

**Asia Pacific Centre for Military Law
and Judicial System Monitoring Programme**

REPORT OF PROCEEDINGS

SYMPOSIUM ON JUSTICE FOR INTERNATIONAL CRIMES COMMITTED IN THE TERRITORY OF EAST TIMOR

**University of Melbourne
Faculty of Law
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**Asia Pacific Centre
for Military Law**

**Judicial System
Monitoring Programme**



EXECUTIVE SUMMARY

In January 2003, the Dili-based Judicial System Monitoring Programme and the Asia Pacific Centre for Military Law at the University of Melbourne Law School convened a Roundtable Symposium entitled *Justice for East Timor: A Review of Past Efforts and Future Possibilities*. The Symposium was to consider efforts to secure accountability for international crimes committed during the Indonesian occupation of East Timor, and to respond to a need for greater dialogue between civil society groups, the East Timorese government and representatives of United Nations on the way forward. The event took place against a continuing debate between the new Government and President, and between the Government, President and civil society groups, as to the relative merits of continued prosecutions, and which mechanisms can and should be pursued in order to bring about accountability.

The Roundtable was attended by senior representatives of the Government and President of Timor Leste, the United Nations, East Timorese, Indonesian and international non-governmental organizations and experts in international law. It was chaired by Ian Martin, former Special Representative of the Secretary-General for the United Nations Mission in East Timor that organised the 1999 ballot on autonomy.

Present State of Accountability

A number of important issues were identified in the discussion of the current state of accountability:

- There was a strong demand for justice among the population of Timor Leste
- The Special Panels lacked vital resources
- A complete absence of Indonesian cooperation with the Serious Crimes process meant that community demands for justice would not be satisfied
- There was a lack of dialogue between the justice sector and the Government of Timor Leste, and a perceived lack of engagement by the Government of Timor Leste with the Serious Crimes Process
- For a number of reasons, the Ad Hoc Human Rights Trials in Indonesia were unlikely to ensure accountability for international crimes committed in East Timor.

The Way Forward

- There is a need for greater advocacy efforts to engage

the international community in providing East Timorese institutions with increased resources

- A thorough assessment of the Ad Hoc Human Rights Court process in Indonesia needs to be undertaken by both NGOs and a UN special representative as a precursor to returning the question of justice for East Timor to the Secretary-General and the Security Council
- The Government of Timor Leste should give due consideration to initiating a joint planning process with UNMISSET to address the continued operations of the Serious Crime process upon the downsizing of the UN mission
- The Government of Timor Leste should give due consideration to establishing a dialogue with the Serious Crimes Unit, the Special Panels and NGOs for the purposes of developing a policy on the continued pursuit of justice for international crimes
- The Government of Timor Leste should give due consideration to the adoption of extradition and mutual assistance arrangements, including Indonesia
- There is a need for wider and more systematic consultation with the people of Timor Leste concerning the methods and objectives of pursuing justice for international crimes
- The Special Panel for Serious Crimes and the Serious Crimes Unit should give due consideration to the adoption of a 'Rule 61' procedure to hold public hearings on issued indictments where the accused have not been presented to the court
- Consideration should be given to filing cases against perpetrators in third states invoking universal jurisdiction
- There should be continuing advocacy for an International Criminal Tribunal for East Timor

Participants felt that the Roundtable provided an unprecedented opportunity for open and vigorous dialogue concerning the complex problems and dilemmas facing East Timor as it struggles to both build a stable independent nation and address the legacy of the gross human rights abuses committed there. Participants also agreed that the dialogue should be continued through the reconvening of a meeting in East Timor in the near future.

I. Background

The Portuguese-administered territory of East Timor was invaded and annexed by the Republic of Indonesia ('ROI') on 7 December 1975. ROI remained in occupation of the territory, in contravention of international law, from December 1975 to October 1999, during which time widespread and systematic human rights abuses were allegedly committed by the Indonesian military (formerly ABRI, now known as 'TNI'). The abuses alleged included torture, crimes against humanity and grave breaches of the Geneva Conventions.

Pursuant to the Agreements signed by ROI and the Government of Portugal on May 5, 1999,¹ a popular consultation administered by the United Nations' Assistance Mission in East Timor (UNAMET) was conducted on 30 August 1999. The people of East Timor voted overwhelmingly to reject autonomy within Indonesia, thereby implicitly endorsing independence. From the beginning of 1999, armed militia groups favoring integration with Indonesia expanded operations against pro-independence groups, and committed grave human rights violations against the civilian population in the course of activities intended to thwart the free conduct of the popular consultation. After the announcement of the ballot results in early September 1999, armed pro-integration groups implemented a 'scorched earth' campaign that forcibly displaced over 200,000 persons, systematically destroyed civilian infrastructure and resulted in the deaths of at least 1500 persons.

The report of the International Commission of Inquiry on East Timor,² the joint reports of the Special Rapporteurs³ of the Commission on Human Rights and the report of the Indonesian Commission of Investigation into Human Rights Violations (KPP-HAM)⁴ all concluded that the violence and human rights violations of 1999 formed part of a carefully planned and implemented TNI policy to obstruct the free participation of the East Timorese in the popular consultation of August 1999. The policy was effected through the formation, arming and coordination of paramilitary groups by

the TNI. Between January and October, the paramilitary groups, with direct and indirect participation of the TNI, engaged in an escalating campaign of extrajudicial killings, disappearance, torture and sexual violence,⁵ punctuated by multiple killings (Cailaco, Maliana, Suai, Liquica, Dili and elsewhere).

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

Unless, in a matter of months, the steps taken by the Government of Indonesia to investigate TNI involvement in the past year's atrocities bear fruit ... the Security Council should consider the establishment of an international criminal tribunal for the purpose.⁶

The International Commission of Inquiry on East Timor ('the International Commission') concluded that the United Nations had a 'vested interest' in investigating and prosecuting persons responsible for international crimes committed in 1999, because the violence was in substantial part aimed at thwarting a resolution of the Security Council. The International Commission also recommended that there be established an international investigation and prosecution body to conduct further investigations into the 1999 violence, and that an international human rights

tribunal be established to try those accused by this body.⁷

In his letter of transmittal of the International Commission's report to the Security Council and the General Assembly, the Secretary-General of the United Nations ('the Secretary-General') did not endorse the recommendation to create an international criminal tribunal. The Secretary-General accepted the assurances of representa-

tives of ROI that they would try Indonesian nationals accused of international crimes, and was 'assured ... of the Government [of Indonesia's] determination that there will be no impunity for those responsible.'⁸ The Secretary-General accepted that the United Nations had an important role to play in investigating and punishing perpetrators of international crimes in East Timor, and



committed to ‘closely monitor progress towards a credible response in accordance with international human rights principles.’⁹

There has thus far been a two track approach towards the investigation and prosecution of international crimes committed in East Timor, with both processes concerned exclusively with crimes committed in 1999. On the one hand, investigations and prosecutions have taken place in East Timor under United Nations’ supervision, through the establishment of the Serious Crimes Investigation Unit and the Special Panel for Serious Crimes. Established by the United Nations’ Transitional Administration in East Timor (‘UNTAET’), the Serious Crimes Investigation Unit (‘SCU’) is composed mostly of international staff under the leadership of a Deputy General Prosecutor for Serious Crimes, an international staff member responsible for directing the investigation and indictment of persons accused of ‘serious crimes’ during 1999. Persons indicted by the SCU are tried before the Special Panel for Serious Crimes of the Dili District Court (‘Special Panel’). Established pursuant to UNTAET regulation 15 of 2000, the Special Panel is composed of one East Timorese judge and two international judges, and exercises exclusive jurisdiction over ‘Serious Crimes.’ Serious Crimes were defined in Regulation 11 of 2000 as including war crimes, torture, crimes against humanity and genocide (as defined in the Rome Statute of the International Criminal Court), as well as murder and sexual crimes (as defined by the Indonesian criminal code in force in 1999). The Special Panel was created in June 2000, but did not commence operations for several months. Appeals from judgments of the Special Panel lie with the Court of Appeal, but this Court has not functioned regularly due to a shortage of judges.¹⁰ The jurisdiction of the Special Panel is preserved in respect of 1999 cases by transitional provisions of the East Timorese Constitution. As at 28 February 2003, the SCU had issued 58 indictments charging 225 persons with serious crimes, of which 217 persons are accused of crimes against humanity committed in 1999. On 24 February 2003, the SCU issued several new indictments of very senior Indonesian military figures, including the former Minister of Defence and Commander-in-Chief of the Armed Forces, General (Ret.) Wiranto.

On the other hand, a process of prosecution and trial has been unfolding in Indonesia. In March 2002, an ad hoc human rights court became operational in Jakarta to try 18 persons indicted for crimes committed in East Timor in 1999. Indictees include several high-ranking military figures, as well as middle-level officers and East Timorese pro-integration leaders. The jurisdiction of the ad hoc court is geographically and temporally limited,

extending only to certain districts of East Timor and to events occurring in the months of April and September 1999. The first instance trials of the ad hoc court are approaching a conclusion, with all but two of the TNI officers acquitted thus far. Several appeals are pending.

In addition to these efforts to investigate and prosecute crimes committed in 1999, UNTAET and the Government of Timor Leste have established the Commission for Reception, Truth and Reconciliation (‘CRTR’).¹¹ Constituted by seven national commissioners and a number of regional commissioners, the CRTR is mandated to play both a truth-seeking role, and a reconciliation role. It is empowered to conduct public hearings, take statements from individuals, conduct exhumations and seize documents, for the purposes of establishing an authoritative historical record on the causes and nature of human rights violations committed in East Timor between April 1974 and October 1999. The CRTR is also empowered to conduct Community Reconciliation Procedures in respect of persons admitting responsibility for crimes that are not serious crimes. These procedures enable the CRTR to facilitate the reintegration of low-level perpetrators through non-penal measures. However, where an individual admits to, or the CRTR uncovers information concerning, a serious crime,¹² the matter must be referred to the General Prosecutor for consideration.

II. Purpose and Objectives

With the United Nations Mission of Support in East Timor (‘UNMISET’, successor to UNTAET) projected to conclude operations in mid-2004, and the future of the SCU and Special Panel uncertain, the prospects for continued investigation and prosecution are unclear. There has also been considerable criticism of the seriousness of the ad hoc court process in Jakarta. Within in East Timor, debate continues within the new government, and between the government and civil society groups, as to

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the relative merits of continued prosecutions, and which mechanisms can and should be pursued in order to bring about accountability for perpetrators. In light of this debate, and because of a perceived need for greater dialogue between civil society groups, the East Timorese government and representatives of United Nations on the way forward for accountability for international crimes, the Asia Pacific Centre for Military Law of the Law Faculty of the University of Melbourne and the Judicial System Monitoring Programme (Dili) convened a two day symposium in Melbourne, Australia, to review current progress and future possibilities for justice.

