

# **Justice Denied for East Timor**

## **Indonesia's Sham Prosecutions, the Need to Strengthen the Trial Process in East Timor, and the Imperative of U.N. Action**

The world watched in horror in September 1999 when the Indonesian National Army (TNI) and Timorese militias went on a campaign of murder, arson, and forced expulsion after the people of East Timor voted for independence in a United Nations administered referendum. After almost twenty-five years of brutal occupation, an estimated 1,000 to 2,000 East Timorese civilians lost their lives in the months before, and days immediately after, the voting. Approximately 500,000 people were forced from their homes or fled to seek refuge.<sup>1</sup>

The violence was part of a systematically planned policy by elements of the Indonesian government and TNI to prevent the people of East Timor from freely participating in the referendum, and to punish them for voting for independence.<sup>2</sup> The crimes included mass murder, torture, assault, forced disappearance, mass forcible deportations, the destruction of property, and rape and other sexual violence against women and children. These crimes were part of a pattern of gross violations of international human rights and humanitarian law, which, in many cases, constituted crimes against humanity.<sup>3</sup>

Amidst international condemnation of the transparently orchestrated violence, and in an effort to stave off the creation of an ad hoc international tribunal, Indonesia made unambiguous commitments to the international community and the people of East Timor to prosecute individuals responsible for the atrocities in East Timor. Despite its creation of the Ad Hoc Human Rights Court on East Timor in Jakarta (the Ad Hoc Court), which was created specifically to hear these cases, Indonesia has signally failed to keep its commitments.

The main reason appears to be a lack of political will in Jakarta to prosecute senior Indonesian civil and military officials responsible for the violence. While former President Abdurrahman Wahid promised the U.N. secretary-general that human rights abusers would be vigorously prosecuted, his successor, President Megawati Sukarnoputri, has described many of the military leaders involved in the violence in East Timor as national heroes for their role in fighting for their country. She has actively encouraged the sentiment among Indonesians that the independence of East Timor is a national humiliation. In December 2001, she gave a speech to mark Indonesia's national army day and stated, "Armed with the soldiers' oath and existing laws, carry out your duties and responsibilities in the best possible manner without having to worry about human rights abuses."<sup>4</sup>

The twelve verdicts announced so far by the Ad Hoc Court suggest that Indonesians will not be held accountable for abuses in East Timor. In the cases decided thus far, all nine military and police personnel have been acquitted. All are Indonesians. Only two persons have been convicted. Both are East Timorese.

Few observers of the Ad Hoc Court are surprised by the apparent political interference in the process. The TNI still wields enormous influence over the judiciary. It is unprecedented for civilian judges or prosecutors to try military personnel successfully. The Indonesian judiciary has a history of being subordinate to the executive and the military. Courts are often used to take action against, or deny legal remedy to, political activists and government critics. Although a process was set in place in 1999 to transfer administrative and financial control over the judiciary from Indonesia's Justice Department to the Supreme Court, a 2002 U.S. State Department Human Rights Report indicated that there were few signs of judicial independence.<sup>5</sup> Rampant judicial corruption has also raised concerns about the possibility of a fair and independent process.<sup>6</sup>

Perhaps most appalling has been that some TNI officers implicated in atrocities in East Timor have actually been promoted. Earlier this year Major General Sjafrie Sjamsoeddin was appointed as the chief military spokesman, despite his public role in supporting pro-Jakarta

militias in their campaign of violence throughout the territory.<sup>7</sup> Another notable promotion was that of Brigadier General Mahidin Simbolon, chief of staff of the Udayana regional command in Bali, which oversaw East Timor for the military. He is widely believed to have been a key figure in the setting up and running of the militias in East Timor. Leaked Australian intercepts indicated a close relationship between Simbolon and Eurico Guterres, the head of the militia. Cancio Lopes de Carvalho, militia commander of Sector C (western East Timor), also allegedly named his militia, MAHIDI, after Simbolon's first name.<sup>8</sup> Simbolon has subsequently been promoted to the rank of Major General and is now the military commander for Papua.<sup>9</sup> Timbul Silaen, who was acquitted of crimes against humanity (see below), is now the Security Assistant, Inspector General to the National Police Chief, Da'i Bachtiar.

Trials in Jakarta are not the only justice option for 1999 atrocities. In East Timor, a process was also created to prosecute Indonesians and Timorese remaining in East Timor responsible for the violence. To accomplish this, the United Nations Transitional Administration in East Timor (UNTAET) created the Serious Crimes Investigation Unit (SCIU) to investigate and prosecute cases in front of Special Panels for Serious Crimes (Special Panels) of the newly created Dili District Court. Primarily for technical and financial reasons, this process has only made a modest contribution in addressing the larger issues of justice and accountability that continue to hang over the world's newest country.

