyers who proved inadequate were simply replaced by an almost exclusively international unit rather than being provided with supervision, assistance, and training. There has been little interaction between the SCU and the domestic crimes prosecutors, or between the Special Panels and the regular domestic courts. The UN separately provided several international “judge mentors” for domestic judges, but we were told that these have so far been relatively ineffective, largely because they have refused to work in the comparatively uncomfortable building where the domestic judges work, instead taking offices across town in the Court of Appeals building. A language barrier has also contributed to the problems, since the judge mentors are Portuguese speaking while most local judges speak only Bahasa Indonesia or Tetum.

The SCU prosecutors we spoke to expressed specific dismay at the recent, abrupt removal from their unit of several young East Timorese attorneys who had undergone over a year of on-the-job training in international criminal law.<sup>108</sup> The idea had been for the trainees to complete the two-year training period they were required by law to complete before entering practice, and then to join the SCU as assistant prosecutors on trial teams; when the UN withdrew in May 2005, they would then have gained at least some of the experience needed to try serious crimes cases if perpetrators were captured in the future. In early 2004, however, they were suddenly moved out of the SCU to the ordinary crimes division of the prosecutor’s office, where their specialized training would be relatively useless; indeed, we were told that they were required to recommence the two-year training period from scratch.

Of late, the relationship between the Prosecutor General and the SCU has not been a collaborative one. Instead, there has reportedly been an almost complete breakdown in communication. The debacle surrounding the Wiranto arrest warrant contributed to this breakdown, as have apparent personal tensions between some of the individuals involved.

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<sup>107</sup> Most of the participants in the process with whom we spoke, including the one quoted here, wished to remain anonymous in their criticism of other participants.

<sup>108</sup> This training has included several components with considerable international support and support from USAID. For example, in 2002, the Coalition for International Justice, in cooperation with the Serious Crimes Unit, conducted two eight-week training sessions for East Timorese police officers, prosecutors, and others in an effort to increase their capacity to conduct investigations of the complex crimes within their mandate. The course was then repeated under the auspices of the Serious Crimes Unit in 2003. The Washington College of Law’s War Crimes Research Office has also conducted training programs, particularly for the judges.

### ***Other mistakes and lack of support***

Finally, a combination of administrative errors, questionable decision-making, and inadequate UN support has undermined the effectiveness of both the SCU and the Special Panels in countless ways.<sup>109</sup> These problems were especially severe during the first two years of the SCU's operation.

More than one person criticized the leadership of the investigations division as "incompetent," and while many of the individual investigators were excellent, the majority, one observer told us, were "just ex-policemen looking for a pay increase—they were traffic cops, not detectives." Continuity has, in general, been a problem. No prosecutors or other staff members have stayed at the SCU since its start, although there are a handful with substantial institutional memory and experience.

The Special Panels, meanwhile, have been plagued by a lack of basic infrastructure. For example, until 2004, the court lacked electricity several days a week, and also had, at best, intermittent telephone and Internet connections. Legal research was thus virtually impossible, since the court did not, and still does not, have a law library to speak of. The court, which operates in four languages—Tetum, Bahasa Indonesia, Portuguese, and English—has had too few qualified translators, such that translation has often had to be done by judges and/or through a sequence of steps: from Tetum to Portuguese to English, for example. Until recently, the court lacked the audio equipment needed for simultaneous translation. Courtroom reporting also remains inadequate and the court's system for filing documents and court records has been widely criticized.

Community outreach has also been inadequate and lacks sustained effort and sufficient financial support.<sup>110</sup> According to Robin Perry from the Judicial Systems Monitoring Programme (JSMP), JSMP has sent its own representatives out to villages to inform people about the trials that are relevant to them. They found that the villagers have not been kept informed and have only a very rudimentary understanding of the trial process.<sup>111</sup>

### **Assessment**

For all these reasons, the serious crimes process has, despite genuine and committed efforts on the part of many, fallen far short of its objectives. Many of the problems identified above are fixable with more resources and better administrative decision making, but two are not: the inability to gain custody over defendants in Indonesia and the unwillingness on the part of the East Timor government to criticize

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<sup>109</sup> See Katzenstein, pp. 257-60.

<sup>110</sup> In an effort to reach out to the public, the Coalition for International Justice produced a set of three videos to explain the various phases of the serious crimes process including conducting investigations, going to trial and the inter-relationship between the CAVR and Special Panels. The videos were produced in Tetum and played in town hall settings in the districts; the sound tracks were played on the radio as well as by investigators, on their computers in the field, to explain the process to potential witnesses. These initiatives alone do not suffice, however; any successful outreach effort must have a comprehensive strategy and consistent financial support.

<sup>111</sup> Interview, Sept. 1, 2004.

Indonesia. Extension of the SCU's and Special Panels' mandate thus cannot itself suffice as an effective justice mechanism for East Timor, but it can ensure the SCU is permitted to close down in a rational and responsible manner. Additionally, such an extension might be an important transitional step, a prospect discussed further in the Recommendations section.

