

GREAT EXPECTATIONS - EAST TIMOR AND THE VICISSITUDES OF EXTERNALISED JUSTICE

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Introduction

The history of Indonesia's invasion and occupation of East Timor may serve as a case study for several important themes in international relations and international law. The initial invasion and annexation was a victory of *Realpolitik* over international law norms of self-determination and the prohibition of territorial acquisition by force.¹ Considerable support for the annexation was provided by the United States and regional powers such as Australia, despite evidence of widespread and systematic violations of human rights by the Indonesian military. Indeed, for most of the period of the Indonesian occupation, the case of East Timor exemplified the marginal relevance of fundamental international law norms where they conflict with geopolitical imperatives.

That the illegal occupation remained a 'pebble in Indonesia's shoe' at all was a reflection of the tenacity of the East Timorese resistance movement within and without the territory, as well as the efforts of a dedicated network of international activists. The latter consistently invoked the applicable international law principles to keep East Timorese self-determination on the international agenda, and to document human rights violations under Indonesian occupation. Their efforts indicate the degree to which the normative pressure exerted by certain international law principles depends on the mobilisation of national and international social movements. Eventually, changes in the geopolitical climate and the fall of Suharto in 1998 opened up new possibilities. The new Indonesian President, frustrated with

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¹ For an overview of the application to East Timor of the principles of self-determination and the prohibition on the acquisition of territory by force, see: Roger S Clark, 'The "decolonisation" of East Timor and the United Nations norms on self-determination and aggression' in International Platform of Jurists for East Timor (eds.), *International Law and the Question of East Timor* (Catholic Institute of International Relations: London and Leiden, 1992) 65, 102.

continued international criticism over East Timor, made a hasty decision to permit a referendum on independence in 1999.² International law, it appeared, was to be vindicated, albeit as subsidiary consequence of rapidly shifting political considerations. But any hope for the victory of legality over force proved short-lived, as the Tentara Nasional Indonesia (Indonesian Armed Forces, or TNI) orchestrated a nine month campaign of terror against the civilian population of East Timor in an attempt to coerce a vote in favour of integration with Indonesia. When this failed, TNI and their militia proxies implemented Operation Clean Sweep, destroying much of the territories' essential infrastructure, forcibly deporting almost a third of the population to Indonesian West Timor, and murdering thousands. The violence ended only with the military intervention of an Australian-led peacekeeping force (INTERFET) in September 1999, authorised by Security Council Resolution 1264.³

In the immediate aftermath of the occupation, with East Timor placed under United Nations administration during its transition to independence, the territory and its people became a test case for the international community's willingness and ability to enforce peremptory international law norms proscribing crimes against humanity, torture, war crimes and genocide. Once more, East Timor is in danger of exemplifying the disjuncture between purportedly non-derogable principles and the exigencies of *Realpolitik*.

This article considers the difficult and incomplete steps taken towards justice for crimes committed during the Indonesian occupation of East Timor. It first outlines the crimes alleged to have been committed by TNI between 1975 and 1999. It then considers the nature of the justice demands within East Timor, and the conflicting positions concerning 'justice' and 'reconciliation' that appear to be emerging in different sectors of East Timorese society. Section IV will scrutinise the operation of the two justice mechanisms currently functioning: the United Nations (UN)-sponsored internationalised tribunal (the Special Panel for Serious Crimes), and the Indonesian Ad Hoc Human Rights Court. It will be argued that both institutions have failed, or are likely to fail, to deliver justice in accordance with the expectations of many East Timorese, and that the Serious Crimes process holds important lessons for those advocating UN-sponsored mixed tribunals as a preferred mechanism of accountability for international crimes. Finally, I will

² Detailed information on the background to this radical policy reversal by then-President B. J. Habibie has been relatively scarce. A valuable recent contribution, based on interviews with Indonesian and Australian officials privy to the deliberations behind the decision, is Don Greenlees and Robert Garran, *Deliverance: The Inside Story of East Timor's Fight for Freedom* (Allen and Unwin: Sydney, 2002).

³ SC Res 1264 (1999).

conclude with some reflections on the difficult path forward for justice for East Timor.

Crimes of State: the Indonesian Military Occupation and Crimes Against International Law, 1975 to 1999

It is heuristically useful to divide the Indonesian occupation of East Timor into three periods: invasion and the war of attrition, consolidation of Indonesian rule, and the 1999 campaign of terror. These divisions are pragmatic, and do not reflect a clear differentiation in the nature of human rights violations during Indonesian rule. Rather, they reflect different phases in the intensity of military operations.

Decolonization, civil war and invasion

After 1960, East Timor (or Portuguese Timor, as it was then known) was listed by the UN General Assembly's Special Committee on Decolonization as a non-self-governing territory subject to Chapter XI of the UN Charter.⁴ Chapter XI obliges member states that have responsibility for the administration of territories 'whose peoples have not yet attained a full measure of self-government' to administer them in accordance with Article 73 of the UN Charter, and prepare the territories for self-determination.⁵ Portugal under the Salazar dictatorship rejected the application of Chapter XI to its remaining colonies, but reversed its position after the Carnation Revolution of 1974 and began a rapid withdrawal from all remaining dependent territories.

The coup in Lisbon coincided with a nationalist awakening among the Timorese, and in the political space created by the end of Portuguese intolerance of anti-colonial movements, two major political associations emerged: the Timorese Democratic Union (UDT), and the *Frente Revolucionaria de Timor Leste Independente* (FRETILIN). While initially united in their aim of East Timorese decolonisation, the two groupings differed in their approach, with UDT preferring a gradualist and conservative transition and FRETILIN moving increasingly towards a platform common to revolutionary nationalist parties in other former Portuguese colonies.⁶

⁴ GA Res. 1542 (XV) (1960).

⁵ GA Res. 1541 (XV) (1960); *Case Concerning East Timor (Portugal v. Australia) (Jurisdiction and Admissibility)* ICJ Reports (1995) at paras 23-35.

⁶ See generally, James Dunn, *Timor: A Nation Betrayed* (ABC Books: Sydney, 1996) 50-89.

The polarization between UDT and FRETILIN was accentuated by uncertainty and insecurity created by the beginning of *Operasi Komodo*, the Indonesian covert operation orchestrated by intelligence and special operations troops to destabilise East Timor and hasten the onset of conditions that could be used to justify an invasion. With both Portugal and Australia indicating secretly to Indonesia that the incorporation of East Timor would not be regarded as an undesirable outcome, Indonesian Special Forces (KOPASSUS) and the National Intelligence Coordination body (BAKIN) commenced psychological warfare and disinformation activities in West and East Timor that were designed to promote integration with Indonesia. Australian diplomatic cables from mid-1974 record the establishment of KOPASSUS bases in West Timor to train East Timorese for covert operations, and Australian diplomats had been 'in effect, consulted' on Indonesian plans to mount a clandestine operation to ensure that East Timor would be integrated with Indonesia.⁷