It is time for the international community, led by the U.N., to launch a new initiative to bring the perpetrators of the violence in East Timor to justice. The U.N. and its member states have a particular obligation to see that justice is done for the crimes committed in East Timor. The U.N. set up and administered the referendum in 1999, U.N. personnel were among the targets of the violence, and many U.N. personnel were witnesses to crimes committed against the East Timorese. The international community acted as guarantor of the balloting, implicitly promising the Timorese people a peaceful transition to independence if that was the will of the Timorese people. Indonesia offered the same guarantees, but then orchestrated and allowed the violence to take place. The Indonesian military's behavior was all the more egregious because Indonesia had formally agreed to provide security for the vote.

Human Rights Watch thus urges the United Nations secretary-general to commission a report by a group of experts to:

1. Comprehensively examine the failure of the Ad Hoc Courts to prosecute those most responsible for the violence in East Timor and to conduct credible trials;
2. Make recommendations as to which justice mechanisms should be created or used to prosecute those who planned the violence, as well as those most responsible for carrying it out;
3. Examine the work of the SCIU and the Special Panels in Dili so as to identify resource and capacity problems;
4. Urge an extension of the mandate of the SCIU and Special Panels and for donors to offer increased funding and technical assistance.

## **I. BACKGROUND**

In the time prior to, during, and subsequent to the 1999 violence, the U.N. and, in particular, the Security Council, have been actively involved in East Timor. Yet Indonesia has consistently flouted the will of the U.N. and the Security Council.

In 1999, the Security Council authorized the creation of the United Nations Mission in East Timor (UNAMET) to organize and conduct the referendum (officially called a "popular consultation"). The Security Council called upon all parties to cooperate fully with the

Mission in the implementation of its mandate. It also underlined the responsibility of Indonesia in maintaining stability and security in East Timor during the voting.<sup>10</sup> Indonesia did the opposite.

After the violence erupted, the Security Council authorized the International Force for East Timor (INTERFET), under a unified command structure headed by Australia, to restore peace and security in East Timor, and to facilitate humanitarian assistance operations.<sup>11</sup> Indonesia received broad condemnation at the U.N. for its responsibility for the violence, including from the U.N. Security Council and the High Commissioner for Human Rights.

The violence was so appalling that in an unprecedented move three U.N. thematic Special Rapporteurs visited East Timor at the end of 1999 and issued a joint report describing the Indonesian military's role in the violence, and recommending that the Security Council consider the establishment of an international Commission of Inquiry.<sup>12</sup> The U.N. International Commission of Inquiry on East Timor—a commission set up by U.N. Secretary-General Kofi Annan—undertook investigative work in East Timor in early 2000, and concluded that the systematic and large-scale nature of the crimes warranted the establishment of an international human rights tribunal.<sup>13</sup> Indonesia's National Commission on Human Rights (Komnas HAM) also created a Commission for Human Rights Violations in East Timor (KPP HAM), which was composed of government officials and non-governmental human rights activists. On January 31, 2000, it produced a comprehensive report naming Indonesian and East Timorese officials and military leaders responsible for grave violations of human rights.<sup>14</sup>

To succeed UNAMET, the Security Council in late 1999 created UNTAET to administer East Timor during its transition to independence. A crucial part of UNTAET's mandate was the administration of justice, including accountability for the 1999 violence, which led to the establishment of the SCIU and the creation of the Special Panels.<sup>15</sup>

The United Nations Mission of Support in East Timor (UNMISET) inherited UNTAET's responsibility for justice.<sup>16</sup> Not only did the Security Council give the SCIU an explicit mandate to administer justice, it also reiterated its own call that perpetrators of human rights violations in East Timor should be held accountable.<sup>17</sup>

## II. INDONESIA'S SHAM PROSECUTIONS

The international Commission of Inquiry called for the establishment of an international tribunal. One reason was that many of the alleged planners of the violence were senior Indonesian members of the TNI, police, and its civil administration in East Timor, and therefore beyond the reach of the authorities in East Timor. Given the nationalistic sentiments of many Indonesian leaders and some sections of public opinion, and the longstanding impunity of military personnel for political offenses, it was considered unlikely that Indonesia would prosecute senior members of its armed forces.

But Indonesia rejected the proposals. It promised instead to take responsibility for providing justice for atrocities committed by its nationals in East Timor, and that it would do so in a credible manner.

As a result, in his letter forwarding the Commission of Inquiry report to the Security Council and General Assembly, the secretary-general did not endorse the recommendation for a separate international tribunal. Instead, he accepted Indonesian assurances and stressed that full cooperation should be given to its efforts to prosecute the crimes. He also, however, stated that he would "closely monitor progress" of the response to the crimes in East Timor to see that it is a "credible response in accordance with international human rights principles."<sup>18</sup> The Security Council also accepted Indonesia's assurances and delayed acting upon recommendations for an international tribunal.<sup>19</sup>

There have now been twelve verdicts in the Ad Hoc Court. Two persons, both East Timorese, have been convicted and received light sentences; the other ten cases ended in acquittals, despite considerable evidence against them. These cases make it clear that Indonesia has failed to provide a “credible response” to the violence in East Timor. Furthermore, as discussed below, a variety of factors make it clear that Indonesian “justice” will continue to be a sham. The secretary-general should thus make good on his promise to monitor Indonesia's justice efforts and recognize that a much more credible approach to justice is required.