Despite the failure of the UN-supported serious crimes process, there is a significant dilemma posed by its termination that can be addressed during an extended mandate, namely: what will happen to the hundreds of outstanding indictments and the evidence collected during hundreds of investigations? It is our assessment that, as noted above, far too many indictments have been issued in the first place, and that the SCU prosecutors (perhaps aided by outside experts) should carefully review them and withdraw those that fall short of setting forth serious violations of international law. Even after that withdrawal, however, many indictments against the perpetrators of serious atrocities will remain. As discussed further in section four, we believe that it is important that those indictments remain on the book, or at the very least, not dismissed with prejudice, so that prosecutions will be possible if circumstances change. Amnesty proposals like those recently considered by the East Timor parliament are of concern.

Although many in civil society told us there was little chance such a law would ever pass, as an alternative to amnesty, prosecutors might be well advised to act before the SCU closes and consider the possibility of plea agreements, which are permitted by the regulations. The guarantee of reduced charges or a lenient sentence might be sufficient to entice some of the lower- or mid-level offenders living in the West Timor camps to come back across the border. Their guilty pleas and acceptance of responsibility, especially if combined with a promise to provide evidence against higher level perpetrators, might also provide some meaningful measure of justice to victims.

The East Timor Constitution requires that the trials continue for as long as necessary to complete the process's mandate,<sup>112</sup> while the regulations establishing the Special Panels require that each case be heard by a three-judge panel composed of both international and Timorese judges.<sup>113</sup> It will therefore be necessary to maintain UN support of the judges while the SCU continues its operations. In the future, however, the international judge requirement will have to be changed in order to continue the trials, unless international judges continue to be made available. If in the future a defendant were captured or surrendered, the domestic prosecutor's office would, if the political will were present, have the power to try him. It is important that some court exist with the legal authority to hear the case.

Despite the failures of the process, the SCU has done considerable useful work, including quite thorough investigations of the 1999 cases. Its efforts should not go to waste, but should—along with the information collected by CAVR—form part of the basis of future justice efforts. It is crucial that before the SCU and CAVR wrap up their work, all of the evidence they have collected be transferred to UN authorities outside East

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<sup>112</sup> East Timor Const. sec. 163.

<sup>113</sup> UNTAET Regulation 2000/11, sec. 10.3.



Timor, as well as perhaps two secure locations, one within the country and one to a third country. Although this process is underway, remaining issues to be worked out include whether originals (which carry more evidentiary weight in many judicial systems than photocopies) can be transferred, as well as what should be done with documentary and physical evidence. If East Timor pursues prosecutions in the future, UN authorities could be counted on to return evidence, whereas if the UN or a foreign government pursues a future prosecution, East Timor's government may be placed in a politically awkward position if it is forced to respond to requests for evidence. For this reason, the best approach now is to carefully organize and transfer as much evidence as possible into UN safekeeping before the SCU is terminated, in order to facilitate ready access should international or domestic trials become possible.

## IV. A ROAD MAP FOR RENEWING JUSTICE EFFORTS FOR EAST TIMOR

### Objectives, Obstacles, and Obligations

Achieving justice for East Timor will not be an easy task, but will require the UN and international community, in conjunction with victims and their advocates, to think creatively about possible paths around several serious but not insurmountable obstacles.

First, the overriding challenge facing any justice effort is how to get access to the alleged perpetrators—or how to proceed if access cannot be obtained. The commanding military officers most responsible for the violence are at large in Indonesia, and the former Indonesian government showed no inclination to extradite them or to conduct any credible domestic prosecutions.<sup>114</sup> There appears to be only a small chance the new government will be serious about reforming the judiciary and upholding international law. Thus, if Indonesia continues to indicate that it will not comply voluntarily with any meaningful justice initiative, the process will have to be designed to function without Indonesian cooperation. Such an approach is consistent with the Secretary-General's recent report on the rule of law and transitional justice, which states that “where domestic authorities fail to discharge their international obligations and are unwilling or unable to prosecute violators at home, the role of the international community becomes crucial.”<sup>115</sup>

If the new government in Indonesia continues to protect its accused officers, several specific questions must be posed: Are criminal justice efforts worthwhile if they only result in lower-level and/or solely Timorese perpetrators being tried, or if they result not in trials and punishment at all but instead simply the opprobrium, stigmas, and inconveniences associated with outstanding indictments? If criminal trials prove impossible, are there alternatives—or, if they are possible, complementary approaches—such as civil compensation mechanisms or truth commissions that would provide a meaningful measure of justice to victims? And even if Indonesia does not cooperate, how can the world ensure that other countries that might some day have access to some of the accused will pursue arrest and prosecution or extradition?

The second major obstacle is the lack of political will within the government of East Timor, which is presumably limited to pressuring Indonesia to turn over indictees.<sup>116</sup> The government's main leaders—President Xanana Gusmao, Foreign Minister Jose Ramos-Horta, and to some extent Prime Minister Mari Alkatiri—have increasingly become not merely unwilling to pursue justice for the East Timor crimes, but vocally opposed to it (although Alkatiri has been much less adamant and more often than not on the side of accountability). Well-informed sources have told us that this newly amplified

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<sup>114</sup> See, e.g., Ellen Nakashima, *Rights Groups Fault Indonesian Tribunal: Most Acquitted So Far for East Timor Atrocities; Higher-Ups Avoid Prosecution*, Washington Post, April 6, 2003, p. A16 (quoting Minister Jose Ramos-Horta as saying that the verdicts do a “disservice to the good image” of Indonesia and that “[t]he entire process has been fatally flawed, lacking in integrity and credibility”).