The increasing polarisation between UDT and FRETILIN, and rumours instigated by Indonesian operatives that one was about to launch an armed attack against the other, led to a brief civil war in mid-August 1975. Approximately 1500 people are thought to have been killed over two weeks of fighting, which ended with a decisive victory for FRETILIN and the retreat of armed UDT supporters over border to Indonesian Timor.⁸ From late August 1975, Indonesian special forces troops began cross-border armed attacks that grew in frequency between September and December (including an October raid at Balibo on the western border in which 5 television reporters from Australia, New Zealand and Great Britain were killed). On 6 December 1975, United States' President Gerald Ford and National Security Adviser Henry Kissinger met with Indonesian President Suharto in Jakarta. According to a Memorandum of the conversation cabled that day to Washington, Suharto raised the question of Portuguese Timor, seeking the 'understanding' of the Ford Administration 'if we deem it necessary to take rapid or drastic action'. Ford replied 'we will understand and will not press you on the issue', while Kissinger cautioned that 'it is important that whatever you do succeeds

⁷ See 'Letter from Furlonger to Feakes: Indonesia ? Clandestine Operation in Portuguese Timor, Jakarta, 3 July 1974' reprinted in Department of Foreign Affairs and Trade, *Australia and the Indonesian Incorporation of Portuguese Timor, 1974-1976* (Wendy Way ed., Melbourne University Press, 2000) at 62-3; 'Report by Fisher, Jakarta, July 1974' reprinted in *ibid.* at 74-5. United States' Intelligence Agencies were also aware, in great detail, of the covert action being undertaken, and reported preparations for invasion from July 1975: see Central Intelligence Agency (CIA) and Defence Intelligence Agency (DIA) reports reproduced in Brian Toohey and Marian Wilkinson, *The Book of Leaks* (Allen and Unwin: Sydney, 1987) 143-196

⁸ Dunn, *Timor*, *supra* note 6, at 146-183.

quickly. We would be better able to influence the reaction in America if whatever happens happens after we return. The President will be back on Monday at 2.00 pm Jakarta time'.⁹ On 7 December 1975, a land, air and sea invasion of East Timor was commenced by Indonesian forces.

Available historical accounts of the Indonesian military operations conducted during and subsequent to the invasion of 7 December 1975 describe an intense armed conflict and war of attrition between TNI (then known as ABRI)¹⁰ and the armed wing of FRETILIN (FALINTIL). While not definitively documented, contemporary testimonies¹¹ and secondary sources¹² describe a war waged without quarter, in which TNI did not distinguish between combatants and non-combatants, and engaged in conduct including: armed attacks against unarmed civilian populations, leading to acts of extermination; large scale forced displacement and resettlement; imposition of conditions likely to cause starvation; mass killing of civilian populations in reprisal for military losses; conscription of non-combatants as 'human shields';¹³ aerial bombardment of civilian populations, including bombardment with harmful biological agents; torture and sexual violence as instruments of terror and intimidation; other conduct amounting to persecution of civilian populations for reasons of imputed or actual support for FALINTIL. From 1975 to 1980, the armed resistance was far more than the 'small guerrilla war' that Suharto promised to Kissinger.¹⁴ In 1979, Indonesian Foreign Minister Mochtar Kusmaatmadja estimated that 120,000 people had died in East Timor since 1975.¹⁵

'Normalisation' of Indonesian Rule - 1983 to 1998

Between late 1983 and 1984, FALINTIL's reorganization of the armed resistance, and a grudging acceptance of stalemate by TNI, resulted in a shift from direct confrontation to sporadic armed encounters, within the continued

⁹ Department of State Telegram, 'Ford-Suharto Meeting' (6 December 1975, declassified document).

¹⁰ For the sake of clarity, I will refer to the Indonesian armed forces consistently as TNI.

¹¹ Michelle Turner, *Telling East Timor: Personal Testimonies 1942-1992* (UNSW Press: Sydney, 1992) at 81-202.

¹² Dunn, *Timor*, *supra* note 6, at 250-308; John Taylor, *Indonesia's Forgotten War: The Hidden History of East Timor* (Pluto Press: London, 1991) at 68-99; Amnesty International, *East Timor, Violations of Human Rights: Extrajudicial Executions, Disappearances, Torture and Political Imprisonment, 1974-1984* (1985); Carmel Budiardjo and Liem Soei Liong, *The War Against East Timor* (Zed Press: London, 1984).

¹³ 'Operasi Kikis' (Operation Final Cleansing) and 'Operasi Keamanan' (Operation Security), reported to have occurred in 1981: Taylor, *Forgotten War*, *supra* note 12, at 117 and 161.

¹⁴ Department of State Telegram, *supra* note 9.

¹⁵ Cited in Taylor, *Forgotten War*, *supra* note 12, at 203.

counterinsurgency posture maintained by Indonesian forces. TNI continuously deployed between 20 and 30 battalions in East Timor throughout the 1980s, and periodically mounted intensive assaults to capture FALINTIL units.

Military personnel were integrated into every level of the administrative structure, and thus controlled key dimensions of everyday life. Policies designed to 'win hearts and minds' of the population were paralleled by widespread instances of extrajudicial execution, arbitrary arrest and imprisonment, 'disappearance', torture, and the use of sexual violence as a means of intimidating the civilian population.¹⁶ This period also saw mass killings, such as the murder of 1000 civilians in the Lacluta and Kraras locale, and the notorious Santa Cruz massacre of 1991, in which more than 200 civilians were killed or 'disappeared'. There were also reports of measures designed to prevent births among the East Timorese through the non-consensual administration of hormonal contraceptives to women.¹⁷ As part of the policy of pacification, East Timorese paramilitary groups were established by KOPASSUS from 1983 to participate in anti-FALINTIL offensives and terrorise the local population, and operated in most districts as part of the military command.¹⁸

Military and Paramilitary Terror and Scorched Earth: January - October 1999

The report of the International Commission of Inquiry on East Timor,¹⁹ the joint report of the Special Rapporteurs²⁰ of the Commission on Human Rights, and the report of the Indonesian Commission of Investigation into Human Rights Violations (KPP HAM)²¹ 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 August 1999 plebiscite.

¹⁶ See, e.g., *Visit of the Special Rapporteur to Indonesia and East Timor*, UN Doc. E/CN.4/1992/17/Add.1, paras 73-4; *Situation in East Timor*, Report of the Secretary General, UN Doc. E/CN.4/1998/58, 25 February 1998, at 15 et seq.

¹⁷ Miranda Sissons, *From One Day to Another: Violation of Women's Reproductive and Sexual Rights in East Timor* (East Timor Human Rights Centre: Melbourne, 1997)

¹⁸ Douglas Kammen, 'The Trouble with Normal: The Indonesian Military, Paramilitaries, and the Final Solution in East Timor' in Benedict R. O'G. Anderson (ed.), *Violence and the State in Suharto's Indonesia* (Cornell University Press: Ithaca, 2001) 156-188.

¹⁹ *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*, UN Docs A/54/26, S/2000/59, 31 January 2000.

²⁰ *Situation of Human Rights in East Timor*, UN Doc. A/54/660, 10 December 1999.

²¹ *Report of the Indonesian Commission of Investigation into Human Rights Violation*, Jakarta, 31 January 2000.