The symposium was attended by representatives of the Government of Timor Leste, UNMISSET, East Timorese and Indonesian non-governmental organizations ('NGOs'), international NGOs and experts in international law.¹³ It was chaired by Mr. Ian Martin, vice-president of the International Center for Transitional Justice (New York), and former Special Representative of the Secretary-General ('SRSG') for UNAMET. The symposium was closed to the press and public, and presentations and comments were not for attribution. This report synthesizes the main themes arising from the presentation and discussions. It does not necessarily represent a consensus view

III. The Current State of Accountability for International Crimes Committed in East Timor

3.1 *The Serious Crimes Unit and the Special Panel for Serious Crimes*

The SCU is presently composed of 111 personnel: 64 international staff (including 23 United Nations' Police Officers), and 57 local staff (including 6 East Timorese police officers and 10 East Timorese trainee prosecutors). The SCU has 4 prosecution teams, each responsible for several districts, and one national team. Since the work of the SCU commenced, it has issued 58 indictments accusing 225 persons, of which 217 persons are charged with crimes against humanity. As at 28 February 2003, 60 percent of indictees remain at large in ROI. The SCU is insufficiently resourced to investigate all serious human rights violations from the 1999 period, and has therefore elected to focus its investigations on ten 'priority cases' covering most of the 13 districts of the country. These are:

1. The Los Palos Case
2. The Lolotoe Case
3. The Liquica Church Massacre
4. The Attack on the House

of Manuel Carrascalao

5. The Passabe and Makaleb Massacres
6. TNI Battalion 745
7. The Cailaco killings
8. The Maliana Police Station Killings
9. The Suai Church Massacre
10. The Attack on Bishop Belo's Compound and Dili Diocese

Indictments have been issued in relation to eight of the ten priority cases. One trial in a priority case (the Los Palos case) has been completed in which 10 East Timorese individuals were convicted of crimes against humanity¹⁵ and one other priority case trial (the Lolotoe case) is ongoing. The investigation into the Maliana Police Station Killings are projected to be concluded in the next few months. Due to a lack of human resources, the number of uninvestigated cases from 1999 remains large. It is likely that as many as 60 percent of recorded killings will remain uninvestigated by the time the investigative capacity of the SCU is downsized in preparation for the end of UNMISSET's mandate.

32 persons have thus far been convicted of Serious Crimes, of which 10 have been convicted of crimes against humanity. These figures indicate that the SCU and Special Panel are functioning, but the SCU has only recently achieved the necessary degree of efficiency due to an increase in resources made available to it. The long period during which it was not working effectively could have been avoided with better management and planning.

Thus far, there has been no cooperation from Indonesia with requests for the detention and transfer of indictees within Indonesia. Many witnesses that investigators would like to interview are also in Indonesia, but have not been made available. Indonesia has repudiated the Memorandum of Understanding on judicial cooperation signed with UNTAET in January 2000, on the grounds that it is not binding without ratification by the Indonesian parliament. Letters rogatory issued by the SCU have been ignored. The SCU will continue to issue indictments and seek Interpol arrest warrants in respect of persons believed to be Indonesia, but it will require concerted pressure from the international community to encourage Indonesia to detain and transfer these individuals. Even if this pressure were forthcoming, it was noted by one participant that there may be a constitutional barrier to the extradition of Indonesian nationals, although the legal basis for the prohibition is unclear. In its most recent statements in response to the indictment of General Wiranto and other senior TNI personnel, the ROI has firmly indicated that it does not consider indictments by the SCU to be legitimate, and that it is under no obliga-

tion to surrender the accused to the Special Panel.¹⁶

As they have moved through the districts of East Timor, SCU investigators have encountered a strong demand that those who organized and perpetrated crimes of 1999 be brought to justice. The return of militia members and organizers to communities is difficult for victims whose cases are yet to be investigated or tried. Many have waited for justice for many months and could potentially lose faith in the delivery of justice. This is compounded by the knowledge for many that the high-level perpetrators and planners remain unaccountable, in Indonesia. There appears to be minimal belief that the ad hoc court in Jakarta will bring perpetrators to justice, and little respect for the Indonesian justice system. The demand of community leaders is that the organizers and the perpetrators, both Indonesian and East Timorese, are brought to justice through the East Timorese justice system, and failing that, through an International Tribunal for East Timor. The call for justice remains strong in most sections of society, and this may conflict with the attempts of the Government of Timor Leste to promote reconciliation and forge links with the Indonesian government.

The future of the SCU after the end of UNMISSET's mandate (July 2004) is unclear. Steps are presently being taken by the SCU to train East Timorese prosecutors and investigators through ongoing weekly training. The Norwegian government has donated funds to pay trainee salaries, and USAID has funded 8 weeks of training for 20 East Timorese. Four of these East Timorese trainees are ready to assume a role as prosecutors in Serious Crimes cases, but before they can do so they must be nominated by the Government of Timor Leste. Despite requests that the nominations proceed expeditiously, the government had not, as of January 2003, nominated them as prosecutors. As a consequence, there are currently no East Timorese Serious Crimes prosecutors, and the SCU is unable to take on more trainees.

There is considerable frustration among judges at the lack of resources and support for the work of the Special Panel courts. In particular, it was noted that the non-functioning of the Court of Appeal, due to the continued inability to appoint an international judge, was jeopardizing the rights of convicted persons to appeal and undermining community faith in the justice process. The courts also face great limitations in human and material resources. Judges have irregular access to the internet, few computers on which to do their work, no support staff and almost no texts or legal materials in Bahasa Indonesia. No transcription service presently exists, making it very difficult to verify evidence given in court or carefully review legal arguments. There is a shortage of translators with the required legal knowledge. Moreover, the

problems faced by the Special Panel have been replicated throughout the domestic legal system.

In response to a question about the continuing failure to appoint an international Court of Appeal judge, it was noted that the Transitional Judicial Services Commission had put forward the names of three suitable judges in early 2002, but these persons were not appointed by UNTAET before the end of their mandate. The Government of Timor Leste has not subsequently appointed these judges. It was further observed that several qualified candidates have been presented to the Ministry of Justice of Timor Leste, but without a timely response. Overall, the failure to promptly appoint Court of Appeal judges was a result of poor planning and management on the part of both UNTAET and the Government of Timor Leste.

The law of Timor Leste governing the appointment of judges stipulates that Court of Appeal judges must have fifteen years experience and be fluent in English and Portuguese. It is difficult to attract such highly qualified candidates at present salary levels. However, a Court of Appeal judge has been located and should be announced shortly. Moreover, more Special Panel judges, prosecutors and defence counsel are to be appointed. Nevertheless, there needs to be a greater level of engagement from the Government of Timor Leste.

It was also observed that thus far, the construction of a viable judicial system has been approached as a developmental goal, rather than a priority need. As a result, both the Special Panels and the ordinary court system continue to suffer the same problems that were identified over two years ago. As one participant noted, the fact that the judicial system is not working is a 'public secret'. Within the legal sector, there is great frustration at the current state of affairs, and some feel that, despite their own best efforts, the system will not be adequate to meet the need for justice. In particular, it was noted that of the 20 or more people presently convicted, most have been low-level perpetrators, often illiterate. Those most responsible remain in Indonesia, beyond the reach of the Special Panels. Many extradition requests have been sent to Indonesia without response, and it is also necessary to ask whether the East Timorese Constitution – which prohibits the extradition of East Timorese nationals – will also become an obstacle to having Indonesia extradite its own nationals to East Timor.

Clearly, the crimes already tried are not 'insignificant' or unimportant for the victims of these incidents. Nevertheless, among those whose cases have not – or cannot, due to the inability to apprehend indictees – come to trial, the issuing of an indictment has some significance. Feedback from victims to investigators indicates that an

indictment is seen as a public document identifying probable guilt. To this extent, there is still public support for the Serious Crimes process, but also a realization that it is presently very unlikely to gain custody over high-level planners and perpetrators, without action from the international community – and even then, Indonesian domestic law may thwart extradition proceedings.

3.2 Commission for Reception, Truth and Reconciliation

The CRTR has seven national commissioners, 29 regional commissioners, 200 East Timorese staff and 10 international staff. Its mandate is to inquire into the history of human rights violations in East Timor between April 1974 and October 1999, and to report its findings to the government, the people of East Timor and the international community. It is also responsible for facilitating community level reconciliation for persons who have committed crimes other than ‘serious crimes’.¹⁷ The CRTR supports the work of the judiciary and government in their attempts to prosecute grave human rights violations committed in East Timor.

Thus far, the CRTR has collected 300 statements, mostly given voluntarily by perpetrators. The CRTR determines which of these are suitable for community reconciliation procedures, and which are to be referred to the General Prosecutor’s office for possible prosecution. It was noted that, at present, the SCU is not resourced to investigate and prosecute cases referred to it by the CRTR, thereby affecting the proposed balance between reconciliation and accountability. Another 2000 statements have been collected as part of the CRTR’s truth-seeking function.

In its work thus far, the CRTR has encountered a strong demand for justice for high-level perpetrators. East Timorese have asked, why does the CRTR concern itself only with small cases? Moreover, there appears to be little faith in the trials taking place in Jakarta. The question of justice must be resolved, and the work of the CRTR is complementary to a continuing justice process.

3.3 The Executive of the Government of Timor Leste

It was repeatedly observed that the Government of Timor Leste has yet to establish a clear position and policy on:

- (a) the relative priority of justice for international crimes as a foreign policy and domestic objective;*
- (b) the continuation of the Serious Crimes process after the end of the UNMISET mandate;*

- (c) the level of support that it can and will provide for continuing prosecutions through the Serious Crimes process, and whether it will actively seek support from donors for this purpose;*
- (d) other options that it may pursue should both the Serious Crimes process and the Jakarta trials prove inadequate to ensure the necessary level of accountability.*

In the absence of policy clarity on these issues, it is unlikely that the international community could be motivated to return the question of justice for East Timor to the international agenda.

In response to these difficulties, it was noted that the Ministry of Foreign Affairs and Cooperation supports international efforts – by state and non-state actors – to pursue accountability for international crimes committed in East Timor, which may include the prospect of an international tribunal. However, East Timor cannot expend resources in campaigning for this outcome. Executive government in East Timor remains fragile and underdeveloped, responding to urgent needs and demands that arise on a day-to-day basis. As a consequence, Government-wide policies on the issue of justice, the Serious Crimes process and an international court have not been formulated in any coherent manner.