<sup>115</sup> Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, 3 August 2004, S/2004/616, para. 40.

<sup>116</sup> East Timor ratified the Rome Statute of the International Criminal Court in September 2002, expressing its commitment to support and enforce prosecutions of war crimes, crimes against humanity, and genocide.

opposition stems from serious pressure exerted by Indonesian government officials at a series of meetings over the past two years in Bali and Jakarta. Whether Indonesia made specific threats against East Timor or offered it positive incentives for this shift is unclear. In any event, these officials hold the view that both economic and security concerns compel East Timor to tread quietly on the justice issue, and indeed, if necessary, vocally oppose it. For instance, justice efforts were included among the issues when President Xanana announced at a press conference in Indonesia in March 2003 that “the relationship between Timor Leste and Indonesia is far too important for any issue that might arise to discourage us or to derail this relationship.”<sup>117</sup>

East Timor’s economic dependence on Indonesia is real: for example, as Minister Ramos-Horta has noted, 80 percent of its food imports and a larger percentage of its energy come from Indonesia.<sup>118</sup> East Timor’s poverty is staggering. Many have starved to death over the past decades, and severe hunger and malnourishment are still widespread. Many officials stress it would be irresponsible to take actions that would endanger its food supply. And although Minister Ramos-Horta and President Gusmao acknowledge that Indonesia is unlikely to invade East Timor again, there are ongoing security risks, and Indonesia and East Timor have still failed to define all border delineations despite years of talks. Many contend that Indonesia has used this issue, as well as military maneuvers close to the borders, to remind East Timor of its vulnerabilities. While an invasion appears unlikely, security concerns have been cited as rationale for continuing to extend the UN’s overall mandate in East Timor.

A third significant obstacle to justice efforts is that international political will to pursue the issue is limited. First, few countries wish to risk antagonizing Indonesia, which is enormous, powerful, and—as the world’s largest Muslim country, and site of several bombings in the past two years—considered a crucial battleground in the war on terror. An imposed solution that results in a nationalist backlash could be dangerous, both for human rights within Indonesia and for security outside. An important criterion in the design of justice mechanisms is to avoid unnecessary antagonism and, especially, resentment by the civilian population. Second, the international community has indicated it will not support a full-scale ad hoc international tribunal of similar magnitude to the ICTY and ICTR. A justice mechanism limited to a handful of individuals considered most responsible for atrocities may be more realistic, just as the hybrid approach in Sierra Leone and Cambodia has been designed to provide justice in a more focused, efficient, and affordable manner. Third, innumerable other human rights disasters the world over, including ongoing crises in Sudan, Uganda, and the Democratic Republic of Congo, place competing demands on international resources and attention.

Realistic efforts toward justice must find a way around these impediments, even if it means a significant degree of compromise. One crucial point, made vigorously by Timorese civil society leaders, is that the solution must come from the international community. Whatever the merits of the East Timor government’s arguments, the reality

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<sup>117</sup> Fabiola Desi Unidjaja, *Dili Says Relations With RI More Important Than Justice*, Jakarta Post, March 5, 2003, available at <http://www.etan.org/et2003/march/01/05tsays.htm>.

<sup>118</sup> Interview, Sept. 2, 2004.

for the indefinite future is that East Timor is simply not going to take the lead on this issue. International leadership on creating a justice mechanism is not only an obligation—given the many promises made and broken in the past—but also the only credible option for addressing some or all of the government’s concerns. Further, it should be anticipated that the East Timor government will oppose any subsequent justice efforts.

The need for international leadership on justice endeavors is one of the few points of consensus we found in our discussions with representatives of East Timorese civil society, who otherwise have quite varied ideas about specific justice mechanisms.<sup>119</sup> While there is divergence about process and structure, our discussions have shown that there is still a strong public desire for justice.<sup>120</sup> Far from resenting the idea of an externally imposed solution, Timorese victims’ groups and other justice advocates, as well as a quieter but substantial number of government officials, are pleading for international leadership. They suggest that the international community bears partial responsibility for the violence, because it tolerated and materially supported the occupation and then further betrayed the Timorese in 1999 by catastrophically entrusting their security to Indonesian authorities during the election period. They also maintain that the East Timor government cannot, for the above-mentioned economic and security reasons, be expected to confront Indonesia, and that international leadership is necessary to take the pressure off of it. As Lucas da Costa, Rector of the Universidad de Paz, has noted, the offenses committed are “crimes against humanity, not against East Timor alone.”<sup>121</sup>

In designing remedies, it is important to keep in mind the UN’s Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity as well as its Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law. The right to know the truth, the right to justice, the right to reparation, and the right of non-repetition are all goals which should be a major focus of justice efforts for East Timor.

Furthermore, whatever strategy is adopted now should not foreclose the possibility of criminal prosecution later. Indeed, as the UN High Commissioner for Human Rights has recently emphasized, “judicial accountability for international crimes should always remain a real option.”<sup>122</sup> The Secretary-General has also stressed that even when negotiating peace agreements, one should “never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights.”<sup>123</sup>

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<sup>119</sup> ICTJ’s focus group studies show that the call for international leadership on justice is shared by the public generally, not just civil society leaders. See Pigou, pp. 29-30.