The policy was effected through the formation, arming and coordination of paramilitary groups by TNI and intelligence officers. Australian Defence Signals Directorate intelligence reports leaked in March 2002 confirm that, by early 1999, Australia and other states had evidence indicating that senior Indonesian army figures were directly involved in 'black operations' to subvert the UN-sponsored referendum.²²

Between January and October, the paramilitary groups, with direct and indirect participation of TNI special forces, engaged in an escalating campaign of extrajudicial killings, disappearance, torture and sexual violence,²³ punctuated by multiple killings (in Cailaco, Suai, Liquica and Dili and many other places). The policy culminated in the 'scorched earth' campaign of September 1999, in which paramilitary groups and TNI orchestrated a mass 'evacuation' of 270,000 civilians to West Timor (planned, apparently, since June or July 1999), systematically eliminated identified pro-independence figures and comprehensively destroyed civilian infrastructure and property. During this time, mass killings of civilians were perpetrated in Maliana, Suai, Los Palos and Oecussi, as well as numerous instances of extrajudicial killings of individuals.

The acts allegedly committed by TNI and their East Timorese proxies from 1975 to 1999 appear to meet the definitions of international crimes. The kinds of conduct alleged, if proven, would satisfy the elements required to convict perpetrators of crimes such as grave breaches of the Geneva Conventions,²⁴ crimes against humanity,²⁵ and torture.

²² Hamish McDonald, 'Defence finds Indonesian commander linked to Timor violence', *The Age* (Melbourne), 14 March 2002, at 1 and 13. More information on the 'shadow command' and the formation of the militia, see Greenlees and Garran, *Deliverance*, *supra* note 2, at 134-144.

²³ 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* (Dili, November 1999).

²⁴ For a discussion of the application of the laws of war to the Indonesian occupation of East Timor, see generally Suzannah Linton, 'Rising from the Ashes: the Creation of a Viable Criminal Justice System in East Timor' 25 *Melbourne University Law Review* (2001) 122; Suzannah Linton, 'Prosecuting Atrocities at the District Court of Dili' 2 *Melbourne Journal of International Law* (2001) 414.

²⁵ The definition of crimes against humanity which may be applicable from the period 1975 to 1990 is discussed in *Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/135*, 18 February 1999, at 18-19.

East Timor and the Challenge of Impunity - Emerging Debates

In principle, the crimes committed in East Timor are violations of the most basic principles of world order: the *jus cogens* prohibitions against war crimes, crimes against humanity, genocide and torture, breaches of which may amount to a threat to international peace and security.²⁶ An aggravating circumstance of the 1999 violence was that the Agreements of 5th May²⁷ and the Security Council had expressly entrusted the 'security' of the referendum to the state of Indonesia.²⁸ The unambiguous role of TNI in attempting to subvert the ballot and terrorise the population amounted to a flagrant defiance of an international treaty and a Security Council resolution by an organ of the Indonesian state. The International Commission of Inquiry for East Timor considered this to be an additional reason for the international community to ensure that the persons who planned and implemented the 1999 campaign of destruction were held accountable:

The actions violating human rights and international humanitarian law in East Timor were directed against a decision of the United Nations Security and were contrary to agreements reached by Indonesia with the United Nations to carry out the Security Council decision. The organized opposition in East Timor to the Security Council decision requires specific international attention and response. Effectively dealing with this issue will be important to ensuring that future Security Council decisions are respected.²⁹

Recent scholarship on impunity and accountability for gross human rights violations proposes several different purposes purportedly fulfilled by criminal prosecutions.³⁰ This 'cornucopia of objectives'³¹ includes: deterrence and prevention of future crimes; restoration of a rule of law and ending a cycle of impunity; judicial retribution as an alternative to self-help; individualised, rather than collective, guilt;

²⁶ Lyal Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation* (Kluwer Law International: The Hague, 1997) at 229-234.

²⁷ Done at New York, 5 May 1999, between the United Nations, the Government of Indonesia and the Government of Portugal.

²⁸ See SC Res. 1246 (1999).

²⁹ *Report of the International Commission of Inquiry*, *supra* note 21, at para. 147; comment reiterated by the Secretary-General of United Nations in *Identical Letters Dated 31 January 2000*, *supra* note 19, at para. 4.

³⁰ This large and rapidly expanding body of literature is usefully summarised in 'Developments in the Law: International Criminal Law: The Promises of International Prosecution', 114 *Harvard Law Review* (2001) 1957 at 1961.

³¹ *Ibid.*

moral education in the norms of human rights; restorative justice and reconciliation; and articulating a body of international criminal law. Some of these objectives are clearly benefits claimed on behalf of the society to which the victims' belong, while others are benefits said to accrue to the international community. The achievement of these objectives rests on the pious hope that criminal justice will prevent future abuses and help repair the damage that past crimes have wreaked upon the relevant society.³² Missing from theoretical and abstract analyses of the 'justice versus reconciliation' debate, however, is attention to the concrete material realities of the specific society to which the victims belong. The applicability and realisation of each of the above-listed aims of criminal accountability will depend upon the political and economic topography of the relevant society.

In many respects, the burgeoning discourse on the 'dilemmas' of transitional justice has marginal relevance to East Timor. East Timor is not comparable to states, such as Guatemala, Chile or South Africa, in which the intellectual authors of authoritarian rule and repression retain potentially destabilising positions of economic, military or political power within the transitional society. Rather, East Timor is a territory suffering the aftermath of an exceptionally brutal colonial occupation, in which the principal perpetrators remain powerful figures in the former colonial power, and in which high-level collaborators have taken up residence outside the new state and have lost the influence they held by virtue of their collaboration with the coloniser. Lower-level collaborators remain or are returning to the territory, and their presence constitutes a threat to stability not because of their social power, but because, in the absence of prosecution, victims' antagonism to the perpetrators in their midst poses a danger of erupting as violent self-help.³³

On the other hand, a palpable threat to the future security and viability of East Timor is continued antagonism from Indonesia, and its resurgent armed forces. The former colony cannot afford to alienate its erstwhile master, due to the vulnerability of its land and sea borders, and its position within Indonesia's 'economic envelope' of trade and production. Viewed pragmatically from the perspective of the East Timorese leadership, aggressive pursuit of leading Indonesian military figures - many

³² Leila Nadya Sadat, 'Universal Jurisdiction and National Amnesties, Truth Commission and Other Alternatives to Prosecution: Giving Justice a Chance' in Stephen Macedo (ed.), *The Princeton Papers on Universal Jurisdiction* (Princeton University Press, forthcoming) at 34 of manuscript (emphasis in original, footnotes omitted). The author is indebted to Professor Stephen Macedo of Princeton University for making the Princeton Papers available before publication.

³³ See, e.g., the discussion in Bishop Carlos Filipe Ximenes Belo, 'On Amnesty and the Settlement of Crimes against Humanity: A Pastoral Appeal', 1 July 2002 (email copy).

of whom are still in active service with TNI - may not be in the best interests of the new state of Timor Lorosae.

The issues underlying the East Timor's justice dilemmas are thus distinctively post-colonial, and, although still fluid and developing, are taking the shape of a tension between strong, visceral demand for accountability among a significant proportion of the population, and a forward-looking pragmatism of a leadership emphasising clemency and economic development. Within this, there also lies some unresolved bitterness from the turbulent civil conflict of August 1975.