It was suggested that, in a practical sense, the government operates within the limits of its dependence on foreign assistance. Its policy options are further constrained by the conditions imposed by international financial institutions, such as the World Bank. It lacks sufficient skilled administrative personnel and its administrative infrastructure is over-burdened by responding to daily crises. The situation of defence and security remains weak, and this raises the question of whether East Timor can sustain the consequences of trying or attempting to try senior Indonesian military figures. East Timor has only relative freedom of choice in making decisions about how to deal with international crimes.

3.4 East Timorese NGOs

East Timorese NGOs have undertaken consultations with victims and victims’ groups in East Timor, and the demand for justice is very strong. Two demands are foremost: that perpetrators of murder and crimes against humanity be taken to court, and that there be some form of rehabilitation for the victims. That is, victims seek some kind of compensation or redress for the harm they suffered, and they also seek psychological recognition. While this is something that the CRTR is considering, it is a difficult programme for the CRTR to resource. Victims groups have been organizing themselves into eco-

conomic cooperatives to help empower themselves economically, and to strengthen their voices in demanding justice. NGOs have compiled evidence of crimes committed since 1975, and will provide this information to the CRTR.

The position of East Timorese NGOs is that only an international criminal tribunal will adequately meet the justice needs of the East Timorese people. The ad hoc human rights court in Jakarta is regarded in this sector as a 'theatrical tribunal', to conceal rather than expose the crimes of the perpetrators. The Special Panel's resource limitations and the lack of cooperation from Indonesia make it unlikely that the Special Panel will try persons most responsible for international crimes. It was suggested that the international criminal tribunal could either be a 'hybrid' tribunal composed of East Timorese, Indonesian and international staff and located in a neutral state, or a fully international tribunal located in Dili or a neighboring country. It was emphasized that any tribunal must be established by a Security Council resolution requiring states to cooperate with the tribunal's orders. Representatives of the NGO sector in East Timor also stated that any justice mechanism should incorporate means to provide rehabilitation to victims, such as health care, reparations and forms of acknowledgment.

3.5 The Jakarta Trials

In January 2000, the commission appointed by the Indonesian National Human Rights Commission (KOMNAS HAM) to investigate human rights violations in East Timor during 1999 (KPP-HAM) produced a detailed report naming 32 TNI officers and militia leaders as responsible for gross human rights violations, and recommending their prosecution. In November 2000, the Indonesian Parliament passed a law authorizing the creation of ad hoc human rights courts, which may be established by presidential decree. In March 2001, then-Indonesian President, Abdurrahman Wahid, issued a decree establishing an ad hoc human rights court to try human rights violations committed in East Timor *after* 30 August 1999. Upon her entry into office in August 2001, President Megawati Sukarnoputri amended the jurisdiction of the court to include crimes that were committed in April 1999. The court thus has jurisdiction only in respect of five cases of grave human rights violations committed in 1999: the Liquica Church Massacre, the attack on the residence of Manuel Carrascalao, the Suai Church Massacre, the attack on Bishop Belo's compound, and the killing of Dutch journalist Sanders Thoenes.

It would be another six months before judges were appointed and the ad hoc court commenced operations. Of the 32 persons named in the KPP-HAM report, only

18 were indicted. Of these (as of April 2003), 11 have thus far been acquitted, 4 convicted and sentenced to between three and ten years imprisonment, and 3 verdicts are pending. Appeals have been lodged in both acquittals and convictions, and are as yet undetermined.

Several experts and trial observers made serious criticisms of the ad hoc human rights court trials and concluded that they were unable to ensure justice for international crimes committed in East Timor. The indictments were 'appallingly' prepared, and were often internally inconsistent, such that it would be difficult for even a fair-minded court to convict on the basis of the evidence presented. Accused have been prosecuted on the basis of their 'failure to prevent' human rights violations, with the strong implication that the violence was essentially a result of a conflict between Timorese factions, in which TNI were helpless bystanders. Large amounts of evidence refuting this thesis, including the KPP HAM report, have been ignored or not introduced during the trial. Translation has been largely inadequate, and the absence of a witness protection program has meant that few eyewitnesses have come forward for the prosecution.

The judges lack competence in international criminal law, and have been unable to adequately interpret and apply the relevant legal principles. They have not been provided with adequate institutional support, lacking appropriate facilities for research and, indeed, have not yet been paid for their work because the presidential decree authorizing their salaries remains unsigned. This express lack of institutional support is part of a context of political pressure which has impressed upon judges that their task is not backed by other institutions and sectors of the state. Moreover, there is little public support for the trial process, because of the continued credibility of the official position that the violence in East Timor was an intra-Timorese conflict made worse by UN deceit. On this view, TNI officers were patriots attempting to do their duty and defend Indonesian unity. This view has become part of the judicial account, through the indictments themselves, such that 'the court has thus metamorphosed into the strongest fortress for the protection of the defendants.'

It was speculated that TNI agreed to domestic trials because it would be more convenient for the military to face the legal process in Indonesia, rather than internationally. It is possible that a deal was made at the outset that military personnel would escape conviction or serious punishment. Nevertheless, it was noted that in the three convictions handed down by January 2003 (including one middle-ranking military officer), a panel of non-career judges with greater expertise in international criminal law has been presiding. With appeals being considered in the Supreme Court, it is unlikely that TNI person-

nel who are convicted will serve any time in jail.

It was emphasized that the failure of the domestic Indonesian prosecution process needed to be analyzed in a sophisticated and careful way in order to help return the question to the international agenda. Specifically, it was noted that the Secretary-General had undertaken to 'closely monitor progress towards a credible response' to the crimes of 1999, and report back to the Security Council on the matter. It was recalled that the Secretary-General's deferral of a Security Council response to international crimes committed in 1999 was based upon his acceptance of ROI's 'assurance' that justice would be pursued fairly and expeditiously. Thus, it was argued that it was now necessary to work towards creating the conditions in which recognition of the failure of the Indonesian domestic process gains the imprimatur of the Secretary-General. Several international NGOs are completing reviews of the Jakarta trials, and the United Nations High Commissioner for Human Rights has recommended the appointment of an expert to review and report on the trials. Once a firm analytical base is established through such efforts, consideration must be given to the means by which the findings can be returned to the agenda of the Security Council.

Several factors suggest a need to move quickly on this front. International interest in the trials has already waned significantly, with few embassies sending observers. Moreover, since the terrorist attacks in New York in 2001, pressure on Indonesia has decreased significantly, and interest in the issue of East Timor as a whole is fading. The attitude appears to be that 'East Timor is history,' and it is particularly unlikely that this tendency will be reversed if the East Timorese government has no unified or coherent approach to mobilizing support among states for keeping the issue of justice on the international agenda. Within Indonesia, civil society forces are weaker than three years ago and only small groups are interested in seeing justice for East Timor. Consideration also needs to be given to how the indictments of TNI officers by the Special Panel can be utilized effectively outside East Timor. Mechanisms to be investigated include the use of immigration blacklists, circulation of Interpol Red Notices, and lodging cases in jurisdictions that permit prosecution on the basis of universal jurisdiction.

The acquittals and convictions of the Jakarta trials raise question of whether further prosecutions of the same individuals would be barred by the rule against double jeopardy (*non bis in idem*). It was observed that the rule will generally not apply if the original trials were fundamentally flawed, or pursued in a manner that was not impartial, independent, diligent or were designed to shield the accused from future prosecution.¹⁸ The question of dou-

ble jeopardy will have to be considered, but the role of the above-mentioned reports in establishing the inadequacy of the Jakarta trials will be important evidence in determining whether the rule does not apply to these cases.

IV. The Way Forward:

Summary of Comment and Discussion

The current conjuncture was widely seen as an opportunity to bring the issue of justice for East Timor back to the international agenda.

4.1 The Jakarta Trials

It was accepted that the failure of the Jakarta trials must be impressed upon the international community and the United Nations over the next six months, through a variety of channels, including:

- (a) *Analytical reports of NGOs;*
- (b) *Review by an independent expert appointed by the Secretary-General or the High Commissioner for Human Rights;*
- (c) *A statement by the Commission on Human Rights in its upcoming meeting in March 2003;*
- (d) *A report by the Secretary-General, at the behest of a member of the Security Council.*

Crucial to the effectiveness of these efforts is the adoption of a position by the Government of Timor Leste on the trials, and on the question of accountability generally.

4.2 The Serious Crimes Process

Despite the frustration voiced with the Serious Crimes Process, it was concluded that it was now functioning more effectively than in the past, and had the potential to yield useful results. However, this potential is being hampered by uncertainty on several issues, which must be addressed. These issues include:

- (a) *The remaining life of the process: with UNMISSET's mandate scheduled to end in July 2004, the downsizing of the SCU will commence in 2003. The willingness of the international community to extend the process beyond the UNMISSET mandate is uncertain. The life of the process may be extended if the Government of Timor Leste were to request, multilaterally and bilaterally, continued donor support for it. Thus far, however, no policy position has been adopted, and assessments of the overall needs of the justice sector provided to the government have not yet been adopted. Some kind of joint planning process would need to be undertaken between the United Nations and the Government of Timor*

Leste to address the downsizing of SCU and efforts to develop East Timorese capacity.

(b) The commitment of the Government of Timor Leste: Several East Timorese participants strongly questioned why the government had taken no stance on the difficulties of the Serious Crimes process, and had failed to respond to proposals from East Timorese and international staff. Senior legal personnel expressed frustration that the demands for justice which they confront daily are not being heard at the governmental level.

(c) East Timorese popular sentiment: Apart from anecdotal evidence, there has yet been no formal and systematic consultation with East Timorese society, and victims in particular, about whether there is popular support for continuing the Serious Crimes process. There have been indications that communities are deeply frustrated with the slowness of the process and its failure to try high-level perpetrators, and also with the lack of outreach and communication from legal institutions to victims. Nevertheless, it is necessary to gauge support for extending the process. This may form part of a wider consultation to determine the content of community justice demands, and the perceived objectives of justice processes, which could inform government policy on the issue.

4.2.1 The Rule 61 Procedure

An interim measure proposed to help enhance victims' sense that some action is being taken to address their cases, and to raise the profile of Indonesian non-cooperation with the SCU, is the 'Rule 61' procedure. The procedure derives from Rule 61 of the Rules of Evidence and Procedure of the International Criminal Tribunal for the Former Yugoslavia ('ICTY'). Under that rule, the Court could hold a hearing to review an indictment where the accused could not be found, or was not surrendered to the Court because of the non-cooperation of another state. The hearings allowed the Court to hear some of the evidence against the accused – including evidence from witnesses – to determine whether there are 'reasonable grounds' to conclude that the accused committed the crimes. Where the Court reached this determination, it could publish its reasons and certify, if appropriate, that the failure to apprehend the accused was a result of non-cooperation of a state.