<sup>120</sup> Ibid, p. 34 (observing that focus group members “almost without exception . . . emphasized the importance of making sure that those responsible for violations were held to account”).

<sup>121</sup> Interview, Sept. 1, 2004.

<sup>122</sup> Opening Address, Louise Arbour, UN High Commissioner for Human Rights, delivered at the Transitional Justice Workshop, Rule of Law Tools for Post Conflict States, September 27, 2004.

<sup>123</sup> Secretary-General’s Report on Rule of Law and Transitional Justice, para. 10.

### ***Assessment of possible policy options***

As an important step toward achieving the justice goals, the Open Society Justice Initiative, the Coalition for International Justice, and other organizations have called for the appointment of a UN Commission. Such a Commission would analyze the justice failures in East Timor and Indonesia and make recommendations for the Secretary-General and the international community to remedy those failures and to keep the promises that have been made to the people of East Timor.<sup>124</sup> In order to increase transparency and public dialogue on these issues, such a report, as well as those of the initial UN observers of the Jakarta trials, needs to be made public and translated into regional languages—at the very least, into Bahasa Indonesia, which is about as broadly spoken in East Timor as is Tetum. There are several future strategies we believe merit consideration and encourage a Commission to consider, and we briefly outline them below.

### ***Rational completion of the serious crimes process***

The Serious Crimes Unit has accumulated a considerable amount of institutional experience as well as evidence that could be quite useful in any subsequent justice processes. Moreover, shutting it down with hundreds of outstanding indictments would deeply undercut the UN's credibility and commitment to ensuring there is accountability for crimes against humanity committed in East Timor. For these reasons, serious attention should be given to the development of a rational "completion strategy" for the serious crimes process. This may be necessary in order to ensure that prosecutions remain possible in the future in the event of political change. It also will help facilitate a smoother transition to other justice mechanisms.

In devising a strategy, a Commission should not be wedded to deadlines imposed by the May 2004 Security Council resolution, which simply stated that trials "should" be completed by May 2005 and investigations by November 2004. The implementation of a successful completion strategy might require some extension of the SCU's mandate beyond those deadlines. We do not propose extending the time allotted to the SCU simply so that it can continue doing what it has been doing for years. But with a very specific, directed mandate—and a change in the unit's current lines of authority as a body of the East Timor justice system to that of a stand-alone UN institution—a short extension may be justified.

If the SCU's mandate is extended, it should use the additional time to:

- 1) review the hundreds of cases already charged and withdraw those that fall short of serious violations of international law;
- 2) refer some cases to domestic courts, notably those of lower-level perpetrators (requiring some reform in the regulations governing the judicial system to ensure that domestic courts have the proper jurisdiction and capacity);
- 3) pursue plea agreements in which low-level accused would plead guilty and give evidence against high-level accused;

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<sup>124</sup> See, e.g., Joint Letters to the Secretary-General of September 17, 2003, June 24, 2004, and November 1, 2004.

- 4) ensure that remaining indictments against the perpetrators of serious atrocities will remain live or at the very least that they will not be dismissed with prejudice; and
- 5) ensure all material is properly copied and archived.

During this transitional period, the SCU should be removed from the political control of the Timorese government and treated as an independent UN institution. Such a repositioning would insulate the East Timorese government from Indonesian political pressure to withdraw the indictments of its high-ranking officers. As for the Special Panels, it is less necessary for them to be separated from the Timorese judicial system, although such a division may be politically preferable. In any case, it is essential that the UN continue to pay two panels of international judges' salaries during the transitional period so that the court can continue to function consistently with governing regulations—or, at the very least, that it allow amendments to regulations requiring the SCU to include international judges.

Finally, even if its mandate is not extended, future justice mechanisms should make use of the evidence and institutional memory accumulated by the SCU, which could possibly be reorganized into some form of one of the mechanisms discussed below. Thus, even if the upcoming deadlines are adhered to, storing evidence in perhaps two secure locations within East Timor and proper copying and transfer of these materials to United Nations authorities are essential tasks.

### ***Civil compensation mechanisms***

Another possibility that a Commission might usefully consider is the establishment, outside of East Timor, of an international civil tribunal or compensation commission to provide civil remedies to victims of crimes against humanity. The primary advantage of such a strategy is that it provides a way around the biggest problem facing criminal justice efforts: the inability to gain access to the defendants. We would not recommend criminal trials held *in absentia*, because such proceedings would raise serious human rights concerns. Civil trials, in contrast, can be held *in absentia* when the defendant is otherwise out of reach. Although civil claims against the perpetrators of violence in East Timor can be and have already been brought in national courts under various domestic statutes, we favor the establishment of an international civil tribunal/compensation commission. Such a tribunal would not be mutually exclusive with other approaches discussed here. The Security Council has authority to establish an international civil tribunal or commission to adjudicate and compensate crimes against humanity under Chapter VI of the UN Charter; it has established such bodies several times already, as noted further below.