Under intense international pressure and in an attempt to stave off calls for an international tribunal, in November 2000 Indonesia's Parliament passed legislation providing authority for the establishment of a Human Rights Court as a special chamber within the existing Indonesian court system, presided over by panels of career and non-career judges. After extensive delay, in August 2001 the Ad Hoc Court for East Timor was established.<sup>20</sup>

In January 2002, President Megawati Sukarnoputri appointed eighteen non-career judges to sit on the Ad Hoc Court. Twenty-four prosecutors were inducted in February.<sup>21</sup> That month the first charges were issued against seven individuals, including the former Governor of East Timor, Abilio Soares, and the former Police Chief, General Timbul Silaen. Both were charged with crimes against humanity. The trials against these seven individuals commenced in March 2002.

The verdicts, which were announced in August 2002, received wide-scale international and domestic criticism, including from the High Commissioner for Human Rights, Mary Robinson, who responded to them by calling for an international tribunal.<sup>22</sup> The OHCHR also issued a blunt statement criticizing the weakness of the trials and the prosecution, a statement which was endorsed by the U.N. secretary-general.<sup>23</sup>

Soares was convicted on two counts of crimes against humanity, one for murder, the other for assault/persecution. These convictions were premised on the concept of command responsibility for failing to prevent his subordinates from carrying out the attack on the Liquisa church on April 6, 1999, where at least twenty-two civilians were killed; the attack on Manuel Carrascalao's house in Dili on April 17, 1999, where twelve civilians were killed; the attack and destruction of Bishop Belo's house in Dili on September 5 and 6, 1999, where four civilians were killed; and the Suai church massacre on September 6, 1999, where at least twenty-seven civilians were killed, including three priests. Despite the enormity of the crimes, Soares was only sentenced to three years imprisonment, much less than the minimum requirement of ten years set under Indonesian law or the ten-and-a-half years requested by the prosecution. He remains free pending appeal.

In spite of strong evidence of his guilt, Silaen was acquitted of crimes against humanity charges, which also were premised on the principle of command responsibility. Silaen was charged with failing to prevent his subordinates from carrying out the attack on the Liquisa church on April 6, 1999; the attack on Manuel Carrascalao's house in Dili on April 17, 1999; the attack on the UNAMET office in Liquisa on September 4, 1999; the attack on Dili Diocese on September 5, 1999; and the attack on Bishop Belo's residence on September 6, 1999.

The Ad Hoc Court also acquitted TNI officers Lieutenant Colonel Liliék Kusardiyanto, Captain Ahmad Syamsudin, and Lieutenant Sugito; a police official, Colonel Gatot Subiaktoro; and a district head, Herman Sedyono, for their involvement in the Suai Church Massacre.

A second set of verdicts was announced by the Ad Hoc Court in late November 2002. One defendant, Eurico Gutteres, the Aitarak militia commander and Deputy Commander of the National Integration Fighting Force (Pasukan Pejuang Integrasi, PPI), was found guilty on two counts of crimes against humanity for the attack on the house of independence leader Manuel Viegas Carrascalao. However, Gutteres was only sentenced to the minimum sentence of ten years and has been allowed to remain free pending appeal. Few in Indonesia believe that Gutteres will ever serve his sentence, particularly as he is a leading

member of the youth wing of President Megawati's political party, the Indonesian Democratic Party of Struggle (PDI-P).

Three other defendants—Lt. Col. Asep Kuswani, the former Liquica military commander, Lt. Col. Adios Salova, the former police chief of Liquica, and Leoneto Martins, the former district head of Liquica—were acquitted for the Liquica church massacre. Another defendant, Lt. Col. Endar Priyanto, the former Dili police commander, was acquitted on the same day for the attack on Manuel Carrascalao's house.<sup>24</sup>

A lack of consistency further undermines these verdicts. While Abilio Soares was convicted for his failure to prevent the actions of his subordinates, those subordinates— Leonito Martens, the District Head of Liquisa, and Herman Sedyono, the District Head of Covalima, both of whom were specifically named in the indictment—were later acquitted in their own trials for the same crimes.

As set forth below, while the weak initial verdicts are a source of obvious and serious concern, problems with the Ad Hoc Court and the trials are far more pervasive.

### **A. The Failure of the Prosecution**

Serious questions have been raised about the professionalism, autonomy, and impartiality of the prosecution.