The legal issues entailed in introducing such a procedure in the Special Panel for Serious Crimes are considered in an Appendix to this report,¹⁹ but it was noted

that the principal difficulty with using such a procedure is the drain on resources of the SCU and Special Panel that it would represent. The SCU and Special Panel are currently unable to conduct more than one or two crimes against humanity hearings at a time, and thus the introduction of Rule 61 hearings may prove an unfeasible burden on current resources. Nevertheless, it was accepted that the hearings could have several beneficial consequences. First, they may help restore victims' dignity by providing them the opportunity to give evidence and have the case against the accused publicly ventilated, even though the accused is not in custody. Secondly, the publicity surrounding the hearings may increase political pressure on Indonesia and the international community, by highlighting Indonesian inaction. Thirdly, a Panel's determination that there were reasonable grounds for believing in the guilt of the accused on the basis of the information brought by the prosecutor could be used to enhance the credibility of the cases against the accused and encourage other states to enforce arrest warrants circulated through Interpol.

At this stage, however, East Timor has yet to conclude any extradition or mutual assistance treaties with any other states, and so the prospects for detention and transfer on a bilateral basis remain poor. It was suggested that more serious consideration be given to filing criminal complaints against high-level perpetrators in jurisdictions that permit investigation and prosecution under universal jurisdiction, in order to cast a wider net.

4.3 International Criminal Tribunal for East Timor

It was observed by some participants that while the demand for an international tribunal was justified, it should not be seen as a straightforward solution to the problems of Indonesian cooperation. While on paper a Security Council-mandated international tribunal has greater coercive powers, in reality it is as dependent upon consensual cooperation as other mechanisms. Moreover, the funding and effective operationalization of an international tribunal may also be a slow process. Pursuing interim strategies, such as those discussed above, was therefore advisable. However, some participants stressed that the credible threat of an international court must be maintained if any of the other strategies are to be successful. Care needs to be taken that advocacy for other strategies is not conducted in a way which undermines the case for an international tribunal, particularly where some governments have stated in writing that they remain open to the possibility of an international tribunal.

There was some discussion of a proposal raised recently by H.E. Jose Ramos Horta, Minister of Foreign

Affairs and Cooperation for Timor Leste. Dr. Ramos Horta has publicly suggested the formation of another international commission of inquiry, mandated by the Security Council and composed of international judges (including at least one Indonesian judge), to review evidence of international crimes committed in 1999 and make recommendations. The detail of this proposal remains unclear, but it appears to be put forward as an intermediate step towards the creation of an international tribunal. It is similarly unclear whether this proposal has any official status in East Timorese government policy. While there was some support for the idea that such a commission could produce an authoritative account of the evidence for international crimes, and perhaps have access to hitherto undisclosed intelligence material held by foreign governments, there was also concern that it would not significantly add to the work of the three previous inquiries. There was the prospect that a new commission would result in duplication of effort and further delay action on the issue by procedural maneuvers, or by diverting resources from other mechanisms.

Within East Timor, popular and NGO support for an international tribunal remains strong. In 2002, 100 Indonesian NGOs adopted a resolution calling for an international criminal tribunal as the preferred mechanism for prosecuting international crimes committed in East Timor. The investigations of the CRTR into the wide-

spread human rights violations committed throughout the Indonesian occupation may also heighten international consciousness of the need for justice, not only for 1999, but for the entire period of the military occupation. Presently, however, there are insufficient resources for any criminal investigations beyond the 1999 period.

V. Continuation of the Dialogue

Participants agreed that the intensive two-day dialogue had been productive and useful in ventilating the crucial practical and strategic issues confronting the pursuit of justice for East Timor. It was therefore considered important that an intensive dialogue continue in the next several months, as events are likely to unfold quickly. It was proposed that another meeting of this kind be held in Dili, East Timor, as soon as possible. It was also hoped that the next round of dialogue would involve greater participation by the Government of Timor Leste, and the possibility of involvement by the ROI or other Indonesian actors. It was felt that the following concrete steps needed to be taken in the next few months:

- (a) *Clarification of the position of the Government of Timor Leste on the life span of the Serious Crimes process, and a joint planning process between the Government and the United Nations on this question;*



(b) *The opening of formal and informal means of dialogue between the judiciary, the prosecution and NGOs, and the Government of Timor Leste, on the formulation of government policy on the continued pursuit of justice for international crimes;*

(c) *Wider and more systematic consultation between the Government of Timor Leste and the people of East Timor concerning the methods and objectives of pursuing justice for international crimes;*

(d) *Coordinated and concerted efforts to return the issue of justice for East Timor to the agenda of the United Nations Secretariat and the Security Council, in the immediate aftermath of the Jakarta trials;*

(e) *A reconvening of a dialogue as soon as possible, in East Timor.*

In the medium term, the following issues were identified for further analysis and discussion:

(a) *Investigation into the legal and practical issues raised by the adoption of a rule 61 process by the Special Panel for Serious Crimes;*

(b) *Consideration of the adoption of extradition and mutual assistance arrangements with neighboring states, including, but not limited to, Indonesia;*

(c) *Consideration of filing cases against high-level perpetrators in third states employing universal jurisdiction;*

(d) *Continuing advocacy for an international criminal tribunal for East Timor, and further public events aimed at international civil society and public opinion, to highlight the unmet demands for justice in East Timor.*

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Appendix 1

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Appendix 2 – Double Jeopardy

International Practice Relating to *Non Bis In Idem*

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This Appendix addresses the question, ‘Under what circumstances can individuals previously prosecuted in Indonesia be prosecuted by another judicial authority for crimes committed in East Timor without violating relevant *non bis in idem* standards?’ My analysis considers three distinct situations, focusing on the first: (1) prosecution before a Special Panel in East Timor; (2) prosecution in a third country, presumably exercising universal jurisdiction or another type of extraterritorial jurisdiction; and (3) prosecution before an international tribunal if one were to be established with jurisdiction over the relevant offenses.

I. Trials in East Timor

The most important law governing prosecution in East Timor of defendants previously prosecuted in Indonesia is set forth in Regulation No. 2000/15, adopted by the United Nations Transitional Administration in East Timor (UNTAET) in June 2000.²⁰ I am not aware of any international treaties or principles of customary international law that impose additional limitations beyond those set forth in UNTAET Regulation No. 2000/15. Various international instruments examined in Sections II and III may nonetheless provide some guidance in interpreting Regulation No. 2000/15. Further, they point to standards that, if not legally binding, may appropriately guide the exercise of discretion by East Timor’s public prosecutors.

A. UNTAET Regulation No. 2000/15

Pursuant to UNTAET Regulation No. 2000/15, individuals who have already been tried by a court outside East Timor for any of the offenses that are subject to the jurisdiction of the Special Panels may not be tried before a Special Panel ‘with respect to the same conduct unless the proceedings in the other court . . . [w]ere for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the panel’ or ‘[o]therwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.’²¹

Under this regulation, individuals already prosecut-

ed in Indonesia could be prosecuted before a Special Panel in East Timor if the latter prosecution did not involve ‘the same conduct’; if the proceedings in Indonesia were undertaken to shield the perpetrator from criminal responsibility for a crime within the jurisdiction of the Special Panels; or if the proceedings in Indonesia did not conform with international standards of fair process and were conducted in a manner that is ‘inconsistent with an intent’ to bring the perpetrator to justice.

Section 10.3 of UNTAET Regulation No. 2000/15 would allow but not require a Special Panel that convicted an individual who had already been tried for the same conduct in Indonesia to deduct time already served in connection with the Indonesian proceeding from any sentence the panel imposed. Should a Special Panel prosecute someone already tried for the same conduct in Indonesia, it would be desirable for the judges to apply the ‘deduction from sentence’ rule even if they are not required to do so.

Each of the provisions of UNTAET Regulation No. 2000/15 noted above is adapted from similar provisions in the Rome Statute of the International Criminal Court (ICC).²² I briefly discuss in Section III provisions in the Rome Statute from which the provisions noted above are drawn.

B. East Timor Constitution

The Constitution of the Democratic Republic of East Timor includes two provisions that have a bearing on the question addressed in this memorandum. Section 31(4) of the Constitution provides: ‘No one shall be tried and convicted for the same criminal offence more than once.’ The analysis that follows is based on the assumption that Section 31(4) applies only in respect of individuals who have already been tried by another court in East Timor.²³

Section 9(1) provides that the ‘legal system of East Timor shall adopt the general or customary principles of international law.’ Since the next two paragraphs of Section 9 address the domestic legal status of international treaties to which East Timor is a party, paragraph 1 apparently refers to non-treaty sources of international law.

It is doubtful whether ‘general or customary principles of international law’ include the *non bis in idem* principle. The law of most countries recognizes a *non bis in idem* principle,²⁴ which is also affirmed in numerous international human rights and extradition instruments.²⁵ In light of this, Christine Van den Wyngaert and Tom On-

gena write, ‘one might, at first sight, think of it as a generally accepted principle of fairness and of criminal justice and perhaps even as a principle of customary international law.’²⁶ They nonetheless conclude that ‘national legislation and international instruments differ so widely that it would be nearly impossible to define the rule in such a way that it would reflect the positive law of most nations or of conventional international law.’²⁷ Another writer similarly concludes that ‘no general international *ne bis in idem* exists in [international criminal law] and it thus does not seem to be a rule of customary international law.’²⁸ If these writers are correct, it would appear that Section 9(1) of East Timor’s constitution does not, by its incorporation of ‘general or customary principles of international law,’ impose any restraints on East Timor’s ability to prosecute individuals already tried in Indonesia beyond those imposed by domestic sources of law.

A review of *non bis in idem* provisions in international instruments may nonetheless be useful. Even if East Timor is not legally required to observe any *non bis in idem* principle in respect of persons already tried in Indonesia other than the rule set forth in UNTAET Regulation 2000/15, the Government of East Timor may wish to avoid prosecuting such individuals under circumstances that do not accord with emerging or widely-accepted standards. Further, approaches to the *non bis in idem* principle embodied in various treaties and other international instruments may provide some guidance in interpreting ambiguities in relevant domestic law.

In brief, the overall import of approaches described in Section II is to reinforce the basic approach embodied in UNTAET Regulation No. 2000/15, while adding several nuances: An individual who has already been prosecuted may be prosecuted in another country if 1) the second prosecution does not involve the same conduct or offense prosecuted in the first proceeding; 2) the first proceeding did not result in a final judgment; 3) there are new or newly discovered facts that were not available at the first trial; or 4) the first prosecution suffered from a fundamental defect. In addition, a second trial may be especially appropriate when undertaken in the country where the crimes concerned occurred.