Victims' groups and their advocates in East Timor have been vocal in stating that compensation is not a substitute for criminal justice; those who committed horrible crimes deserve to be put behind bars. As opposition political leader Fernando de Araujo stated, "Money cannot compensate for the loss of human life."<sup>125</sup> But a civil case would not preclude subsequent criminal trials if the defendant ever became subject to arrest. In

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<sup>125</sup> Interview, Aug. 31, 2004.

the meanwhile, civil trials and judgments might provide at least a measure of justice. A civil trial would provide a means for clarifying the historical record. Victims would have an opportunity to tell their stories in court, and an international tribunal would issue a legal finding that the defendants were (or were not) responsible for crimes against humanity.

Furthermore, it is conceivable that civil trials could result in compensation being paid to victims, many of whom are struggling to survive and would benefit enormously from such relief. It would be crucial to emphasize to victims that the chances of securing monetary relief are minimal, and thus to not unduly raise expectations or hopes. Enforcement of individual judgments would be difficult. Many cases would probably result in default judgments, with defendants refusing to pay. However, in some cases, defendants might have foreign assets that could be attached. Many high-ranking Indonesian officials have such assets, including bank accounts and homes overseas. Courts throughout the world often enforce default judgments by attaching assets, even those of state entities. It may be possible for the assets of those individuals already identified as likely defendants—by the SCU's indictments, for example, or by the Komnas HAM report—to be frozen in anticipation of likely suits being filed. In addition, unpaid judgments might be paid by international donors; this would have the benefit of helping victims, even though compensation might be more meaningful to them if it came from the perpetrators.

We discussed the idea of an international civil tribunal or compensation commission with a number of members of the international diplomatic community and generally received a favorable reaction. We also discussed it with a number of the Timorese civil society groups, and although there was some initial skepticism, they would likely support such an effort if its advantages are clear.

The main objection to civil claims is that they are not considered as sufficient a remedy as criminal prosecution. Yet they are not mutually exclusive, and civil claims may make sense when criminal prosecution is unlikely. Another concern, in addition to the likely nonpayment of judgments, was that default judgments would not adequately fulfill the truth function, since such judgment would be automatic and not based on an assessment of the evidence. This factor led many people to be discouraged with the outcome of a civil lawsuit in the United States against Johny Lumintang, the deputy chief of staff of the army, which resulted in a default judgment that was never paid. As Kieran Dwyer of CAVR observed, part of the desire for justice is the desire to have defendants sitting in court, confronted directly by their accusers, and hearing the evidence against them.<sup>126</sup>

One partial solution to this problem would be to require plaintiffs, even in default cases, to present evidence supporting each element of the underlying criminal offense, and to require judges to find whether this evidence is sufficient (akin to a summary judgment standard or Rule 61 hearing in the ICTY/R Statutes, i.e. with only one side

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<sup>126</sup> Interview, Aug. 31, 2004. Several participants in ICTJ's focus group study made this point as well. Pigou, p. 36.

presenting evidence). Another possibility would be to appoint counsel to represent absent defendants; although they would not present evidence, they could at least argue the legal deficiencies in plaintiffs' cases. Default could also be discouraged by granting immunity from arrest to defendants when they traveled to appear in court, or by allowing them to contest cases by briefing and paper submissions without physically appearing. And if assets were successfully frozen at the commencement of a case, defendants would have a real incentive to contest it.

Careful attention to the form, mandate, and procedures of a civil tribunal would be crucial to its success, and there are many important questions to which the Commission should devote further inquiry. One question would be whether the court would consider group claims on behalf of injured communities or instead only those of individuals. Along the same lines, some simplified means of filing individual claims for fixed sums of money might be established. Another question is whether the defendants would be individuals and/or institutions such as the Indonesian military. Indonesian human rights advocates—who believed that on balance a civil compensation mechanism would be less anathema to their government than would a criminal tribunal—advised us that claims against institutional defendants might create a risk of public and governmental backlash. That is, Indonesians would feel that they were being unfairly punished for the crimes of other individuals, because claims against the Indonesian treasury would ultimately come out of services for the Indonesian people. Although the military has its own assets separate from those of the state generally, these concerns may point in the direction of claims against individual defendants.

In general, as it addresses these and other details, a UN Commission could review several examples of international civil tribunals already established to hear claims concerning violations of international criminal and humanitarian law, tailoring these to the East Timor situation. As Professor Howard Holtzmann explained, “[s]ince 1980 at least ten tribunals or commissions have been created to resolve [an estimated] 4-1/2 million mass claims. These Mass Claims tribunals and commissions have been created in a number of different ways—some by treaties, others by action of the United Nations, still others by agreements of non-governmental organizations.”<sup>127</sup> These bodies, established in response to major crisis situations, although not necessarily to hear “mass claims” in the sense of the collective claims of large groups, include the Iran-U.S. Claims Tribunal, the Eritrea Ethiopia Claims Commission, and the United Nations Compensation Commission that addresses claims stemming from Iraq’s invasion of Kuwait. These commissions and tribunals, Holtzmann noted, have developed a number of innovative mechanisms for dealing with large numbers of claims in a cost- and time-efficient manner.<sup>128</sup> He concludes that “modern Mass Claims Processes have been a valuable way to defuse diplomatic crises . . . as well as a means of providing compensation for historic wrongs.”<sup>129</sup>

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<sup>127</sup> Howard M. Holtzmann, *Mass Claims Processes*, 13 *American Review of International Arbitration* 69, p. 69 (2002).