One of the most serious problems is the seeming lack of will to indict high- and mid-level military officers. Although Indonesia's KPP-HAM report named top Indonesian military and administrative officers as responsible for the 1999 violence, that report does not appear to have been used by prosecutors or investigators. Most prominent among those named by the KPP-HAM report but not charged is General Wiranto, chief of Indonesia's armed forces at the time of the violence. He remains unindicted despite the Indonesian Commission of Inquiry's determination that he was responsible for human rights abuses and had full knowledge of what the army was doing.<sup>25</sup>

When charges have been filed, it appears that the prosecution has not been eager to succeed. Indictments have been factually inaccurate. Observer reports from the trials have suggested that prosecutors are actively seeking acquittals.<sup>26</sup> Prosecutors have made little or no attempt to portray the military as an active participant in the violence. Rather, the conflict is depicted as a civil disturbance, or even a "brawl," between two violent East Timorese factions.<sup>27</sup> Despite overwhelming evidence and witness testimony that the violence was part of a widespread, orchestrated attack by persons at a senior level in the Indonesian military and civilian administration, the culpability of the accused has been premised on the defendants' failure to prevent the violence rather than their active participation in planning, organizing, and carrying out atrocities.

The most glaring example of such weak indictments was in the case of Eurico Gutteres, leader of the Dili-based militia, Aitarak. Gutteres was tried on crimes against humanity charges stemming from the April 1999 attack on independence leader Manuel Carrascalao's house, including the killing of Carrascalao's son. Despite having been videotaped on the morning of the killing inciting thousands of militiamen to capture and kill independence supporters, Gutteres was not charged with ordering, inciting or participating in the attack. Instead, he was only charged with failing to control his subordinates.

In several instances prosecutors called other defendants as their first witnesses, who then gave testimony favorable to the accused. Witnesses with testimony harmful to the accused have only appeared later in the trials. In the Suai church massacre trial, *prosecutors* told the court that the trial failed to prove the prime charge. On the remaining secondary charge, the prosecution proposed that the defendants be given sentences at or near the minimum, ten years in jail, for command responsibility for crimes against humanity.<sup>28</sup> For the third set of cases, the prosecution again announced that it would seek the minimum sentence.<sup>29</sup>

## **B. Limited Geographic and Temporal Jurisdiction**

The Ad Hoc Court has also been hampered from the outset by having unreasonable geographical and temporal limits placed on its jurisdiction. An executive order by President Megawati Sukarnoputri limited the jurisdiction of the Ad Hoc Court on East Timor to crimes committed by Indonesian citizens in three of East Timor's thirteen districts during the months of April and September 1999.<sup>30</sup> By restricting its jurisdiction to crimes that occurred in those periods, prosecutors may not be able to get at the broader patterns of state policy and practice that contributed to the violence.

The restrictions also mean that cases of unlawful killing, torture, rape and other crimes against humanity that occurred in other districts or months will not be prosecuted in the Ad Hoc Court. These include a large-scale massacre in Oecussi District, killings by the TNI Battalion 745, located in Los Palos (for which the SCIU has issued indictments), and the mass forced deportation of an estimated 250,000 East Timorese to West Timor in September 1999.<sup>31</sup>

Another effect of these restrictions appears to be to make it more difficult to prosecute for crimes against humanity, which require proof of a widespread or systematic attack. The definition of crimes against humanity used in Law 26/2000 was improperly translated from the Rome Statute for the International Criminal Court, and instead of defining such crimes to include a "widespread or systematic attack directed against any civilian population," the Indonesian law uses the phrase "widespread or systematic attack directly on the civilian population." That wording may make it more difficult to convict defendants who were not actually present at the scene of the massacre.<sup>32</sup>

## **C. Inadequate Witness Protection**

Successful prosecutions can only be mounted with the cooperation of appropriate witnesses. Yet witness protection has been widely criticized as inadequate.<sup>33</sup> The prospect of testifying before a court packed with military supporters and a courthouse surrounded by hundreds of pro-integration supporters has dissuaded many prosecution witnesses from making the journey to Jakarta.<sup>34</sup> The most notable member of this group is Nobel laureate Bishop Belo, who refused to testify in Jakarta because his security could not be guaranteed. After much delay, in December 2002, it was announced his testimony may be taken via a video-link from East Timor.<sup>35</sup>

One of the four East Timorese witnesses who traveled to Indonesia to testify in one of the first trials alleged threats and intimidation by militia leader and defendant Eurico Guterres when he arrived at court.<sup>36</sup>

A witness in the Suai Church massacre trial asked the prosecutor to be allowed to testify in Tetum, an indigenous language of East Timor. However, the Panel of Judges in the case, led by Cicut Sutiarmo, rejected the request stating that the UNTAET interpreter present did not hold correct documentation to interpret in court, forcing the witness to testify in Indonesian. As a result the testimony was riddled with language difficulties, causing the testimony to be limited primarily to yes or no responses to questions, and resulting in heckling by soldiers present in the courtroom, which the judges have made no attempt to control.<sup>37</sup>

The prosecution has offered little logistical support to witnesses, raising serious security concerns. No provisions were made for the first witnesses to be met at the airport. In addition, they had to walk, in public, to the courthouse, due to roadblocks. No safe space was arranged for them at the courthouse, and no safe passage to travel between the courtroom and other parts of the building. On one occasion, a defendant was let in to see protected witnesses.<sup>38</sup>

The climate in the courtroom has also not been conducive to the security of witnesses. Statements supportive of the TNI or critical of the U.N. are accompanied by loud cheering from those in attendance.