II. International Standards Governing Prosecutions in Two or More States

Several international human rights treaties include a *non bis in idem* provision. None of these treaties is in force with respect to East Timor,²⁹ however, and in any event their *non bis in idem* provisions apply only in respect of prosecutions instituted within the same state that

conducted the prior prosecution. The *non bis in idem* rule has, however, been broadly recognized in extradition treaties and in other instruments governing interstate cooperation in matters relating to criminal justice.

Before turning to those instruments, it may be useful briefly to consider how various human rights conventions approach the *non bis in idem* rule. Although not directly applicable to the situation considered here, these treaties indicate circumstances in which prosecution of an individual who has already been tried would not raise any significant problems.

A. Human Rights Conventions

Both the International Covenant on Civil and Political Rights (ICCPR)³⁰ and Protocol 7 to the European Convention on the Protection of Human Rights and Fundamental Freedoms (‘European Convention’) prohibit retrial following either a final conviction or acquittal, while the American Convention on Human Rights protects against retrial only after an acquittal.³¹

1. ICCPR

Article 14 of the ICCPR assures the right to a fair trial, and enumerates specific rights designed to ensure this guarantee. Paragraph 7 establishes a *non bis in idem* rule, providing in full:

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.³²

The preparatory work indicates that the drafters understood that states would be free, in accordance with national law, to try persons already sentenced for the same offence by courts of another country,³³ and the jurisprudence of the Human Rights Committee (HRC) under the Optional Protocol confirms this interpretation. In *A.P. v. Italy*,³⁴ the HRC ruled inadmissible a communication alleging that Art. 14(7) had been violated by Italy’s prosecution of the applicant for a currency offence for which he had already been convicted and sentenced in Switzerland. The Committee observed that Art. 14(7) ‘prohibits double jeopardy only with regard to an offence adjudicated in a given State.’³⁵ Thus, even if East Timor were already bound by the ICCPR, the Covenant’s *non bis in idem* rule would not prevent the Special Panels from retrying persons convicted by a court in Indonesia.

The *travaux préparatoires* make clear that what is considered a ‘final’ judgment for purposes of triggering

the *non bis in idem* turns on national law. The phrase ‘in accordance with the law and penal procedure of each country’ was added to qualify only the phrase ‘finally convicted or acquitted,’ and not the entire text of the *non bis in idem* provision.³⁶

2. European Convention

Article 6 of the European Convention establishes basic rights of due process. Paragraph 3, which provides ‘minimum rights’ for persons charged with a criminal offence, does not include an explicit guarantee against double jeopardy, but Protocol 7 to the Convention fills this gap. Article 4 of the protocol provides in full:

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
3. No derogation from this Article shall be made under Article 15 of the Convention.

The bar against retrial established in this provision applies by its terms only to retrial by the same state.³⁷ And, of course, East Timor would never be bound by the European Convention or Protocol 7 thereto. It is nonetheless noteworthy that if the standards of Protocol 7 were applicable to East Timor in its relationship with Indonesia, East Timor could retry defendants already convicted or acquitted in Indonesia if there were new or newly discovered facts, or if there had been a ‘fundamental defect’ in the earlier proceedings that could have affected the outcome of the trial.³⁸

B. Transnational Cooperation in Criminal Law Enforcement

While the *non bis in idem* provisions discussed above apply only within a state, many extradition treaties contain a transnational analogue to the *non bis in idem* provisions described above. Bilateral extradition treaties frequently contain such provisions.³⁹ In addition, some multilateral treaties on matters of transnational criminal procedure include a *non bis in idem* rule.

It is nonetheless doubtful that these provisions reflect a general and binding transnational norm prohibiting states from prosecuting individuals who have already been tried for the same offense in another state. An explanatory report concerning a 1975 European extradition treaty observed that, while the principle of *non bis in idem* ‘is generally recognised in the law of member States’ for intra-state purposes, ‘[a]t the international level, . . . the position is less clear’⁴⁰ The report continued:

Thus no State in which a punishable act has been committed is debarred from taking proceedings in respect of an offence merely because it has already been the object of proceedings in another State. This position results not only from the fact that the right to take proceedings in respect of offences has traditionally been considered part of sovereignty but also from the fact that the State of the offence more often than not will be the State in which the commission of the act can best be proved; it would therefore seem unjustified for that State normally to be bound by decisions delivered in other States, where the absence of certain elements of evidence may have led to acquittal or the imposition of less severe penalties.⁴¹

More recently, a Trial Chamber of the ICTY observed that the *non bis in idem* rule set forth in Article 14 of the ICCPR ‘is generally applied so as to cover only double prosecution within the same State, and has not received broad recognition as a mandatory norm of transnational application.’⁴²

Even so, the treaties mentioned above and other instruments noted in this section may be relevant to the issues addressed in this memorandum. As previously suggested, to the extent that their *non bis in idem* provisions reflect widely accepted standards, East Timor might wish to observe those standards even if they are not legally binding.⁴³

In addition, some of the instruments discussed in this section might be directly applicable to countries that may be able to prosecute individuals already prosecuted in Indonesia by exercising universal jurisdiction or another basis of extraterritorial jurisdiction. (It should be noted, however, that the European treaties mentioned in this section generally apply only as between states parties.)

Article 9 of the European Convention on Extradition⁴⁴ provides:

Extradition shall not be granted if final judgment has been passed by the competent authorities of

the requested Party upon the person claimed in respect of the offence or offences for which extradition is requested. Extradition may be refused if the competent authorities of the requested Party have decided either not to institute or to terminate proceedings in respect of the same offence or offences.⁴⁵

The Explanatory Report for this treaty explains that the first sentence of Article 9 ‘covers the case of a person on whom final judgment has been passed, i.e. who has been acquitted, pardoned, or convicted.’

A 1975 protocol to this convention supplements the above-quoted provision with text that, among other things, extends the *non bis in idem* rule to circumstances in which the requesting state seeks the extradition of an individual previously prosecuted in a third state:

2. The extradition of a person against whom a final judgment has been rendered in a third State, Contracting Party to the Convention, for the offence or offences in respect of which the claim was made, shall not be granted:

- a. if the afore-mentioned judgment resulted in his acquittal;
- b. if the term of imprisonment or other measure to which he was sentenced:
 - i. has been completely enforced;
 - ii. has been wholly, or with respect to the part not enforced, the subject of a pardon or an amnesty;
- c. if the court convicted the offender without imposing a sanction.

3. However, in the cases referred to in paragraph 2, extradition may be granted:

- a. if the offence in respect of which judgment has been rendered was committed against a person, an institution or any thing having public status in the requesting State;
- b. if the person on whom judgment was passed had himself a public status in the requesting State;
- c. if the offence in respect of which judgment was passed was committed completely or

partly in the territory of the requesting State or in a place treated as its territory.

4. The provisions of paragraphs 2 and 3 shall not prevent the application of wider domestic provisions relating to the effect of *ne bis in idem* attached to foreign criminal judgments.⁴⁶

The explanatory report accompanying this protocol explains that, ‘as in the case of the original Article 9 of the convention, the word “final” used in Article 2, paragraph 2 ‘indicates that all means of appeal have been exhausted.’⁴⁷

Two other non-binding instruments merit brief note. First, Article 3(d) of the UN Model Treaty on Extradition⁴⁸ includes in its enumeration of mandatory grounds for refusing extradition the following circumstance: ‘there has been a final judgement rendered against the person in the requested State in respect of the offence for which the person’s extradition is requested.’

Second, the Princeton Principles on Universal Jurisdiction, adopted by an international group of jurists in 2001, include the following:

Principle 9 — *Non Bis In Idem*/Double Jeopardy

1. In the exercise of universal jurisdiction, a state or its judicial organs shall ensure that a person who is subject to criminal proceedings shall not be exposed to multiple prosecutions or punishment for the same criminal conduct where the prior criminal proceedings or other accountability proceedings have been conducted in good faith and in accordance with international norms and standards. Sham prosecutions or derisory punishment resulting from a conviction or other accountability proceedings shall not be recognized as falling within the scope of this Principle.

2. A state shall recognize the validity of a proper exercise of universal jurisdiction by another state and shall recognize the final judgment of a competent and ordinary national judicial body or a competent international judicial body exercising such jurisdiction in accordance with international due process norms.

3. Any person tried or convicted by a state exercising universal jurisdiction for serious crimes under international law as specified in Principle

2(1) shall have the right and legal standing to raise before any national or international judicial body the claim of *non bis in idem* in opposition to any further criminal proceedings.⁴⁹

III. Prosecution by an International Tribunal

None of the three international tribunals operating today has jurisdiction over offenses committed in East Timor by Indonesian authorities in 1999. These crimes are not encompassed in the jurisdiction of either the International Criminal Tribunal for the former Yugoslavia (ICTY) or the International Criminal Tribunal for Rwanda (ICTR). Although East Timor became a party to the Rome Statute on September 6, 2002, the ICC does not have retroactive jurisdiction.

This section nonetheless briefly notes the approach taken in each of these three tribunals' statutes in respect of the *ne bis in idem* principle, for three reasons. First, although it now seems unlikely, it is theoretically possible that the United Nations will establish an ad hoc tribunal with jurisdiction over serious violations of humanitarian law committed in East Timor in the period surrounding the 1999 plebiscite. In that event, the tribunal's statute would doubtless include a *non bis in idem* provision modeled on provisions in the statutes of previously established international tribunals.

Second and as previously noted, the *non bis in idem* provisions of UNTAET Regulation No. 2000/15 were based upon the *non bis in idem* provisions of the Rome Statute. Accordingly, the negotiating history of the latter may provide useful guidance in interpreting the former. Finally and more generally, the provisions noted below add further insight into prevailing international standards.

A. ICTY and ICTR

Article 10(2) of the ICTY Statute provides in part:

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.