<sup>128</sup> *Ibid.* p. 73.

<sup>129</sup> *Ibid.* p. 74.



A number of features are important to the specific context in East Timor. Control over claims should be taken out of the hands of the government and given to the claimants themselves. The tribunal should sit outside East Timor. A supportive regional country like New Zealand might provide a good base, or possibly The Hague, The Netherlands. Additionally, the tribunal's mandate should ideally extend to crimes committed throughout the occupation, and it should also extend to crimes committed by resistance forces. The East Timor government has already expressed a willingness to pay compensation for the latter category of crimes.

This proposal is still in its nascent stages; it has not been subject to significant discussion among the various stakeholders. Another alternative that could be considered would be some form of reparations from the Indonesian government, which would be a valuable step for some of the same reasons supporting a civil compensation mechanism: if payments were made to the government of East Timor, they might help the fledgling state get back on its feet or allow it to provide financial support to struggling victims and their families. Further, it would be enormous demonstration of good will and future dialogue.

### ***International truth commission***

One option that has received serious consideration recently is that of an international truth commission. This option carries weight in part because it is promoted by Foreign Minister Ramos-Horta, who initially floated the idea two years ago. It therefore provides the possibility of an approach that would presumably have the support of the Timorese government—and one with which, Ramos-Horta believes, Indonesia would be likely to go along. His proposal is for a commission that would have one primary duty: to name those individuals most responsible for the violence. The naming of names would be the sole “remedy” or punishment, and the commission would recommend no other. Countries would be free to pursue unilaterally whatever remedies they deem appropriate, including visa bans or the freezing of assets—the latter being an approach Ramos-Horta deems “radical.” However, no country would be under an obligation to pursue any remedy.

We believe that this proposal falls short of providing any meaningful justice, as reflected in the fact that victims' groups roundly oppose it. The reasons why they see it as inadequate are identified by Eliza Dos Santos: Timorese' victims' main goal is not simply to be told the truth, which, for the most part, they already know too well. The truth-seeking function is one important aspect of justice, but it is not the only one. Indeed, identifying the perpetrators of mass crimes, then saying their identification is their sole punishment, may only exacerbate the harms and the anger. As Eduardo Gonzales of the International Center for Transitional Justice has explained, “Comparative experience suggests that official truth-telling works better when placed within a comprehensive transitional justice strategy, as a complement—not as an alternative—to criminal justice, reparations and guarantees of non-recurrence.”<sup>130</sup>

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<sup>130</sup> Interview, Oct 31, 2004.

Taking into consideration the justice minimums of the victims, Ramos-Horta's proposal could perhaps be adjusted in fruitful ways. For example, the commission could be empowered to order—or at the very least, to recommend—remedies such as travel bans and asset-freezing. Indeed, it could be given some of the powers of a civil compensation tribunal discussed above, such that it could order that assets not only be frozen but be turned over to pay compensation to victims. And it could insist that those named in the report be stripped of their medals, dishonorably discharged from the military, and removed from their office and position.

Some have suggested that the CAVR's community reconciliation approach, now used only for ordinary crimes, be expanded to reach serious crimes, either domestically or as a reconciliation wing of an international commission. This approach is worth considering for perpetrators who have committed offenses at the lower end of the "serious crimes" scale, where the community might accept an apology and some form of restitution as a remedy. Conceivably, this could extend even to individual acts of serious violence such as rape and murder. CAVR's approach, however, has not escaped criticism. For example, Charlie Scheiner of La'o Hamutuk has argued that community members often felt pressured to accept apologies and reconcile when they were reluctant to.<sup>131</sup> A recent justice process participant survey, conducted by JSMP, concluded that the reconciliation process has had mixed results, and that community members' participation has generally been predicated on the understanding that criminal investigation and prosecution of serious crimes would follow.<sup>132</sup> A comprehensive assessment of CAVR's work is beyond the scope of this report, but it appears that the approach has had real value in some communities.

### ***Renewal of ad hoc court trials with international involvement***

Another strategy is for the international community to push Indonesia for a renewal of trials there, this time with a genuine prosecutorial commitment to secure convictions. But because Indonesia's track record is so poor, the international community cannot simply trust its promise to try again, even if that promise were offered by the new president. This time, there must be some form of international participation, if even as advisors. And there must be international accountability built into the process, with monitors sounding the alarm early if the process goes awry.

The preferred approach would be a genuine hybrid tribunal, involving international as well as Indonesian judges, prosecutors, investigators, and defense attorneys—an option that would be far less expensive than an international tribunal.

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<sup>131</sup> Interview, Sept. 3, 2004. See also Judicial Systems Monitoring Programme, *Unfulfilled Expectations: Community Views on CAVR's Community Reconciliation Process*, pp. 30-32 (Dili Aug. 2004) (citing victims who said they participated under pressure); La'o Hamutuk Bulletin, Nov. 2003, available at <http://www.etan.org/lh/bulletins/bulletinv4n5.html#cavrcrp> (observing that some victims and witnesses have been afraid to participate in reconciliation proceedings, and warning that an excessive focus on reconciliation could be used as an excuse to avoid efforts to end impunity for perpetrators of serious crimes).