#### **D. Questionable Selection of Judges; Inadequate Judicial Training**

The judges for the Ad Hoc Court were chosen during the course of secret hearings by a closed session of Indonesia's Supreme Court. It is unclear what the criteria were for their selection. Most have no training in, or experience with, international law or human rights.

The appeals process will be discharged by a mixed panel of career and non-career judges, with little or no experience of international law or crimes of this complexity. Appeals against convictions will go to the High Court and then to the Supreme Court, while appeals against acquittals will go straight to the Supreme Court. There is no clear timetable as to when appeals will be heard or when decisions will be issued.

A very worrisome aspect of the appeals procedure is that the decisions and reasoning of the High Court or Supreme Court will not be public documents (though it is likely that the decisions will be leaked by either the judges or the lawyers due to the high level of interest in these cases).

#### **E. History of Light Punishment for Members of the Security Forces**

The acquittals and light sentences issued by the Ad Hoc Court are consistent with notoriously weak sentences given to military personnel for crimes in past trials. After the November 1991 massacre of hundreds of civilians by the military at the Santa Cruz cemetery in East Timor, a Military Honor Council sentenced low-ranking soldiers to between ten and eighteen months in prison. More senior officials involved in the massacre were sent abroad to study. Timorese militia members who were recently convicted of brutally killing three UNHCR workers in West Timor September 2000 were initially sentenced to 10-20 months in prison. Only after intense international pressure were the prison terms increased to seven years during appeal. While welcome, the increased sentences are another indication of the lack of independence of the judiciary.

Eurico Gutierrez was also charged in 2001 in relation to an incident in Atambua, West Timor that took place shortly after the UNHCR killings. He was accused of incitement for resisting efforts by authorities to disarm the militias and sentenced to six months in prison by the North Jakarta district court. However, he served only twenty-three days before being released.

In recent years other cases of human rights violations have been prosecuted by *koneksitas* courts, mixed civilian and military courts with jurisdiction to hear cases involving military officers. However, these courts also raise concerns about accountability and impunity. In the May 2000 *koneksitas* trial of the massacre in West Aceh in July 1999 of Muslim cleric Teungku Bantaqiah and fifty-seven others at his religious school, twenty-four soldiers were found guilty and sentenced to between eight-and-a-half to ten years imprisonment. Not one senior officer implicated in the murder was prosecuted in the first trial of Indonesian troops involved in atrocities in Aceh, creating an illusion of justice while ensuring that those who ordered the killings escaped punishment.<sup>39</sup>

Several other high profile cases involving the military in Indonesia have failed to be prosecuted at all. These include the killing of Papuan Independence leader Theys Eluay on November 10, 2001, in which members of the Indonesian Army's Special Forces are implicated and have been named as suspects by the Indonesian army.

## II. THE SERIOUS CRIMES INVESTIGATION UNIT AND THE SPECIAL PANEL FOR SERIOUS CRIMES, EAST TIMOR

Indonesia's failure to take seriously its responsibility is in sharp contrast with the efforts made in East Timor, which, while seriously hampered from the start by a lack of resources and appropriate staffing, are *bona fide* attempts to achieve justice.

Unfortunately, Indonesia has refused to cooperate with these efforts, despite a Memorandum of Understanding signed between the Indonesian Attorney General and UNTAET in April 2000. This has meant that virtually all of the defendants prosecuted before the Special Panel have been East Timorese. This has created widespread cynicism among the East Timorese public and even its leadership (including President Xanana Gusmao), who question the fairness of a process that leads to the prosecution of relatively low-ranking Timorese in Dili while the sponsors of the violence remain free—and even promoted—in Indonesia.

Following the introduction of UNTAET, the Transitional Administrator promulgated a regulation that established a judicial and legal system in East Timor.<sup>40</sup> Four District Courts and a Court of Appeals were created to administer justice in East Timor.

UNTAET established two Special Panels as part of the Dili District Court system, comprised of one East Timorese and two international judges. They have exclusive jurisdiction over murder and sexual offenses that were committed in East Timor between January 1, 1999 and October 25, 1999 and have universal jurisdiction over genocide, torture, war crimes, and crimes against humanity.<sup>41</sup>

The first Special Panel commenced operation in January 2001. As of December 2002, 140 people have been accused under forty five indictments by the SCIU of the Dili District Court in East Timor. Thirty one individuals have been tried and convicted, with sentences ranging from eleven months to thirty-three years.

A new judicial and legal system cannot be created without large and even systemic problems. There is no way for East Timor to avoid problems of lack of education, training, and experience. The trial process has had technical flaws, some extremely serious. But the SCIU's ineffectiveness early in the process was also due in part to the lack of political will by the U.N. and donors and a lack of requisite funding. Ineffective management and inappropriate recruitment also exacerbated the situation in the early stages. Under new management, the SCIU has made remarkable progress in the last year despite some ongoing problems.