2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:

(a) The act for which he or she was tried was characterized as an ordinary crime; or

(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

Virtually identical provisions appear in Article 9(1) and (2) of the ICTR Statute.⁵⁰

Several decisions of an ICTR trial chamber have apparently interpreted the phrase 'acts constituting serious violations of international humanitarian law' in Article 9(2) of the ICTR Statute to encompass all charges entailing serious violations of international humanitarian law that relate to the same act. Explaining its decision approving the Prosecutor's request that Swiss authorities defer their investigation of Alfred Musema to the ICTR, a trial chamber suggested that a Swiss prosecution on war crimes charges would preclude the ICTR from prosecuting the same defendant on charges of genocide and crimes against humanity:

The Prosecutor rightly observes that Article 9.2 of the Tribunal's Statute, concerning the principle of *non bis in idem*, sets limits to the subsequent prosecution by the Tribunal of persons who have been tried by a national court for acts constituting serious violations of international humanitarian law. As Swiss criminal legislation does not contain any provision concerning genocide or crimes against humanity, Alfred Musema has only been prosecuted by the Swiss courts for charges related to serious violations of the Geneva Conventions and of the Additional Protocols. Thus, should the Prosecutor subsequently wish to qualify the charges against Alfred Musema as genocide or crimes against humanity, Article 9 of the Statute would preclude any prosecution for such charges if a decision has already been made by the Swiss national courts.⁵¹

If, however, a national court prosecuted a defendant under charges that amount to an 'ordinary crime,' the ICTY/R would not be barred from prosecuting the same defendant for the same act.⁵²

It should also be noted that the *non bis in idem* provisions of both statutes direct the relevant tribunal to 'take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.'⁵³

B. ICC

Article 20(3) of the Rome Statute provides:

(3) No person who has been tried by another court for conduct also proscribed under [the provisions of the Rome Statute establishing crimes that may be prosecuted before the ICC] shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Like the corresponding provision of UNTAET Regulation No. 2000/15, Article 20(3) uses the word ‘conduct’ rather than ‘offense’ to characterize the ‘idem’ for which a second trial before the ICC is generally barred. Had Article 20(3) used the term ‘offense’ or ‘crime’ instead of ‘conduct,’ it would have been more plausible to interpret the Rome Statute to allow the ICC to try someone on a charge such as genocide who had already been prosecuted for the same underlying conduct on a charge such as murder.

While the matter is not free of doubt,⁵⁴ the actual phrasing of Article 20(3) of the Rome Statute seems to preclude a second trial for the same underlying conduct.⁵⁵ Van den Wyngaert and Ongena conclude: ‘if a person has been convicted or acquitted for genocide by a national court, he cannot be prosecuted again before the ICC for war crimes on the basis of the same conduct (unless one of the exceptions in Article 20(3)(a) or (b) apply).’⁵⁶

This conclusion is reinforced by the fact that, in contrast to the *non bis in idem* provisions in the statutes of the ad hoc tribunals, the Rome Statute does not provide an exception to its *non bis in idem* rule when the conduct in question was characterized as an ‘ordinary crime’ in previous national proceedings. It has been suggested, however, that ‘reducing the national charge to a minimum

so that it does not correspond to the conduct in question . . . might fall under the exceptions in Article 20 § 3(a) or (b) (sham trial exception).’⁵⁷

Finally, two other provisions of the Rome Statute merit brief mention. Article 84 allows either party to a case already concluded before the ICC to seek an appeal for revision of a final judgment of conviction or sentence on several grounds entailing the discovery of new evidence, including under limited circumstances the discovery of significant new evidence that was not available at the time of trial and the discovery that decisive evidence used in the trial was false or falsified; and serious misconduct by one of the judges who participated in the trial. Second, Article 78(2) allows (but does not require) the ICC to ‘deduct any time . . . spent in detention in connection with conduct underlying the crime’ in addition to time served in accordance with the Court’s own orders when imposing a sentence of imprisonment. This provision has been faulted for not making the deduction of sentence rule mandatory.⁵⁸

Conclusion

Based on the foregoing analysis, East Timor apparently is not bound by any rule of international law to refrain from prosecuting in its courts individuals already prosecuted in Indonesia. Its own law would allow prosecution of individuals already prosecuted in Indonesia for 1) different conduct than that prosecuted in Indonesia; and 2) the same conduct as that prosecuted in Indonesia if the earlier proceedings were intended to shield the defendants from criminal responsibility for crimes within the jurisdiction of the Special Panels or otherwise ‘were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.’

Although not legally binding on East Timor, various international instruments discussed in this memorandum suggest that East Timor would be above reproach in prosecuting individuals already tried in Indonesia if the proceedings in East Timor were based on newly discovered evidence or on different conduct, or if there were a fundamental defect in the Indonesian proceedings. Finally, prevailing standards suggest that, if prosecutions were instituted in East Timor for the same conduct already prosecuted in Indonesia, any period spent in detention in connection with the Indonesian proceedings should be deducted from any sentence imposed in East Timor.

Appendix 3

‘Rule 61’ Hearings

ACCOUNTABILITY IN EAST TIMOR

A Proposal For A Procedure In The Event of Failure To Execute A Warrant Issued In Respect Of An Indictment Alleging The Commission Of Serious Crimes

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I. INTRODUCTION: THE ACCOUNTABILITY GAP

This paper proposes the introduction of a procedure by the Special Panels of Dili District Court in the event of failure to execute an arrest warrant issued by an investigating judge in relation to the alleged commission of serious crimes as defined in UNTAET Regulation 11/2000⁵⁹.

Notwithstanding the small number of convictions in the Ad Hoc Human Rights trials in Jakarta, these trials have not been successful in taking the dignity of victims seriously or of addressing honestly the systematic nature and institutional responsibility of the crimes concerned. Early indications regarding the Indonesian state’s attitudes to the publication of recent indictments against high-ranking officials show that there is little hope of high-level suspects being handed over to stand trial. The Commission for Reception, Truth and Reconciliation is mandated to carry out community reconciliation procedures in relation to, in principle, non-serious criminal offences, but will not deal in this context with serious crimes committed in 1999.

A hearing before the Special Panels is now the only place where victims, relatives and survivors of serious crimes such as rape, murder or torture can turn to feel that official institutions are taking them seriously and doing all that reasonably can be done to achieve justice. The Special Panels also represent the only viable opportunity at this stage for official and objective hearings that will determine the systematic nature of the crimes committed and the individual and institutional responsibility for them, even if such determinations do not amount to verdicts of guilt in the context of a full criminal trial.

II. THE PROPOSED PROCEDURE

The procedure would have the following basic steps:

- A judge who issued an arrest warrant may hold a hearing to inquire of the Office of the General Prosecutor (OGP) what has come of the efforts to apprehend the suspect
- If the judge does not request such a hearing, the OGP may ask for it
- If at the hearing the judge is satisfied that all reasonable steps have been taken to apprehend the suspect but he remains at large, the judge will refer the matter to a full hearing of one of the Special Panels of Dili District Court
- The Panel will be able to consider all of the evidence the OGP put before the court in presenting its indictment and, if it wishes, will be able to call on witnesses to give evidence, or have other evidence presented. Victims and survivors will have the chance to bear witness and feel that serious steps have been taken to restore their violated dignity
- The Panel will be able to make a determination as to whether there are reasonable grounds for believing the suspect to be guilty of the crimes charged in the indictment
- The Panel will have the power to certify that the reason for the failure to apprehend the suspect relates to a failure of cooperation on the part of the authorities of another state

The hearing would not be a trial *in absentia* since it would not issue a verdict of guilt nor impose any sentence. The procedure seeks to take the interests of victims seriously without violating the due process rights of the accused, and to ensure that those who would seek to obstruct the course of justice are not able to do so with complete impunity.

III. REASONS FOR THE PROCEDURE

A. Interest of Victims

As a result of the flawed processes of the Ad Hoc Human Rights Trials in Jakarta and the slow progress of the prosecutions in Dili, the victims and survivors of the crimes against humanity committed in 1999 have not had an opportunity to be fairly heard and to tell their story. They deserve as a matter of dignity and justice such an opportunity. Not only are the Jakarta processes almost entirely inimical to helping to restore the dignity of per-

sons whose rights had been violated, they have also conspicuously failed to present in a fair and balanced way the truth about the systematic nature of the violence and the institutional responsibility for it. The proposed procedure represents the best opportunity available to publicly demonstrate the systematic nature of the crimes committed⁶⁰.

The procedure would also allow a more complete picture to be presented to the victims and survivors of what steps have been taken to achieve justice and where responsibility lies for the failure of those processes⁶¹.

B. The Interests of Timor Leste

Timor Leste faces a number of immediate challenges both nationally and internationally. The failure to develop a viable justice system has created a crisis of credibility in terms of law and order. The perceived weaknesses and failures of the serious crimes regime, including the skepticism that has been generated by the perception that it only presents a threat to the “low-level” Timorese, also contribute to this. A demonstration of the efforts made against high-ranking officials will help to restore credibility and explain the difficulties.

Internationally, Timor Leste’s relationships with Indonesia continue to be both crucial and delicate. The proposed procedure may succeed in avoiding areas of diplomatic sensitivity where the Timor Leste Government would rather not tread. Recent reactions to the publication of indictments against high-level accused have demonstrated the sensitivities relating to the institutional ties of the serious crimes regime to the United Nations (‘UN’).⁶² Whatever the correct legal analysis of the relationship between the UN and the serious crimes regime, it is clear that the doctrine of the separation of powers requires the Government of Timor Leste not to interfere in the actions of the OGP or of the Special Panels. A strict adherence to the doctrine will not only help foster a robust democratic culture but may also be diplomatically beneficial.

C. The Interests of the United Nations

The UN’s interests’ in the proposed procedure might be described in terms of justice, fairness, policy and efficiency.

UN staff members were killed in 1999 and Indonesia violated its obligations under Chapter VII of the UN Charter in its conduct at various points during 1999.⁶³ As a matter of dignity and justice to those UN staff members killed in the crimes that were committed, the UN should do all it possibly can to achieve justice and where that is not possible to explain fully why it cannot be

achieved.

The Serious Crimes Unit (‘SCU’) has demonstrated a marked improvement in efficiency and professionalism in the last year. Likewise, the difficulties experienced by the Special Panels have been due primarily to a lack of resources and not to the lack of willingness or ability on the part of the judges. As a matter of fairness to the Special Panels and the SCU the proposed procedure affords an opportunity for those institutions to demonstrate more clearly the fruits of their labors and the relevance of their roles.

It is also important that all the lessons that can be learned from the East Timor experience are learned. As such, from a policy point of view, all possible steps should be taken to make the processes as successful as possible in order that the limits and possibilities of such a model can be adequately established.

Considerable effort and money has been spent in helping to establish the SCU as a viable and effective unit. The publication of several recent indictments bears witness to increased effectiveness. As a matter of efficiency, it is appropriate for the effort that has been expended to date to be used to its maximum possible effect. The procedure proposed here assists that goal.