In district level consultations conducted by the preparatory committee of the Commission for Reception, Truth and Reconciliation (CRTR) in 2001, communities consistently stressed the need for legal justice processes against returning militia members suspected of committing crimes, in the absence of which the community was unlikely to reintegrate them.³⁴ When international forces took control of East Timor and the UN assumed transitional administrative responsibility, expectations of justice among the Timorese were high. For a variety of reasons, discussed in the following section, these expectations are unrealised, but the underlying demand for accountability has not diminished. As militia returnees have increased in the immediate aftermath of independence, anger appears to be growing: 'I don't support popular justice or lynch mobs. But if these people don't appear before the courts or the government issues an amnesty, then people will take justice into their own hands'.³⁵

Justice demands in respect of the earlier periods of gross human rights violations are more ambiguous. Once again, the scale of killings precipitated by the invasion and occupation meant that large sections of the population were directly affected. There is some bewilderment, perhaps resentment, at the amount of international attention given to the 1999 period, in comparison to the rest of the occupation. However, some East Timorese interviewed by the author expressed trepidation in extending the criminal prosecutions back to 1975 because of the perception that more East Timorese, including current leaders, may be implicated.

³⁴ Steering Committee for the Commission and Human Rights Unit (UNTAET), 'Update on the Establishment of the Commission for Reception, Truth and Reconciliation', 12 March 2001; Selection Panel, 'Progress Report', 14 November 2001. As Emilia dos Santos, whose husband was killed by TNI and militia in the town of Liquica in April 1999, states: 'Those people [her husband's killers] are still on the other side of the border. They can come back here and can be forgiven. But first they must go before a court. If they don't, I can't forgive them', cited in Tom Hyland and Lindsay Murdoch, 'Getting Away with Murder', *The Age* (Melbourne), 20 May 2002, at 8.

³⁵ Teresina Cardoso of Maliana, quoted in Philip Sherwell, 'Widows' grief overshadows East Timor independence', *Sunday Telegraph* (London), 19 May 2002 (email copy); see also Margot Cohen, 'Survivors in East Timor find it hard to forgive', *Far Eastern Economic Review*, 28 March 2002 (email copy).

Despite the strength of this demand for justice, East Timor's palpable military vulnerability, and the severe underdevelopment of essential services and basic infrastructure,³⁶ has led leadership figures such as President Xanana Gusmao to suggest that justice for past crimes cannot be prioritised over a critical need for scarce resources to be directed towards social and economic development.³⁷ Gusmao has also been a public proponent of amnesty for militia figures and FALINTIL guerrillas, although until recently there has been no discussion of the terms on which amnesty may be granted. Underlying Gusmao's approach would appear to be his personal view that offers of amnesty or pardon are necessary to entice pro-integration leaders back from exile in Indonesia, and to thus forestall future attempts to destabilise the country. He appears to be willing to risk disquiet or even violence provoked by militia returnees going unpunished, in the hope that 'reconciliation' will speed the consolidation of national unity, and that recrimination will be supplanted by a sense of national purpose in combating poverty and developing the economy. Undoubtedly, his own exceptional charisma and popularity as a national 'father-figure' will be a powerful galvanising influence in such efforts. Nevertheless, the author's discussions with UN officials and FRETILIN party members in January 2002 suggested that Gusmao's vision was very much a personal one, formulated without debate within and between political parties and without widespread consultation.

Shortly after the declaration of independence on 20 May 2002, a sweeping amnesty law was introduced into the National Parliament.³⁸ Purportedly drafted by the Justice Minister in consultation with President Gusmao, the bill proposed an amnesty for all crimes before 30 September 1999 committed by East Timorese who were coerced into joining militia groups, provided that the crimes were not 'violent and bloody'. The draft law did not define this term, or the meaning of coercion. It also conferred an amnesty on all FALINTIL fighters for past criminal conduct, provided that the conduct did not amount to war crimes, crimes against humanity or genocide. The amnesty would also apply to all non-violent offences against property committed prior to 20 May 2002.

³⁶ Joao Mariano Saldanha, 'The Transition of a Small War-Torn Economy into a New Nation: Economic Reconstruction of East Timor' in Richard Tanter, Mark Selden and Stephen R Shalom (eds.), *Bitter Flowers, Sweet Flowers: East Timor, Indonesia and the World Community* (Rowman and Littlefield: New York and Oxford, 2001) at 229.

³⁷ See, e.g., President Gusmao's statement to the Security Council: UN Press Release, Security Council Debate at 4522nd meeting, SC/7379, 26 April 2002 (email copy).

³⁸ I am indebted to Caitlin Reiger, co-director of the Judicial System Monitoring Programme, Dili, for a copy of the draft amnesty law.

The draft law did not set out a procedure for applying for amnesty, or who would be responsible for deciding upon grants of amnesty. It contained no provisions governing the interaction between the existing Serious Crimes prosecution process³⁹ and the amnesty. The law was also inconsistent in its terms with the mandate of the CRTR, which is not empowered to grant amnesties, but only to establish non-prosecutorial 'Community Reconciliation Processes'⁴⁰ for criminal acts not amounting to 'serious crimes'.⁴¹ The amnesty law was drafted without any public consultation, and was withdrawn from circulation after strong expressions of surprise and dissatisfaction in many sectors. That the law could be devised and introduced in such a hasty manner, and apparently without any consideration of the role of existing institutions such as the Serious Crimes process and the CRTR, suggests that the thought and energy hitherto invested by local and international actors in East Timor's justice and reconciliation efforts may be swept aside by the new government's political agenda of 'national unity'.

A pragmatic approach to justice issues is also evident in the posture of Chief Minister Mari Alkatiri and Foreign Minister Jose Ramos Horta towards Indonesia. As outlined below, Indonesia has failed to cooperate with UN investigations into the events of 1999, despite a Memorandum of Understanding with the then-UN Transitional Administration (UNTAET) and the presence of numerous witnesses and suspects in Indonesian territory. In multilateral and bilateral fora, however, East Timor's representatives have refrained from raising Indonesia's non-cooperation, and have denied the need for an extradition treaty between Indonesia and East Timor.⁴² According to one senior UN official interviewed in January 2002, the international community could be forgiven for believing that justice was not a priority for the present East Timorese government.

This position is perhaps also a reflection of the East Timorese leadership's acceptance of indifference or hostility among international and regional powers, such as the United States and Australia, towards attempts to hold the Indonesian military accountable. Australia is endeavouring to rebuild its strategic relationship with Indonesia after the rift caused by Australia's role in bringing about international intervention in East Timor, and has recently recommenced military and intelligence

³⁹ See the section entitled 'The Serious Crimes Experiment', *infra*.

⁴⁰ See UNTAET/REG/2001/10, 13 July 2001, sections 22-33.

⁴¹ See section on The Serious Crimes Experiment, *infra*, for the definition of 'serious crime'.

⁴² Don Greenlees, 'East Timor puts justice to one side', *The Australian* (Sydney), 4 May 2002 (email copy).

cooperation.⁴³ The events of September 11 have given new impetus to a push by the US Department of Defence to renew military ties with Indonesia,⁴⁴ with the TNI now seen as a strategic ally in the 'war on terrorism'.⁴⁵ With a resurgence in the view of TNI as a 'stabilising' force in Indonesia,⁴⁶ neither state is currently willing to risk its relationship over the prosecution of military figures. It seems likely that token advances in accountability will be embraced as adequate responses to the human rights violations committed in East Timor.