<sup>132</sup> JSMP, *Unfulfilled Expectations*, p. 5.

One possible objection to this strategy, which Indonesia can be expected to raise, is that it interferes with defendants' rights against double jeopardy. The same argument could be made about criminal prosecutions in an international tribunal or elsewhere, although some conceptions of double jeopardy permit parallel prosecutions by different sovereigns. In any event, however, the double jeopardy concern poses no real barrier to any of these strategies, simply because Indonesia's prosecutors did such a poor job of bringing charges in the first place. Most of the highest-level perpetrators have never been charged and those who *were* tried could easily be charged with different crimes or different locations, since the indictments were from the beginning grossly inadequate. Double jeopardy only bars re-prosecution for the same offense. A principal advantage of this approach is that it could contribute significantly to the process of building the rule of law and the institutional capacity of Indonesia's fledgling human rights institutions.

In the event new and additional trials are not undertaken in the East Timor cases within Indonesia, it is nonetheless essential that the international community, including the United Nations, commit significantly increased resources and attention to the support of the Indonesian justice process. If a solution for the East Timor situation is sought outside Indonesia, which may turn out to be the only realistic option, it will remain important to demonstrate to Indonesian human rights advocates—both those working within and outside the government—that their concerns have not been abandoned, and that the world cares about the future of human rights and the rule of law inside the world's fourth most populous country. There is a real possibility for change in Indonesia that should not be cynically dismissed.

### ***International criminal tribunal***

Another option that must remain on the table is the establishment of an ad hoc international criminal tribunal for the crimes committed in East Timor. It is essential that this option be considered, particularly as it is overwhelmingly preferred by victims' groups and civil society generally in East Timor. Indeed, for many, an international tribunal is seen as the only possible means of providing true justice. These groups' expectations have been rejected by some as unrealistic and too expensive. But they are genuine sentiments that should not be readily dismissed, because any justice mechanism that leaves the victimized community deeply unsatisfied is a failure in perhaps its most important respect.

An international tribunal should also remain an option because that threat is what prompted Indonesia to promise to hold the East Timor trials in the first place; the UN agreed to Indonesia's proposal, but indicated it would return to an international tribunal if the trials were not deemed fair and credible. An international tribunal need not be a mirror of the ICTY and ICTR. Indeed, it is fairly plain that international political will and funding for such a large-scale effort would not be forthcoming—and Indonesia is savvy enough to be aware of this fact. More realistic is the establishment of a tribunal of significantly more limited scope: for example, one permitted only to prosecute a few defendants bearing the greatest responsibility for crimes against humanity in East Timor.

Access to defendants would continue to be a problem, which is one reason the international community might want to leave Indonesia the option of cooperating with another strategy. It is unlikely that the Indonesian government would eagerly transfer defendants to an international tribunal, but other states might. And tying aid to cooperation or imposing sanctions might provide sufficient motivation. There is also some value in the issuance of international indictments and arrest warrants, even apart from arrests—for example, in constricting indictees' travel options and providing a strong basis to freeze assets.

Timorese government opposition would be another obstacle, but not necessarily an insurmountable one. International control would insulate the government from a great deal of pressure by Indonesia. The tribunal could be located in The Hague, or ideally, in a willing country within the region such as New Zealand, which in August 2004 again called for the establishment of an international tribunal to redress the East Timor crimes.

Indonesia has shown itself to be responsive to international pressure when that pressure is sustained. Had the international community continued to pressure Indonesia after the decision was made to authorize a vote for independence, instead of appeasing it with the May 5, 1999 security agreement, the backlash and violence that followed the vote in East Timor might have been avoided. And it was international pressure, including the threat of economic sanctions that finally convinced Indonesia to leave East Timor in October 1999. Indeed, it is possible that had international pressure been sustained, the subsequent failures of the Ad Hoc Human Rights Court might have been avoided. Unfortunately, the attention of the UN and international community was diverted and Indonesia made a mockery of the proceedings while thus far avoiding any international repercussions. The new government has the opportunity to reverse that course and demonstrate that Indonesia is committed to democratic reform and protection of human rights. The international community must pressure Indonesia to comply with its obligations.

### ***Removal of accused perpetrators from military positions***

No Indonesian rhetoric regarding the government's commitment to justice will be credible as long as the generals who perpetrated the atrocities—many of whom were, as discussed above, promoted in the wake of their actions in East Timor—remain in positions of power in the Indonesian military. Many of these individuals have been found responsible for wrongdoing by Indonesia's own National Human Rights Commission, which is certainly an adequate basis for professional discipline even if they are never convicted by a criminal court.

Indonesia should be pressured to take action against these officers. Even if Indonesia refuses to send its officers to prison, it must not send them to Aceh and Papua with guns and troops. They should be dishonorably discharged from the military and police and stripped of their honors.

### ***Apology and reparations***

Finally, the international community should encourage Indonesia to apologize officially for its actions in East Timor, and to provide reparations to victims directly or to the Timorese government. Although an apology is not a substitute for criminal justice, a genuine apology encompassing an accurate recounting of the facts goes a long way in providing healing to the victims. It also would help to correct the false historical record the Indonesian government has so far embraced. The appeals court's July 2004 verdicts overturning *all* existing convictions of Indonesian officers are likely to further confirm, in many Indonesians' minds, the notion that Indonesian military and police forces are simply not responsible. An apology would help to dispel that misimpression.