D. The International Community

The crimes committed in Timor Leste in 1999 were, in many cases, crimes against humanity. They also were committed in the context of a clear breach of Indonesia’s obligation under the UN Charter⁶⁴. The UN, as well as other national and regional fora in the international community, has both obligations and vested interests in ensuring that an appropriate degree of accountability for what occurred is achieved. The proposed procedure presents one avenue to ventilate more clearly both the facts that occurred as well as the reasons behind the failure to bring those responsible to justice. The procedure in itself is a very limited measure of accountability, but more importantly, provides the international community with significant evidence of the nature of the crimes that were committed as well as the attitude adopted by Indonesia to those events. It will allow all States the opportunity to determine what they consider to be an appropriate response to such an attitude.

IV. PROCEDURAL STEPS

Section 17.5 of Regulation 2000/30 (as amended by regulation 2001/25) provides:

Where a matter of administrative practice arises that has not been regulated by the present Regulation, the

matter shall be decided by the President of the Court of Appeal.

As of March 2003, the position of President of the Court of Appeal had not been formally filled. It is submitted that the Acting President would have the authority to act under Section 17.5, and has in effect exercised such authority, pending the full appointment of the President. It is suggested that the establishment of the proposed procedure can be reasonably and legitimately viewed as an exercise of the powers provided by Section 17.5. The question is whether such exercise of authority would be *ultra vires*. The question is not whether it involves 'judge-made' law.

That the exercise of such powers should be considered appropriate can be seen from the legislative history of section 17.5, consideration of the powers of analogous courts and the interests of justice generally. When the text of Section 17.5 first emerged in Regulation 2000/11, it referred to matters of "practice or proceedings". It was later amended in Regulation 2001/25 to refer to "matters of administrative practice". In the absence of any clear indication to the contrary it is suggested that the purpose of the change had more to do with economy of language than altering the powers of the court. Such a view is tenable if one considers that there is no fine distinction in what constitutes an administrative matter and what constitutes a procedural matter. A review of the ICTY's Rules of Evidence and Procedure will demonstrate that many of the Court's "procedural" provisions (for they surely had nothing to do with evidence) deal with what would appear to be clearly administrative matters.⁶⁵ In short, the use of the word "administrative" should not necessarily be read narrowly. What may be procedural may be considered in some circumstances administrative and vice versa. Whether the power to establish the proposed procedure can be considered administrative should be determined at least partly in the light of the powers of courts dealing with similar crimes in similar situations. It should be noted that the ICTY, ICTR, Sierra Leone Special Court and the International Criminal Court all have power to regulate their own proceedings and this has clearly been taken to mean, in the case of the ICTY, ICTR and Sierra Leone, the power to decide whether to institute proceedings of the type created by Rule 61.

Finally, the interests of justice require that courts be given sufficient powers to deal with matters that allow justice to be delivered as far as possible within a reasonable time in due regard for the interests of both the accused and the victims. Inherent in that requirement is the power of Courts to deal with matters that arise in the course of proceedings which, without unduly prejudic-

ing the rights of any parties, will assist in furthering the goal of achieving justice to the extent possible. The deliberate obstruction of the pursuit of justice by the accused and certain foreign authorities are matters that have arisen in the course of proceedings. The proposed procedure allows the Courts to deal with that matter without unduly prejudicing the interests of any party and, at the same time, furthering the cause of justice and accountability.

As such, it would appear difficult to argue that it would be unreasonable for the President of the Court of Appeal in East Timor to regard the establishment of such a procedure as within his or her powers in the light of legislative history of Section 17.5 and by analogous reasoning from other relevant experiences, and with due consideration given to the inherent powers of the court to act, among other things, in the interests of justice.

V. THE EFFECTS OF THE PROCEDURE

There exists no international agreement between Timor Leste and Indonesia at this point that would require Indonesia to transfer subjects of arrest warrants to Timor Leste. Timor Leste is a member of Interpol and can have Red Notices issued by Interpol on the strength of a duly issued arrest warrant before a single judge. However, such Red Notices only constitute a valid request for provisional arrest if the laws of the requested country so determine. The laws of Indonesia would not create such a situation. The issue of Red Notices would of course facilitate the arrest of suspects if encountered on the territory of States where such notices did serve as valid requests for provisional arrests. The proposed procedure does not therefore add any direct legal effects to those that can already be achieved by other means. However, the non-legal effects achieved by the procedure can be summarized as follows:

- It would assist in the restoration of dignity to the victims and their communities

- By achieving determinations by full tribunals the credibility of the findings would be enhanced, thus making it difficult to dismiss the processes in Dili as either politicized or frivolous.

- The UN and the international community in general would have a more sound base upon which to make their determinations regarding further action

V. DUE PROCESS CONCERNS

It should be abundantly clear that the proposed procedure does not constitute a trial *in absentia*. As such, the relevant due process guarantees to be considered are those in the context of arrest warrants being issued and executed rather than trials themselves. The procedure would not

in any way violate international standards of fairness in this context. While it may generate unwanted publicity from the suspect's point of view, any such effects would not be disproportionately prejudicial to the rights of the suspect, in the context of the competing interests of the victims and of justice generally. Equally, since the process does not constitute a trial, there would be no violation of the prohibition of being tried twice for the same thing. Any such objection to the jurisdiction of the court would remain open to the defense to be made at the appropriate time.

VI. THE CAPACITY OF THE SERIOUS CRIMES REGIME

The success of the proposed procedure would depend on the credibility of the Panels issuing determinations. Serious thought must be given to ensuring that all necessary support is given to the judges concerned to ensure the necessary quality of the determinations. If such support cannot be guaranteed the efficacy of the process would be put at grave risk and be almost certainly counter-productive. Likewise the appropriate support for the SCU must be in place for the preparation of such hearings. Such support would include appropriate outreach activ-

ities to ensure adequate preparation of victims and clarity about the limits of the proposed procedure.

VII. NEXT STEPS

- a. Representations should be made to the Court Presidency of Dili District Court to discuss the proposal, asking for the Presidency to implement it as soon as is reasonably possible.
- b. Steps should be taken by bodies with an interest to seek the provision of adequate support that would assist the Panels in their determination on these matters. This would require coordination among interested parties as well as, in all probability, a financial commitment.
- c. The SCU should be informed and kept abreast of the proposal's development. It should be asked to develop a plan of action in relation to victim support and outreach and to determine the logistical capabilities of holding hearings outside of Dili.

The proposal should be forwarded to political leaders of Timor Leste and other institutions, including the Commission for Reception, Truth and Reconciliation.

ANNEX ONE

(A) If, within a reasonable time, a warrant of arrest has not been executed, and personal service of the indictment has consequently not been effected, the Judge who issued the warrant shall invite the Prosecutor to report on the measures taken. When the Judge is satisfied that:

(i) The Prosecutor has taken all reasonable steps to secure the arrest of the accused, including recourse to the appropriate authorities of the State in whose territory or under whose jurisdiction and control the person to be served resides or was last known to them to be; and

(ii) If the whereabouts of the accused are unknown, the Prosecutor has taken all reasonable steps to ascertain those whereabouts

The Judge shall order that the indictment be submitted by the Prosecutor to one of the panels with exclusive jurisdiction for serious crimes

(B) If, within a reasonable time, the warrant of arrest has not been executed and the judge who issued the warrant has not invited the Prosecutor to report on the measures taken as detailed in Section (A) above, the Prosecutor may petition the judge who issued the warrant so that such a report may be made. The judge who issued the warrant will grant the request for such a report to be made unless it is manifestly unreasonable to do so. When the Judge is satisfied that:

(i) The Prosecutor has taken all reasonable steps to secure the arrest of the accused, including recourse to the appropriate authorities of the State in whose territory or under whose jurisdiction and control the person to be served resides or was last known to them to be; and

(ii) If the whereabouts of the accused are unknown, the Prosecutor has taken all reasonable steps to ascertain those whereabouts

The Judge shall order that the indictment be submitted by the Prosecutor to one of the panels with exclusive jurisdiction for serious crimes

(C) Upon obtaining such an order the Prosecutor shall submit the indictment to the Panel in open court, together with all the evidence that was before the Judge who initially issued the warrant. The Prosecutor may also call before the Panel and examine any witness whose statement has been submitted to the issuing Judge. In addition, the Panel may request the Prosecutor to call any other witness whose statement has been submitted to the issuing Judge.

(D) If the Panel is satisfied on that evidence, together with such additional evidence as the Prosecutor may tender, that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment, it shall so determine. The Panel shall have the relevant parts of the indictment read out by the Prosecutor together with an account of the efforts to effect service referred to in (A) above.

(E) If the Prosecutor satisfies the Panel that the failure to effect personal service was due in whole or in part to a failure or refusal of a State to cooperate with the authorities of Timor Leste the Panel shall so certify.

(F) The Panel may require to be effected any further appropriate steps not yet taken to seek the apprehension of suspects mentioned in original warrants.

Endnotes

¹ Done at New York, 5 May 1999, between Government of Indonesia and Government of Portugal.

² *Identical Letters Dated 31 January 2000 from the Secretary General Addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights*, A/54/26, S/2000/59, 31 January 2000.

³ *Situation of Human Rights in East Timor*, A/54/660, 10 December 1999.

⁴ *Report of the Indonesian Commission of Investigation into Human Rights Violation*, Jakarta, 31 January 2000.

⁵ See also Forum Komunikaun Feto Timor Lorosae (FOKUPERS), *Progress Report Number 1: Gender Based Human Rights Abuses During the Pre and Post-Ballot Violence in East Timor, January - October 1999*.

⁶ *Situation of Human Rights in East Timor*, above n 3, recommendations, para 6.

⁷ *Report of the International Commission of Inquiry on East Timor to the Secretary General*, annexed to *Identical Letters Dated 31 January 2000 from the Secretary General Addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights*, above n 2, at paras 152, 153.

⁸ *Identical Letters Dated 31 January 2000 from the Secretary General Addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights*, above n 2, at para 5.

⁹ *Ibid* para 8.

¹⁰ See Judicial System Monitoring Programme, *The Right to Appeal in East Timor: JSMP Thematic Report 2*, October 2002.

¹¹ UNTAET Regulation 10/2001, 13 July 2001.

¹² The definition of serious crimes is identical to that found in the Regulation establishing the Special Panel for Serious Crimes, below n 17.

¹³ See Appendix 1 to this report for a list of participants.

¹⁴ General Wiranto, Major General Syahnakri, Major General Zacky Anwar, Major General Adam Damiri, Colonel Suratman, Colonel Mohamed Noer Muis, Lieutenant Colonel Sudrajat and former Governor Abilio Soares.

¹⁵ See Judicial System Monitoring Programme, *The General Prosecutor v. Joni Marques and 9 Ors (The Los Palos Case): A JSMP Trial Report*, March 2002.

¹⁶ See John Aglionby, 'Ex-military chief charged with East Timor crimes, Jakarta refuses to hand over indicted general', *The Guardian*, February 26, 2003.