### A. Current Lack of Resources and Capacity

#### 1. *Insufficient number of trial judges; Non-functioning court of appeals*

Although there has long been an intention and desire among U.N. officials to establish two Special Panels for Serious Crimes, due to delays in recruitment only one panel has convened. Moreover, that one panel shut down for five months this year due to the absence of one or more judges. Thus, for example, a major trial for crimes against humanity—the Lolotoe case, covering twenty seven charges against three defendants—was suspended during this period.

The Court of Appeals has jurisdiction to hear appeals from both the Special Panel and the ordinary panels of Dili's District Court. The Court of Appeals started operating in July 2000 but has essentially not been functioning since October 2001. The Court of Appeals requires a panel of three judges, comprised of two international judges and one East Timorese. However, there have been no international judges appointed since January this year. A recent report from the Judicial Systems Monitoring Programme notes that thirty-nine appeals are still pending, including eight appeals from decisions of the Special Panel.<sup>42</sup> Since that report was written two more SCIU cases have filed appeals.

## **2. Inadequate trial transcripts and translation services**

Trial recording and translation services are wholly inadequate. No written trial transcripts have been made. Audio recordings are now used, but given the three to five different languages spoken in the courtroom at any one time, it is very difficult to decipher the content of the court proceedings. Consequently, a great deal of trial time is taken over disputes concerning prior testimony.

The difficulty caused by using multiple languages has been exacerbated by a lack of qualified translators. Interpreting services are often rudimentary. There has been little if any training of East Timorese in the skills of courtroom interpreting or in legal terminology. Proceedings are often delayed while an interpreter is located. When a judge or case manager realizes that a translation problem exists, interruptions to check or protest the quality of translation can delay court proceedings for hours at a time.<sup>43</sup> More funding is needed for interpretation and training.

## **3. Lack of support services and resources for judges**

Judges of the Special Panel lack fundamental support staff services such as law clerks and administrative assistants. As a consequence, much time is spent by judges conducting legal research or performing routine tasks generally taken care of by support personnel, such as typing their own judgments, further delaying the adjudication of cases. This lack of support has been particularly problematic for the East Timorese judge on the Special Panel, for whom this is her first judicial appointment.

The judges of the Special Panels are also hindered by a significant lack of material resources. Access to the internet and the crucial legal research facilities it offers is limited or non-existent. A functioning court library does not exist. Lack of office space and computers create obvious obstacles for the judges.<sup>44</sup>

## **4. Inadequate professional training for the judiciary**

Thus far, training that has been provided for the new East Timorese judiciary has been uncoordinated and lacking in continuity. Training has also been too theoretical, with little emphasis on the procedural and other laws that the judges are required to apply. Judges have been provided with little training in practical judicial skills such as decision writing, drafting directions and orders, and proper courtroom procedures.

Human resources problems are exacerbated by Ministry of Justice policy that requires personnel to attend compulsory legal training in Dili for as many as two weeks per month. That training is provided in Portuguese and involves examination only of legal texts from other former Portuguese colonies, such as Mozambique. All the East Timorese jurists studied for their degrees in Indonesian universities. None of them speaks Portuguese fluently.

Judges lack training in international criminal law and have little human rights experience. As of November 2001 no decision rendered by the Special Panel had contained any application of any international jurisprudence.

## **5. Need for added resources/qualified individuals to serve as defense counsel**

Competent defense counsel is just as important to the integrity of the trial process as competent judges and prosecutors. Yet serious concerns remain about the qualifications, experience, and resources provided to the public defenders appointed to represent the accused.

At the outset, neither the East Timorese nor the international defenders had any experience in crimes against humanity cases. In one case, three international lawyers and three East Timorese public defenders defended ten defendants, raising potential conflict of interest problems.

There have also been problems of continuity of representation. In one case one international lawyer left before completion of the presentation of evidence due to the expiration of his contract, one East Timorese lawyer took vacation during presentation of the evidence, and four of the accused had their final statements read by someone who had not represented them at trial.

## **B. The Planned Phasing Out Of the SCIU**

The SCIU's mandate is currently directly tied to that of UNMISSET. UNMISSET is currently due to finish on May 20, 2003, although this mandate is expected to be extended by the Security Council for a further year. The SCIU is therefore due to start winding down investigations in July 2003, so that trials may be completed by May 2004. One prosecutor at the Dili Court indicated that this limited time frame will allow the SCIU to prosecute only ten additional priority cases, leaving hundreds of others uninvestigated.<sup>45</sup>

The greatest challenge to the SCIU and Special Panels are thus not how they are operating, but that their work is being shut down prematurely. Shutting down the SCIU pursuant to the current schedule will leave a vast backlog of cases that require investigations and trials. This could also have a negative impact on preparations for other comprehensive indictments against senior Indonesian military officers, for which more time and resources are necessary.

The SCIU must be continued and expanded. As the SCIU and Special Panels are the only mechanisms currently achieving a measure of accountability, it would be a serious mistake to curtail their work before it is completed. Both the SCIU and the Special Panels require additional contributions and should remain within the funding scope of any subsequent U.N. mission. Efforts will also need to be made to collate all available evidence in order to allow the preparation of indictments and international arrest warrants even after the peacekeeping mission has ended. In this regard a new agreement should be made with the East Timorese government to ensure that the work of the SCIU can be continued after the peacekeeping mission has finished.