Justice Delayed - The UN Serious Crimes Process and the Indonesian Ad Hoc Court

The immediate aftermath of the TNI's scorched earth campaign in September 1999 saw strident calls for an international criminal tribunal to be established to try those responsible. No Security Council resolution was introduced, however, and the international community – encouraged by Australia, the United States and many ASEAN countries? – accepted a 'two-track' approach to criminal trials: a UN-sponsored court composed of East Timorese and international staff and based in Dili, would investigate, indict and try offences committed in East Timor by applying a mixture of domestic and international law, while Indonesia would be permitted to establish its own process to investigate and try Indonesian nationals accused of committing grave human rights violations in East Timor in 1999. Threats of an international tribunal receded with Indonesia's assertion, implicitly accepted by the

⁴³ Peter Hartcher, 'PM Urges Closer US-Indonesia ties', *Australian Financial Review* (Sydney), 6 February 2002, at 1; Tim Dodd, 'Military ties with Jakarta resumed', *Australian Financial Review* (Sydney), 8 March 2002 (email copy).

⁴⁴ In fact, military funding has recommenced. In April 2002, the State Department requested US\$ 16 million to equip and train 'counterterrorism' units in Indonesia. As the International Crisis Groups points out, 'once the U.S. gives U.S. \$8 million to the TNI, it has little control over how the money is used': International Crisis Group, *Resuming U.S.-Indonesia Military Ties* (Jakarta/Brussels, 21 May 2002) (email copy).

⁴⁵ This message has been consistently reiterated by Pentagon representatives and Donald Rumsfeld: see, e.g., 'US Admiral: Easier to Fight Terror in Indonesia if Military Ties Resumed', *AP Newsfeed*, 29 January 2002; Lee Siew Hua, 'Pentagon keen to renew Jakarta ties', *The Straits Times* (Singapore) 1 March 2002 (email copy).

⁴⁶ F. Berrigan, 'Indonesia at the Crossroads: US Weapons Sales and Military Training', Arms Trade Resource Center, World Policy Institute of the New School University, New York, October 2001, at <www.worldpolicy.org/projects/arms/reports/indo101001.htm>, 2 September 2002; Council on Foreign Relations, *The United States and Southeast Asia: A Policy Agenda for the New Administration* (Washington DC, 2001); RAND Corporation, *Indonesia's Transformation and the Stability of Southeast Asia* (Washington DC: 2001).

UN Secretary-General, that it was willing and able to try its own nationals for their conduct in East Timor during 1999.⁴⁷ Since that time, and notwithstanding a two-year delay in the commencement of the Indonesian ad hoc court, UN organs such as the Commission on Human Rights have consistently indicated their preference to await the outcome of the Indonesian trials and the Serious Crimes process before considering any further action.⁴⁸ Unfortunately, it is already apparent that neither process is likely to satisfy the justice demands of East Timorese victims.

The Serious Crimes Experiment

In the debates about international criminal tribunals and 'externalised' justice, there has been growing support for the 'mixed tribunal' model, in which internationally contributed staff work with national prosecutors and judges in a locally-situated court which applies a combination of national and international law. In theory, such a tribunal will be more responsive to the needs and demands of the post-conflict society itself, more relevant to its unfolding justice and reconciliation priorities, and thus more likely to make a concrete contribution to re-creating social cohesion and the rule of law. The model is also intended to contribute to 'capacity-building' among local legal personnel and judicial institutions, something that the International Criminal Tribunals are not intended to achieve. More cynically, the substantially lower cost and resource commitment entailed in mixed tribunals, as compared with the Ad Hoc International Criminal Tribunals, may also help to explain the enthusiasm for them.

The experience of East Timor's Serious Crimes Investigation Unit and Special Panel for Serious Crimes suggests that there is nothing inherently virtuous about the mixed tribunal model that renders it more effective in achieving the goals of accountability. The Serious Crimes experiment indicates that the laudable aims of 'localised' international justice will not be realised where the actual implementation of the model is deficient due to a lack of resources, institutional flaws in UN administration, and endemic personnel and management difficulties. Security Council resolution 1272 of 1999 established a UN Transitional Administration in East Timor (UNTAET)⁴⁹, and conferred upon the Special

⁴⁷ See Letter dated 26 January 2000 from the Minister for Foreign Affairs to the Secretary-General, UN Docs A/54/727, S/2000/65, 31 January 2000; *Identical Letters Dated 31 January 2000, supra* note 19.

⁴⁸ See, e.g., Chairperson's Statement, Situation of Human Rights in East Timor, 58th session of the Commission on Human Rights, UN Doc. OHCHR/STM/CHR/02/1 (19 April 2002); *AP Newsfeed* 'Annan downplays international tribunal for East Timor suspects', 18 May 2002.

⁴⁹ UNTAET ceased to operate on independence day, 20 May 2002. It has been replaced by the Government of Democratic Republic of East Timor, which is assisted by the United Nations Mission

Representative of the Secretary-General (SRSG) all legislative, executive and judicial power over the territory.⁵⁰ Included within its mandate of preparing East Timor for independence was the administration of justice. UNTAET Regulation 11 of 2000⁵¹ established a system of District Courts presided over by the Court of Appeal, based in Dili. Section 10 of Regulation 11 provides the Dili District Court with exclusive jurisdiction over the 'serious criminal offences' of genocide, war crimes, crimes against humanity, murder, sexual offences and torture. The Court's jurisdiction in respect of murder, sexual offences and torture is limited to the period 1 January 1999 to 25 October 1999. Section 10.3 permitted the Transitional Administrator to create a panel of the Dili District Court dedicated to hearing serious crimes cases.

On 6 June 2000, pursuant to Regulation 6 of 2000,⁵² the SRSG created the Special Panels for Serious Crime with exclusive jurisdiction over the offences listed in section 10 of Regulation 11. Regulation 15 expressly adopted the definitions and elements of the crimes of genocide, war crimes, and crimes against humanity from the Rome Statute of the International Criminal Court. The definition of torture applied was taken from the Convention against Torture. Murder and sexual offences were defined in accordance with Indonesian law, which continued to apply in East Timor except where inconsistent with an UNTAET Regulation, or international human rights standards.⁵³

Panels are composed of two international and one East Timorese judge, with international judges nominated by the UN Secretariat. The investigation and prosecution of serious crimes is the responsibility of the Deputy General Prosecutor for Serious Crimes, an international post, who in the first 18 months of its operation answered to the transitional Ministry of Justice, and since late 2001 has answered directly to the SRSG.

The Serious Crimes process is thus a quasi-externalised justice mechanism: the institutions are funded primarily from UN assessed funds, and are dependent on international staff for expertise and policy direction. However, the seat of the Court is in Dili, and local lawyers participate as judges, prosecutors and defenders. The experiment was an innovative attempt to 'localise' international justice, and had the potential to achieve a synthesis of local and external justice models. It also held out

in East Timor (UNMISSET), a scaled down 'security' mission authorised under Chapter VII of the UN Charter.

⁵⁰ See Jarat Chopra, 'The UN's Kingdom of East Timor', 42 *Survival* (2000), 27-39; Joel C Beauvais, 'Benevolent Despotism: A Critique of UN State Building in East Timor', 33 *New York University Journal of International Law and Politics* (2001) 1101.