¹⁷ The definition of serious crimes is contained in sections 4-9 of UNTAET Regulation 15 of 2000.

¹⁸ See Appendix 2.

¹⁹ See Appendix 3.

²⁰ This regulation is still in effect. See Constitution of the Democratic Republic of East Timor, §§ 163 and 165 (20 May 2002); see also UNTAET Regulation No. 1999/1 on the Authority of the Transitional Administrator in East Timor, UNTAET/REG/

1991/1, § 4 (27 November 1999). This memorandum does not consider the April 2000 Memorandum of Understanding (MoU) between Indonesia and UNTAET Regarding Cooperation in Legal, Judicial and Human Rights Related Matters since it is my understanding that, if the MoU ever entered into force, it is no longer in effect.

²¹ UNTAET Reg. No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15, §11.3 (a) and (b) (6 June 2000).

²² UN Doc. A/CONF.183/9 (1998) [as corrected by the procès-verbaux of 10 November 1998 and 12 July 1999] ('Rome Statute').

²³ Cf. Christine Van den Wyngaert and Tom Ongena, 'Ne bis in idem Principle, Including the Issue of Amnesty' in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 711 (Antonio Cassese, Paola Gaeta and John R.W.D. Jones, eds., 2002) ('Many States only give a *res judicata* effect to judgments rendered by their own courts, and not to convictions or acquittals decided by foreign courts').

²⁴ See *id.* at 706. See also *The Prosecutor v. Duško Tadic*, Case No. IT-94-1-T, Decision on the Defence Motion on the Principle of *Non-Bis-In-Idem*, para. 9 (14 November 1995); M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 289 (1993).

²⁵ Some of these are noted in Section II.

²⁶ Van den Wyngaert and Ongena, *supra* 23, at 706.

²⁷ *Id.*

²⁸ Geert-Jan Alexander Knoops, *SURRENDERING TO INTERNATIONAL CRIMINAL COURTS: CONTEMPORARY PRACTICE AND PROCEDURES* 316 (2002).

²⁹ This observation may be subject to one qualification. UNTAET Regulation 1999/1 on the authority of the Transitional Administration in East Timor provides that 'all persons undertaking public duties or holding public office in East Timor shall observe internationally recognized human rights standards, as reflected, in particular, in . . . The International Covenant on Civil and Political Rights . . . and its Protocols.' UNTAET/REG/1999/1, § 2 (27 November 1999). Since this regulation was adopted, the UN transitional administration has handed over authority to the Government of East Timor. Still, Article 165 of the Constitution of the Democratic Republic of East Timor provides: 'Laws and regulations in force in East Timor shall continue to be applicable to all matters except to the extent that they are inconsistent with the Constitution or the principles contained therein.'

³⁰ According to the Judicial System Monitoring Programme (JSMP), East Timor signed the ICCPR on Dec. 10, 2002. See JSMP, 'Timor-Leste Celebrates Human Rights Day and Signs International Rights Treaties,' Dec. 10, 2002. As of February 7, 2003, however, the UN web site did not yet reflect East Timor's signature. In any event, East Timor has not yet ratified the Covenant. *But see* note 29, *supra*.

³¹ Article 8(4) of the American Convention provides: 'An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.'

³²The *travaux préparatoires* make clear that this provision does not bar second prosecutions arising out of the same conduct that led to conviction or acquittal in every circumstance. This text was adopted instead of the proposals of some representatives who sought protection against retrial not only for the same ‘offence,’ but also for the same action. Marc J. Bossuyt, GUIDE TO THE ‘TRAVAUX PRÉPARATOIRES’ OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 316 (1987).

³³See UN Doc. A/C.3/SR.963 (1959), p. 267, para. 3 (Representative of Japan); UN Doc. A/4299, p. 17, para. 60 (1959).

³⁴Comm. No. 204/1986, UN Doc. CCPR/C/OP/2 (1987).

³⁵*Id.* at 242. See also Views of the Human Rights Committee, A.R.J. v. Australia, Comm. No. 692/1996, UN Doc. CCPR/C/60/D/692/1996, para. 6.4 (1997). Cf. The Prosecutor v. Duško Tadić Decision on the Defence Motion on the Principle of *Non-Bis-In-Idem*, Case No. IT-94-1-T, para. 9 (14 November 1995) (noting that the principle *non-bis-in-idem* ‘is generally applied so as to cover only a double prosecution within the same State’).

³⁶Report of the Third Committee, UN Doc. A/4299, para. 62 (1959). Several European conventions that include transnational *non bis in idem* provisions may take a different approach. As noted below, explanatory reports accompanying at least two conventions suggest that the treaties may have been intended to impose a uniform meaning of the term ‘final judgment.’

³⁷Several other Council of Europe conventions include *non bis in idem* rules that operate in a transnational setting. See, e.g., European Convention on Extradition, art. 9, E.T.S. No. 024, opened for signature in Paris, 13 December 1957; European Convention on the International Validity of Criminal Judgments, art. 53, E.T.S. No. 070, done at The Hague, 28 May 1970; and European Convention on the Transfer of Proceedings in Criminal Matters, art. 35, E.T.S. No. 073, done at Strasbourg, 15 May 1972.

³⁸On the matter of ‘new or newly discovered facts,’ the explanatory report accompanying Protocol 7 states that the phrase also ‘includes new means of proof relating to previously existing facts.’ Explanatory Report on Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Doc. H (84) 5, p. 5. For discussion of case law interpreting Article 4 of Protocol No. 7, see the attached analysis of Geert-Jan Alexander, beginning at p. 330.

³⁹See I.A. Shearer, EXTRADITION IN INTERNATIONAL LAW 13 (1971).

⁴⁰Explanatory Report on the Additional Protocol to the European Convention on Extradition, paras. 18-19 (1975).

⁴¹*Id.*, para. 19. The report went on to note counter-considerations that explain the text of the *non bis in idem* provision of the protocol.

⁴²The Prosecutor v. Duško Tadić, Case No. IT-94-1-T, Decision on the Defence Motion on the Principle of *Non-Bis-In-Idem*, para. 19 (14 November 1995).

⁴³It should be noted, however, that even in circumstances that are governed by a treaty that includes a *non bis in idem* exception to states parties’ obligation to cooperate with each other, the provision may ‘not necessarily mean that the individual is also protected against multiple prosecutions.’ Van den Wyngaert and Ongena, *supra* note 23, at 708. The treaty exception ‘may only acknowledge the fact that States respect each other’s jurisdiction over the offence by allowing cooperation to be refused, which

does not necessarily imply that the State whose request has been turned down on the ground of *ne bis in idem* may not prosecute the offender at a later stage for the same offence.’ *Id.* at 708-09.

⁴⁴E.T.S. No. 024, opened for signature in Paris on 13 December 1957, entered into force 18 April 1960.

⁴⁵This provision apparently applies only with respect to requests for extradition between states parties to the European Convention on Extradition. Article 1 of that convention provides: ‘The Contracting Parties undertake to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order’ (emphasis added).

⁴⁶Additional Protocol to the European Convention on Extradition, art. 2, E.T.S. 086, done at Strasbourg 15 October 1975.

⁴⁷Explanatory Report on the Additional Protocol to the European Convention on Extradition, para. 26(a) (1975).

⁴⁸GA Res. 45/116, UN Doc. A/RES/45/116 (Annex) (1990).

⁴⁹Available at http://www.princeton.edu/~lapa/unive_jur.pdf.

⁵⁰The only difference in the text of the ICTR Statute is the addition of the words ‘for Rwanda’ following ‘the International Tribunal’ in paragraphs 1 and 2.

⁵¹In the Matter of Alfred Musema, Case No. ICTR-96-5-D, Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral, para. 12 (12 March 1996). See also In the Matter of Radio Television Libre des Mille Collines SARL, Case No. ICTR-96-6-D, Decision of the Trial Chamber on the Application of the Prosecutor for a Formal Request for Deferral, para. 11 (13 March 1996); and In the Matter of Théoneste Bagosora, Case No. ICTR-96-7-D, Decision of the Trial Chamber on the Application by the Prosecutor for a formal Request for Deferral, para. 13 (17 May 1996).

⁵²See ICTY Statute, art. 10(2)(a), quoted above, and ICTR Statute, art. 9(2)(a).

⁵³ICTY Statute, art. 10(3); ICTR Statute, art. 9(3).

⁵⁴See WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 70 (2001).

⁵⁵According to one writer, however, the phrase ‘with respect to the same conduct’ was added to the chapeau of Article 20(3) ‘to clarify that the Court could try someone even if that person had been tried in a national court provided that different conduct was the subject of prosecution.’ John T. Holmes, ‘The Principle of Complementarity,’ in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE; ISSUES, NEGOTIATIONS, RESULTS 59 (Roy S. Lee, ed., 1999). Unfortunately, the writer does not provide further elaboration.

⁵⁶Van den Wyngaert and Ongena, *supra* note 23, at 723 (footnote omitted).

⁵⁷*Id.* at 726 (footnote omitted). The authors note but do not attempt to resolve the ambiguities latent in the text of Article 20(2)(b). See *id.* at 725. The meaning of sham proceedings in the context of the Rome Statute must, of course, be considered in light of its provisions dealing with “complementarity.”

⁵⁸Van den Wyngaert and Ongena, *supra* note 23, at 726. As noted earlier, UNTAET Regulation 2000/15 includes a provision

modeled on Article 78(2) of the Rome Statute.

⁵⁹ The proposal is of course based on similar provisions established under Rule 61 of the Rules of Procedure and Evidence of the International Tribunal for Former Yugoslavia.

⁶⁰ While it is true that the Commission for Reception, Truth and Reconciliation is mandated to investigate these events, the systematic nature of the serious crimes committed will only appear in the final written report. The Community Reconciliation Procedure established under Regulation 2001/10 deals only with relatively minor crimes committed by 'low-level' East Timorese perpetrators.

⁶¹ It should be noted that the Transitional Rules of Criminal Procedure under Regulation 30/2000 (Section 12) provide a place for victims in East Timor similar to that found in many civil law

jurisdictions. While nothing in Section 12 provides for the procedure proposed here, the proposal is made, among other things, in the spirit of protecting the legitimate interests of victims as set out in Section 12 of the said Regulation.

⁶² See for example, Jakarta Post, March 7, 2003 on the Wiranto indictment and letter of Yayasan Hak, March 3 to the UN on the same topic.

⁶³ International Commission of Inquiry on East Timor, Paragraph 147, UN Doc, A/54/726, S/2000/59, January 31, 2000

⁶⁴ *Idem*, *ibid*

⁶⁵ See for example all of Section 3 of the Rules on the internal functioning of the Tribunal.