## **C. Indonesia's Unwillingness to Cooperate with the SCIU**

Indonesia has refused to extradite those suspected of involvement in the 1999 violence to East Timor and has been unwilling to assist investigators from the SCIU in their efforts to investigate and prosecute these same suspects. Indonesia has been uncooperative in permitting the SCIU to obtain evidence and interview suspects in Indonesia and has not recognized or acted upon international arrest warrants issued by Dili for suspects with known whereabouts in Indonesia. Indonesia's steadfast refusal to cooperate has come despite the Memorandum of Understanding, signed by the two parties in April 2000, in which Indonesia and UNTAET agreed to share evidence, facilitate the participation of witnesses, and transfer the accused.<sup>46</sup>

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<sup>1</sup> United Nations General Assembly, "Situation of Human Rights in East Timor," Note by the General Secretary, December 10, 1999. See also Indonesian Legal and Human Rights Association, "Ad Hoc Trials Are Far Away From International Standard," May 5, 2002.

<sup>2</sup> See U.N. Document A/54/26, S/2000/59 "Report of the International Commission of Inquiry on East Timor to the secretary-general," January 31, 2000; U.N Document A/54/660 "Situation of Human Rights in East Timor," December 10, 1999;

Komnas HAM, "Report of the Indonesian Commission of Investigation into Human Rights Violations in East Timor," 31 January, 2000.

<sup>3</sup>See U.N. Document A/54/26, S/2000/59 "Report of the International Commission of Inquiry on East Timor to the secretary-general," 31 January, 2000, p.123. In particular, the TNI, as well as the Timorese militias, committed gross violations of fundamental human rights in a planned, systematic, and large-scale way. Ibid, p.60.

<sup>4</sup>"Megawati to Troops: Don't Worry About Rights Abuses," Agence France-Presse, December 29, 2001.

<sup>5</sup>United States Department of State, "Country Reports on Human Rights Practices, Indonesia," March 4, 2002.

<sup>6</sup>In July 2002, Param Cumaraswamy, the U.N. Special Rapporteur on the Independence of the Judges and Lawyers said, "There are serious problems and particularly allegations, widespread allegations of corruption in the system," "Tommy Suharto Jailed for Murder," CNN online, July 27 2002; See also Human Rights Watch, "The Indonesian military and Ongoing Abuses," July 2002.

<sup>7</sup>Tapol (the Indonesian Human Rights Campaign), "The Case for International Tribunal Overwhelming Following Indonesia's Refusal to Transfer Suspects," February 2, 2002.

<sup>8</sup>MAHIDI is also an acronym for Mati Hidup Demi Integrasi (Live or Die for Integration).

<sup>9</sup>Hamish McDonald, "Australia's bloody East Timor secret," *Sydney Morning Herald*, March 14, 2002; "Silence over a crime against humanity," *Sydney Morning Herald*, March 14, 2002.

<sup>10</sup>Security Council Resolution 1246 (1999)

<sup>11</sup>Security Council Resolution 1264 (1999).

<sup>12</sup>U.N. Document A/54/660 "Situation of Human Rights in East Timor," 10 December 1999, pp. 72, 74. The three U.N. special rapporteurs sent to East Timor in early November 1999 were Asma Jahangir, special rapporteur on extrajudicial summary or arbitrary executions; Nigel Rodley, special rapporteur on torture; and Radhika Coomaraswamy, special rapporteur on violence against women.

<sup>13</sup>U.N. Document A/54/726, S/2000/59 "Report of the International Commission of Inquiry on East Timor to the secretary-general," January 31, 2000 pp 123, 153. The five appointed commissioners were Sonia Picado of Costa Rica (Chair); Judith Sefi Attah of Nigeria; A.M. Ahmadi of India; Mari Kapi of Papua New Guinea; and Sabine Leutheusser-Schnarrenberger of Germany.

<sup>14</sup>Komnas HAM "Report of the Indonesian Commission for Human Rights Violations in East Timor (KPP-HAM)," Jakarta, January 31, 2000.

<sup>15</sup>UNTAET Regulation 2000/15 on the establishment of panels with exclusive jurisdiction over serious criminal offences, June 6, 2000.

<sup>16</sup>Security Council Resolution 1410 (2002).

<sup>17</sup>U.N. Document S/2000/137, Letter dated February 18, 2000 from the president of the Security Council to the secretary-general on the report of the International Commission of Inquiry of East Timor.

<sup>18</sup>U.N. Document A/54/726, S/2000/59, 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.

<sup>19</sup>Ian Martin, "No Justice in Jakarta," *Washington Post*, August 27, 2002.

<sup>20</sup>Law No. 26/2000 on Human Rights Courts. The ad hoc court for East Timor was established by Presidential Decree No. 53/2001 with the jurisdiction later limited by Presidential Decree No.96/2001.