⁵¹ UNTAET/REG/2000/11, 6 March 2000.

⁵² UNTAET/REG/2000/15, 6 June 2000.

⁵³ See UNTAET/REG/1999/1, 27 November 1999, sections 2 and 3.

the promise of enforcing international criminal law, while simultaneously contributing to capacity-building in East Timor's new justice system. For the reasons that follow, however, this potential has not been realised.

Outwardly, the Serious Crimes process appears to have been relatively productive. As at March 2002, 21 persons had been convicted of serious crimes, and 33 indictments involving 83 suspects had been issued.⁵⁴ Between July 2000 and July 2001, all trials and convictions by the Special Panel for Serious Crimes were in respect of murder or sexual violence under Indonesian law. According to a Serious Crimes prosecutor interviewed by the author, the initial focus on 'ordinary' serious crimes was a consequence of the need to try a large number of suspects held in detention since their arrest by INTERFET troops in September and October 1999.⁵⁵ As indictments and trials for single charges of murder or sexual violence were likely to proceed faster than crimes against humanity charges, a strategic decision was taken to prioritise the trials of those detainees against whom there was direct evidence of murder or rape. The first crimes-against-humanity trial of ten indictees did not commence until July 2001, with a judgment issued in December 2001.

Behind the statistics, however, lie considerable dissatisfaction and frustration with the Serious Crimes process. There are several different bases for this dissatisfaction among the East Timorese: lack of investigative continuity; inadequate resources and poor management; lack of outreach and accessibility to the East Timorese; and lack of cooperation from Indonesia.

Lack of investigative continuity

Between September 1999 and September 2000, responsibility for investigations was shifted at least four times, and up to six different agencies had overlapping responsibilities. This intensified competition for already scarce resources, and resulted in poor communication and coordination.⁵⁶ For most of the life of the process, there has been a continual shortage of experienced investigative staff, and only intermittent forensic capacity. The absence of a coherent prosecutorial strategy was compounded by rapid turnovers in international staff, which was a consequence of UN requirements for short-term contracts, as well as low morale caused by management difficulties. The absence of continuity has caused considerable distress

⁵⁴ *Report of the United Nations High Commissioner for Human Rights on the Situation of human rights in East Timor*, UN Doc. E/CN.4/2002/39 (1 March 2002), at para. 15.

⁵⁵ Serious Crimes prosecutor, Dili, January 2002.

⁵⁶ Human Rights Watch, 'Unfinished Business: Justice for East Timor', August 2000, available at <www.hrw.org/backgrounder/asia/timor/etimor-back0829.htm>, accessed 30 January 2002.

to some victims, who have been repeatedly interviewed about the same incident. One victim of the 1999 Police Station massacre in Maliana stated to the author in January 2002 that four different investigators had taken her statement in the last 18 months, but no-one had told her anything about the status of the case; she declared that the next time an investigator came to take her statement, she would not cooperate, as it seemed pointless.

The challenges to adequate investigation have been compounded by a reluctance by Australia to share intelligence and other evidence gathered in 1999. In the immediate aftermath of the INTERFET intervention, documents seized by the peacekeeping force were transferred to Australia, and have only been selectively provided to Serious Crimes investigators. Signals intelligence implicating high level Indonesian military figures has also been withheld, and one former army investigator has alleged that the Australian defence force command, on instructions from Canberra, deliberately underestimated the numbers of persons killed in September 1999.⁵⁷

Lack of resources and poor management

The Serious Crimes Unit and the Special Panel have been severely under-resourced since their inception. The combined annual budget for the two entities is a modest US\$ 6 million,⁵⁸ over half of which consists of salaries for international staff. The Serious Crimes Investigation Unit has suffered a chronic shortage of experienced staff and translators, vehicles, forensic capacity, and data management facilities and expertise. This difficulty was commented upon consistently in reports to the Security Council and the Commission on Human Rights,⁵⁹ but offers of further resources were not forthcoming.⁶⁰

The resource problem was compounded by competition for resources between the Serious Crimes process, and the reconstruction of the 'ordinary' justice system. This appeared to be a consequence of both poor management and an attempt to unite under one administrative framework two very different objectives: capacity

⁵⁷ 'Australia's East Timor Secret', Dateline, Special Broadcasting Service, broadcast 9 and 16 May 2001, available at <www.sbs.com.au/dateline>, accessed 18 May 2001.

⁵⁸ Personal communication from a former UNTAET staff member, January 2002.

⁵⁹ See: *Report of the Security Council Mission to East Timor and Indonesia (9-17 November 2000)*, UN Doc. S/2000/1105 (20 November 2000), at paras 8 and 29; SC Res. 1338 (2001), at para. 8; *Report of the High Commissioner for Human Rights on the Situation of Human Rights in East Timor*, UN Doc. E/CN.4/2001/37 (6 February 2001), at para. 13; *Situation of Human Rights in East Timor: Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/56/337 (6 September 2001) at para. 14.

⁶⁰ Amnesty International, *East Timor: Justice past, present and future*, ASA 57/001/2001 (27 July 2001), section 3(2).

building of the ordinary justice system, and efficient prosecution of complex international criminal offences. As one experienced former Serious Crimes staffer commented, 'building a judicial system is quite different from investigating and trying war crimes and crimes against humanity. Each is a gargantuan task. Trying to do both under one department confuses its mandate and seems to prevent progress on either task'.⁶¹ A restructure of the Serious Crimes Unit in December 2001 has alleviated this conflict, but not before much time was lost and many committed staff resigned in frustration.

The resource shortage has imposed upon the Unit a need to limit their investigations and prosecutions to ten 'priority' cases from 1999, which will leave uninvestigated and unprosecuted hundreds of individual cases from the 1999 period alone. The Unit's lifespan has been extended by inclusion within the successor mission to UNTAET, and its funding from UN assessed funds is guaranteed until December 2003. According to one Serious Crimes prosecutor, this is sufficient time to complete the investigation and prosecution of the ten 'priority' cases, after which the Unit may well be scaled down and handed over to an equally under-resourced East Timorese Justice Ministry.⁶²

The constraints of East Timor's 'mixed tribunal' are even more apparent in the operation of the Special Panel for Serious Crimes. The conduct of Serious Crimes trials has been exhaustively monitored by the Dili-based NGO, Judicial System Monitoring Project (JSMP). JSMP reports⁶³ reveal serious resource problems that have compromised court administration and the conduct of trials. Until 2002, there were insufficient resources to operate more than one Special Panel, which lacked research facilities (including Internet access until November 2001), sufficient interpretation for hearings conducted in up to six languages, transcription services of any kind, and basic administrative support. Notwithstanding the hard work of judges and prosecutors, the almost complete lack of the support services customary for a functioning court administration has resulted in not only delay, but also a detrimental impact on the legal quality of judgments and on the fairness of trials.

The first crimes against humanity trial commenced in July 2001 against ten East Timorese defendants. The conduct of the trial involved such a strain on the resources of the court system that no other Serious Crimes trial was able to proceed for the duration of the case, and most other 'ordinary' criminal cases were

⁶¹ Former Serious Crimes case manager, personal communication, December 2001.

⁶² Serious Crimes prosecutor, Dili, 2002.