Another extremely important component of Indonesia's acknowledgment of responsibility would be for it to assist the Timorese government in locating mass graves where victims of the slaughter throughout the occupation are buried. In many cases, victims simply disappeared, with their families never knowing what happened to them. These families deserve answers and some sense of closure. A government official told us that East Timor's government is currently pursuing discussion of this possibility with Indonesian officials, and noted that Indonesian families might also seek East Timor's assistance in locating the bodies of those soldiers killed in East Timor during the occupation.<sup>133</sup>

### **Recommendations**

The Secretary-General has stressed his commitment to accountability for international crimes in post conflict societies. Additionally, the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity<sup>134</sup> and the draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law<sup>135</sup> underscore the obligations to provide accountability for serious international crimes. As the Secretary-General's recent report on the rule of law and transitional justice emphasizes, "No single form of reparation is likely to be satisfactory to victims. Instead, appropriately conceived combinations of reparation measures will usually be required, as a complement to the proceedings of criminal tribunals and truth commissions."

Here, we highlight the justice goals which emerged most frequently in our discussions in East Timor, and make recommendations on possible ways to secure some measure of accountability for the crimes committed:

- 1) The Secretary-General of the United Nations should appoint, as quickly as possible, a Commission to review the justice failures in East Timor and Indonesia and to craft a strategy for remedying them. Their report should be made public in all relevant languages.

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<sup>133</sup> Interview, Sept. 2, 2004.

<sup>134</sup> E/CN.4/Sub.2/1997/20/Rev.1, annex II; E/CN.4/2004/88.

<sup>135</sup> E/CN.4/2004/57, appendix I.

- 2) A Commission should consider the following proposals, the primary details, strengths, and weaknesses of which are set forth in the preceding section of this report. These proposals are not mutually exclusive and will best work when recommended in conjunction with other initiatives:
  - a) reshape the Serious Crimes Unit's mandate and provide it with a temporary extension so as to facilitate the rational completion of its proceedings;
  - b) establish an international civil tribunal or compensation commission;
  - c) establish an international truth commission, incorporating some effective mechanism for ensuring accountability;
  - d) pressure Indonesia to retry the perpetrators it has acquitted on different charges and to try those not previously charged, with credible mechanisms for international accountability built into the process through international participation;
  - e) establish a limited international criminal tribunal;
  - f) secure the removal of those individuals from military, police or civil service who are responsible for serious crimes in East Timor;
  - g) secure an apology from the government of Indonesia, including an accurate recounting of events and identification of burial sites.
  
- 3) The international community should apply sustained pressure on Indonesia to cooperate with the recommendations of a Commission. It should also strengthen its support for the development of effective human rights institutions within Indonesia, including provision of training and resources for participants in the Ad Hoc Human Rights Courts and by working closely with civil society groups.

The United Nations and the international community have failed the people of East Timor too many times. The credibility of international commitment to end impunity for the most serious international crimes is on the line, as is the development of respect for the rule of law within Indonesia and East Timor. As the deadlines for completing the justice process approach while justice and reconciliation for East Timor remain elusive, the international community must not let this opportunity for action pass. The past difficulties have shown that bringing a meaningful measure of justice to East Timor and Indonesia will be neither easy nor perfect, but justice is an essential and realistic goal.

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## **ABOUT THE OPEN SOCIETY JUSTICE INITIATIVE AND CIJ**

The Open Society Justice Initiative, [www.justiceinitiative.org](http://www.justiceinitiative.org), an operational program of the Open Society Institute (OSI), pursues law reform activities grounded in the protection of human rights, and contributes to the development of legal capacity for open societies. The Justice Initiative combines litigation, legal advocacy, technical assistance, and the dissemination of knowledge to secure advances in five priority areas: national criminal justice, international justice, freedom of information and expression, equality and citizenship, and anticorruption. Its offices are in Abuja, Budapest, and New York. In the field of international justice, the Justice Initiative focuses on accountability for international crimes in international/ized courts and promotes respect for and enforcement of international criminal law and international humanitarian law.

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The Coalition for International Justice (CIJ), [www.cij.org](http://www.cij.org), is an international, non-profit organization that supports the international war crimes tribunals for Rwanda and the former Yugoslavia, and justice initiatives in East Timor, Sierra Leone, and Cambodia. CIJ provides practical assistance to the tribunals and other related justice efforts on legal, technical, and outreach matters. CIJ initiates and conducts advocacy and public education campaigns, targeting decision-makers in governments, international and regional organizations, media, and among the public. Working with other non-governmental organizations around the world, CIJ helps focus and maximize the impact of individual and collective advocacy with regard to international and hybrid tribunals. From 2000-2003, CIJ conducted a substantial rule of law project in East Timor. Most recently, CIJ assembled an international team of professionals who conducted over 1200 interviews with Darfurian refugees who had fled to Chad from Sudan. CIJ has offices in Washington D.C. and The Hague, The Netherlands.



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