<sup>21</sup>They consist of fifteen active state prosecutors, seven retired prosecutors, and two active military prosecutors.

<sup>22</sup>"U.N.'s Robinson calls for int'l court for East Timor," Reuters, August 25, 2002.

<sup>23</sup>OHCHR Press Release, "United Nations High Commissioner for Human Rights voices concerns following verdict in Indonesia Tribunal," August 14, 2002; Spokesman for the U.N. secretary-general, Press Release, "Secretary-general endorses human rights commissioner's concerns over Indonesia Tribunal," August 14, 2002.

- <sup>24</sup> Verdicts are still expected in the cases of Lieutenant Colonel Soedjarwo, Former Dili military commander; Colenol M. Yayat Sudrajat, the Tribuana military unit chief; Hulman Gultom, Former Dili police chief; Brigadier General Suhartono Suratman, Former East Timor military commander; Brigadier General M. Noer Muis, Former East Timor military commander (Suratman's successor); and Major General Adam Damiri, former chief of the Udayana Regional Military Command, based in Bali.
- <sup>25</sup> Komnas HAM, "Executive Summary of the Indonesian Commission for Human Rights Violations in East Timor (KPP-HAM)," January 31, 2000.
- <sup>26</sup> TAPOL, "Flawed Indictments of East Timorese Militia Lease an Affront to Justice," Press Release, July 2, 2002.
- <sup>27</sup> In court the violence has been repeatedly referred to as a '*bentrokan*' (brawl).
- <sup>28</sup> Tertiani Simanjuntak, "Light Sentences Proposed for Suai Massacre," *Jakarta Post*, July 17, 2002.
- <sup>29</sup> "10-Years Sentence Sought For 3 Indonesians In E. Timor Trial," AP, November 14, 2002.
- <sup>30</sup> Presidential Decree No. 96/2001. While various legal hurdles surrounding the legislation creating the court were being resolved, the Indonesian attorney general insisted that he could not proceed with indictments. Instead, he announced that his office would give priority to the investigation of five especially bloody incidents that occurred in April and September 1999 in East Timor. Apparently as a concession to those opposing the court, the executive order that established the court's temporal and geographical jurisdiction in 2001 limited the court's mandate to these five cases. See Amnesty International, "Indonesia: First Indictments But Will Justice Be Delivered?," February 21, 2002.
- <sup>31</sup> Human Rights Watch, "Forced Expulsions to West Timor and the Refugee Crisis," a *Human Rights Watch Report*, vol. 11, no. 7, December 1999.
- <sup>32</sup> Human Rights Watch, "Indonesia: Justice For East Timor Still Elusive," February 21, 2002
- <sup>33</sup> See Joint press release: JSMP and Amnesty International, "Indonesia: East Timor Trials Deliver Neither Truth nor Justice," August 15, 2002.
- <sup>34</sup> "East Timor Massacre Survivors Shun Jakarta Trial Over Safety Fears," AFP, June 4, 2002. At least thirteen witnesses have told U.N. officials they are too scared to come to Jakarta; "E. Timor Trial Verdicts Expected; Will Justice Be Done?," AP, August 11, 2002.
- <sup>35</sup> "Indonesian Attorney General Criticizes Bishop Belo," *TEMPO*, September 13, 2002; "Rights court adjourns hearing, waits for Belo testimony," *Jakarta Post*, December 4, 2002.
- <sup>36</sup> "E. Timor Trial Verdicts Expected; Will Justice Be Done?," AP, August 11, 2002.
- <sup>37</sup> Human Rights Watch interview with ELSAM trial monitor, Jakarta, November 14, 2002.
- <sup>38</sup> Human Rights Watch interview with ELSAM trial monitor, Jakarta, November 12, 2002.
- <sup>39</sup> Human Rights Watch, "Indonesia. The War in Aceh," *A Human Rights Watch Report*, Vol.13, No. 4 (C), August 2001.
- <sup>40</sup> UNTAET Regulation 2000/11 on the Organization of Courts in East Timor, March 6, 2000; UNTAET Reg. 2000/15, June 6, 2000.
- <sup>41</sup> UNTAET Reg. 2000/15, June 6, 2000.
- <sup>42</sup> Judicial System Monitoring Programme, "Without a Court of Appeal, East Timor Cannot Guarantee Fundamental Human Rights," October 15, 2002.
- <sup>43</sup> Sarah Pritchard, "United Nations Involvement in Post-Conflict Reconstruction Efforts: New and Continuing Challenges in the Case of East Timor," *University of New South Wales Law Journal*, 24 (1), 183, 189, 2001.
- <sup>44</sup> Human Rights Watch telephone interview with Dili Trial Monitor, October 21, 2002.
- <sup>45</sup> Human Rights Watch telephone interview with SCIU Prosecutor, November 6, 2002.
- <sup>46</sup> Memorandum of Understanding between the Republic of Indonesia and the United Nations Transitional Administration in East Timor Regarding Cooperation in Legal, Judicial and Human Rights Related Matters, April 5, 2000.