⁶³ Judicial System Monitoring Programme, *Justice in Practice: Human Rights in Court Administration: JSMP Thematic Report 1*, November 2001; Judicial System Monitoring Programme, *The General Prosecutor v. Joni Marques and 9 others (The Los Palos Case): A JSMP Trial Report*, March 2002.

postponed, because every one of East Timor's nine public defenders was involved in the trial.

The trial itself may not have met international standards of fairness due to a lack of equality between the prosecution and the defence. While the prosecution team consisted of several experienced international criminal lawyers, with investigative and (limited) forensic support, the defence was conducted by recent East Timorese law graduates with little trial experience. The East Timorese defence lawyers were assisted by international 'mentors', but few of these mentors had criminal law experience and, due to a lack of interpreters, had difficulty communicating with their East Timorese colleagues. The Public Defenders' Office lacked vehicles, computers and other basic resources for the preparation of the defence, and there was a lack of continuity in the representation of the accused, with some public defenders being sent for training to Portugal in the middle of the trial. Such circumstances are hardly conducive to the adequate conduct of a complex criminal defence, involving ten defendants and new areas of international law. These difficulties were perhaps reflected in the fact that not a single defence witness was called.⁶⁴ The judgment may have been compromised by the absence of a transcript of the evidence, and a relative paucity of reliance on international legal authority.⁶⁵

Lack of outreach and accessibility to the East Timorese

Despite the proclaimed virtues of a 'localised' international justice model, the Serious Crimes process has proven no more responsive and adapted to local community concerns than wholly externalised forms of justice. The process was devised without consultation with the East Timorese, and the level of East Timorese involvement in investigation and prosecution has been minimal. Serious Crimes staff members interviewed expressed a strong interest in working collaboratively with East Timorese counterparts, but the absence of trained and experienced lawyers in East Timor has made it difficult to commit East Timorese lawyers to the Unit. Moreover, it is doubtful whether the Unit has the resources necessary to train East Timorese lawyers in a way which enables them to participate fully and effectively in its work.

⁶⁴ See *JSMP Trial Report*, *ibid.*

⁶⁵ *Ibid.* at paras 4(1) and 4(2). The Deputy Prosecutor for Serious Crimes, Ms. Siri Frigaard, has recently admitted that she shares these concerns: 'What I am afraid of is that afterwards, some years ahead, people will say that it's not justice because they didn't have enough defence or they didn't have enough interpreters', Radio Australia, 'East Timor: Deputy Prosecutor admits trials flawed', <www.abc.net.au/ra/asiapac/programs/s593731.htm>, 28 June 2002.

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

Endemic logistical and communication problems with the Special Panel have meant that communities would not necessarily know if a case affecting them was coming to trial, or indeed, if one of the community was required in court as a witness.

Lack of cooperation from Indonesia

In April 2000, UNTAET and the Republic of Indonesia signed a Memorandum of Understanding (MOU) regarding Cooperation in Legal, Judicial and Human Rights Related Matters.⁶⁶ The MOU provided for mutual assistance and cooperation in the investigation and prosecution of crimes, including the arrest and transfer of suspects indicted by the Special Panel. Of the 83 persons indicted by the Special Panel, 38 are believed to be at large in Indonesia.⁶⁷ Despite over 15 requests for arrest and extradition from the General Prosecutor, no defendant has yet been surrendered by Indonesia, and Indonesia has now expressed the view that the MOU is not binding upon it.⁶⁸ It is unlikely that the Special Panel will obtain jurisdiction over the principal TNI defendants on Indonesian territory.

The future of Serious Crimes

The future of the Serious Crimes experiment is uncertain. As noted above, its funding is guaranteed from UN assessed contributions until approximately December 2003, and its role is preserved by transitional provisions in the Constitution of East Timor. However, it seems unlikely that the process will continue ? even in its current limited form? much beyond the end of the

⁶⁶ Done at Jakarta and Dili, on 6 April 2000 by then-Attorney General of Indonesia, Marzuki Darusman, and then-SRSG of UNTAET, Sergio Viera de Mello.

⁶⁷ UNHCR Report on the Situation of Human Rights in East Timor, *supra* note 59, at para. 15.

⁶⁸ *Ibid.*, para. 20.

UNMISSET mission.⁶⁹ The court structure envisaged by the Constitution bears little resemblance to that established by UNTAET during the transitional period, and thus the Special Panel has no place in the new judicial institutions of East Timor. In a climate of intense competition for essential resources, and with an 'ordinary' judicial system that is barely functional, the maintenance of a comparatively resource-intensive internationalised court will probably not be a priority for the new government. Indeed, as already discussed,⁷⁰ key leaders in the new administration have expressed, in word and deed, a distinct preference for national unity over a lengthy prosecution process. As the first experiment in a 'mixed tribunal' model of justice, the Serious Crimes process appears largely to be a failure.

Indonesia's Ad Hoc Human Rights Court

Indonesia's commitment to the Secretary-General that it would try on its own proved hollow for over two years. The promised ad hoc human rights tribunal for East Timor did not commence operation until March 2002, and the integrity of both its procedure and substantive jurisdiction has been the subject of international criticism.

The tribunal is established pursuant to Indonesian Law No 26 of 2000, which created a standing Human Rights Tribunal with prospective jurisdiction, but also permits the President of Indonesia to establish by decree ad hoc courts with jurisdiction over past offences.⁷¹ In March 2001, then-President Abdurrahman Wahid issued Decree 53, authorising the establishment of an ad hoc court to try cases of serious human rights violations committed in East Timor *after* August 1999. This decree would thus deny the court jurisdiction over two of the worst massacres of 1999 — the 6 April Liquica church massacre and the 17 April attack on the Carrascalao household.

Upon coming to power in August 2001, President Megawati Sukarnoputri issued Decree 96, which both extended and circumscribed the jurisdiction of the ad hoc court. On the one hand, it extended the court's jurisdiction to include the Liquica massacre and the Carrascalao house attack, but limited the incidents that the court could try to those occurring within specific districts during the months of April and September. The court's jurisdiction is therefore circumscribed both

⁶⁹ Radio Australia, 'East Timor', *supra* note 65.

⁷⁰ See the section entitled 'East Timor and the Challenge of Impunity – Emerging Debates', *supra*.

⁷¹ See International Crisis Group, *Indonesia: Impunity versus Accountability for Gross Human Rights Violations*, (Jakarta and Brussels, 2 February 2001) at 13-15; Amnesty International, *Indonesia: Comments on the Draft Law on Human Rights Tribunal*, ASA 21/25/00, June 2000; Amnesty International, *Comments on the Law on Human Rights Courts (Law No. 26/2000)*, ASA 21/005/2001, February 2001.

temporally and geographically, with the result that only five instances of grave human rights abuses are currently being tried. 25 defendants have been indicted, including a small number of high-ranking officers such as Major-General Adam Damiri and Brigadier-General Tono Suratman. Other indictees include former East Timor governor Abilio Soares but most are middle- and low-ranking officers. Conspicuously absent from the indictments are Mahidin Simbolon, Zacky Anwar Makarim, Sjaffrie Sjamsuddin, Feisal Tanjung and General Wiranto, all of whom have been identified in leaked intelligence reports as having a supervisory role in the 'black operations'. The limited jurisdiction of the court has caused the High Commissioner for Human Rights to withhold technical assistance, although the Commission itself praised the Indonesian process in its recent Chairman's statement.⁷²

It would be another five months after Decree 96 before judges were appointed to the court, and a further month before trials commenced. Indonesian human rights NGOs were sharply critical of the judges chosen to preside over the cases, on the grounds that the recruitment was not transparent, and that most of the individuals eventually selected were academics with little practical legal experience.⁷³ Pervasive corruption, and the susceptibility of the judiciary to intimidation from a resurgent military are also causes for concern.⁷⁴

A witness protection program was established shortly before the beginning of the trials, but East Timorese witnesses are understandably fearful of journeying to Indonesia to give evidence — with the result that few eyewitnesses will appear. Indeed, those witnesses called by the prosecution thus far have tended to give evidence favourable to the accused. According to a recent report by the International Crisis Group's (ICG) Indonesia project,⁷⁵ the prosecution's indictments are sloppily drawn, make contradictory assertions of fact and are 'extremely weak', despite the large amount of evidence available concerning the cases being prosecuted.⁷⁶ Significantly, ICG's review of the indictments and observation of the hearings led it to conclude that the prosecution case presented a misleading portrayal of the events of 1999, which, even if the defendants were

⁷² Chairperson's Statement, *supra* note 48.

⁷³ Richard Galpin, 'Hopes fade for East Timor Justice', British Broadcasting Corporation transcript, 13 May 2002 (email copy).

⁷⁴ Mustafa Ali, 'Trials and tribulations: The East Timor tribunal', *Asia Times* 21 March 2002 (email copy). On the day the trials opened in Jakarta, TNI top-brass (including the head of the defence forces) packed the public gallery of the court room to show 'moral support' for the indictees.

⁷⁵ International Crisis Group, *Indonesia: Implications of the Timor Trials* (Jakarta and Brussels, 8 May 2002).

⁷⁶ *Ibid.*

convicted, would conceal the gravity of what occurred in East Timor and trivialise the concept of crimes against humanity:

Both prosecution and defence portray the events of 1999 as resulting from a civil conflict involving two violent East Timorese factions in which Indonesian security forces were concerned and sometimes helpless bystanders. The evidence that this was not the case is overwhelming. To portray the violence as two-sided, however, dramatically weakens the case for a charge of crimes against humanity, in a situation where the ability to prove the charge was already undermined by the restricted mandate of the court. It also changes the nature of military involvement in the violence from active to passive, failing to prevent violence rather than actively orchestrating it.

The implications for Aceh and Papua, the two other areas of separatist violence, are also worth noting. In obscuring the true role of the military in East Timor, the prosecution is also obscuring some of the underlying causes of resentment against Jakarta and the Indonesian administration.⁷⁷

ICG's pessimism is echoed by Indonesian human rights NGOs. Asmara Nababan, General Secretary of the National Human Rights Commission (KOMNAS HAM) concludes that 'neither the judges, nor the prosecution, intend revealing the truth of what happened, although I think some middle-ranking officials will be sacrificed to save the senior military and police commanders'.⁷⁸ A Jakarta-based diplomat has described the strategy of opponents of justice for East Timor as one of waiting patiently for the international community to lose interest in the issue, and eventually to seek a pragmatic accommodation with Jakarta.⁷⁹ The renewed push by the US Department of Defence for military ties with Indonesia and the end of human rights conditionalities suggests that token progress may be sufficient to bring about this 'pragmatic accommodation'.⁸⁰

⁷⁷ *Ibid.*, at 12.

⁷⁸ Quoted in Galpin, 'Hopes fade', *supra* note 73.

⁷⁹ Don Greenlees, 'East Timor militiamen "not guilty"', *The Australian* (Sydney), 22 May 2002 (email copy).

⁸⁰ As the ICG states: 'Secretary Rumsfeld's remarks [favouring resumption of military ties] quoted above leave no doubt that the Bush administration is eager to give the seal of approval to a deeply flawed process'. International Crisis Group, *Resuming U.S.-Indonesia Military Ties* (Jakarta and Brussels, 21 May 2002).

Conclusion — East Timor's difficult path to justice

On East Timor's long-awaited day of national independence, its leading human rights NGO Yayasan HAK (Foundation for Law and Human Rights) issued a statement which lamented that 'East Timor is gaining its independence without gaining justice, and without seeing any hope that there will ever be justice'.⁸¹ The Serious Crimes process is mistrusted and widely regarded, among victims at least, as incapable of ensuring justice. The Indonesian ad hoc court was always viewed with deep scepticism by a people who suffered the arbitrariness of the occupier's legal system for 24 years.

Since the retreat of Indonesian troops in September 1999, there has been a strong current of opinion within East Timor in favour of an international criminal tribunal of the kind established for Rwanda and the Former Yugoslavia. This demand has grown as the failure of the Serious Crimes process became apparent, with the result that the model of wholly externalised justice is now seen as the only means by which TNI perpetrators of human rights atrocities could be brought to justice. The demand for an international criminal tribunal for East Timor is not, in point of principle, unreasonable, when one considers the scale of crimes committed there over 24 years. A consistent undertone in the demand for an international criminal tribunal was a sense of entitlement to strong international measures, in light of the international community's prolonged indifference to (or collaboration with) the human rights violations in East Timor under the Indonesian occupation. The 'mixed model' presented by the Serious Crimes process was in part perceived as an indication that the international community was not committed to justice for East Timor. There is a consciousness that the international community failed to stop the Indonesian invasion and its atrocities, and effectively failed to forestall TNI's campaign of violence in 1999. An international criminal tribunal is seen as due recognition of the gravity of the crimes committed and the suffering of the East Timorese over twenty-five years.

The current international geopolitical climate renders an international criminal tribunal for East Timor, with its inevitable focus on the upper echelons of Indonesia's armed forces, highly unlikely. Moreover, the demand for an international criminal tribunal among the East Timorese is, in the author's experience, based on an unrealistically high expectation of the efficacy of such an institution in obtaining custody of the accused. Understandably, there is relatively little appreciation of the tortuous and faltering evolution of the existing international

⁸¹ Yayasan HAK, 'Independence Day: Cause for Celebration or Damnation of International Complicity in the Illegal Occupation of East Timor'. (Dili, 20 May 2002) (email copy).

criminal tribunals from symbolic acts of bad conscience to fully-functioning international courts, or of the shifting sands of state cooperation upon which the edifice of international justice has been built. Within East Timor, an international criminal tribunal is seen, to some degree, as a silver bullet for accountability - an expectation that not even the 'actually existing' international criminal tribunals could fulfil.

Faced once again with the prioritisation of Indonesia's interests over East Timor's, proponents of justice for East Timor face a difficult path, which will depend upon the creativity and determination of activists and international civil society as much as did the country's 24-year struggle for liberation from Indonesia. The emergence of prosecutions in third states under universal jurisdiction is one example of an accountability mechanism driven by determined civil society and justice activists. Such mechanisms obviously offer only ad hoc and piecemeal accountability, but as the Pinochet prosecution demonstrated, careful strategising and vigilant global networks can produce remarkable results, with far-reaching consequences for both perpetrators and victims. East Timor may yet provide us with another case study in the enforcement of international law.