



JUDICIAL SYSTEM MONITORING PROGRAMME
PROGRAMA MONITORIZASAUN BA SISTEMA JUDICIAL

**JUSTICE FOR TIMOR LESTE:
CIVIL SOCIETY STRATEGIC PLANNING
INTERNATIONAL CONFERENCE: 23 – 24 SEPTEMBER 2004**

CONFERENCE PROCEEDINGS

Dili, Timor Leste
October 2004

The Judicial System Monitoring Programme (JSMP) was set up in early 2001 in Dili, East Timor. Through court monitoring, the provision of legal analysis and thematic reports on the development of the judicial system, JSMP aims to contribute to the ongoing evaluation and building of the justice system in East Timor. For further information see www.jsmp.minihub.org

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*Judicial System Monitoring Programme
Rua Setubal, Kolmera, Dili – East Timor
Postal address: PO Box 275, Dili, East Timor
Tel/Fax: (670) 390 3323 883
Mobile: +670 7233711
Email: info@jsmp.minihub.org*

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1. EXECUTIVE SUMMARY

On 23 and 24 September 2004 JSMP organized a Conference entitled “Justice for Timor-Leste: Civil Society Strategic Planning” to discuss the future of the serious crimes process. There were over 200 participants and these included victims and their families from the districts, members of government, members of Parliament, jurists from the Special Panels for Serious Crimes and district courts, members of the diplomatic community and UN agencies.

The Conference was addressed by SRSJ Hasegawa, Vice-Minister for Foreign Affairs and Cooperation Olimpio Branco, the US Ambassador Grover Rees, the Chair of the CAVR Aniceto Guterres, the President’s Chief of Staff Agio Pereira, judges from the Special Panels for Serious Crimes (“SPSC”), a senior prosecutor from the Serious Crimes Unit (“SCU”), NGOs and academics.

The aim of the Conference was to:

- facilitate involvement of civil society and community leaders from all districts of Timor-Leste in a debate over future initiatives to ensure justice for crimes against humanity committed under and immediately following the Indonesian occupation;
- utilise international experts, and senior government and UN leaders to explain the pros and cons of future options;
- provide an opportunity for civil society, government and major stakeholders to engage in debate over the justice requirements of the people of Timor-Leste, including proposals such as an International Truth Commission and International Tribunal;
- generate a Conference Resolution and Action Plan to ensure that civil society’s needs are acted upon.

The Special Panels for Serious Crimes were established by the UN in 2000 to bring to justice the perpetrators of serious crimes committed prior to and during 1999. Since trials began in 2001, 58 accused persons have been brought to trial with 55 persons convicted mostly of crimes against humanity and with 3 acquitted. Currently, 29 defendants present in Timor-Leste face trial at the Special Panels. Another 279 indictees are believed to be outside Timor Leste including a number of high ranking Indonesian military commanders and officers who are accused of crimes against humanity. However, according to Security Council Resolution 1543, the Serious Crimes Unit should complete all investigations by November 2004 and should conclude trials by 20 May 2005, when the current UNMISSET mandate is completed.

According to the presentation of Essa Faal, senior prosecutor at the SCU, this means that by May 2005, almost half the murder cases committed in Timor Leste in 1999 will not have been investigated. It would then not be possible to say that the quest for justice and the objective to end impunity in Timor Leste has been met. As Mr Faal suggested we must consider what Timor Leste and the international community can do about such an unsatisfactory outcome - should the search for justice continue or should we be satisfied that enough has been done? The Conference aimed to promote discussion of these issues amongst civil society.

SRSJ Hasegawa assured participants that the Serious Crimes process continues to be of significance to the UN Secretary General and the Security Council. The Secretary General’s report to the Security Council in August 2004 states that formal legal processes represent a crucial aspect of efforts to move beyond the violence that occurred in 1999 – that is, “those responsible for committing serious crimes in Timor Leste during 1999 should be held to account and justice should be seen to be done”. Mr Hasegawa also said that we should not be deterred from pursuing justice for those generals who committed serious crimes for fear of jeopardizing the relationship with that country. Consequently and as Judge Rapoza pointed out, despite the end of UNMISSET, the serious crimes issue will remain. The large number of outstanding indictments, the likelihood of defendants re-entering the country at any moment, and the possibility of new arrests and prosecutions taking place, all indicate the need for a continuing strategy to deal with serious crimes.

Various **options for the future of the Serious Crimes process** were discussed by Mr Hasegawa, Judge Rapoza, Judge Maria, and Mr Faal, including:

- Termination of the Serious Crimes Process
- Continuation of the Serious Crimes Process through:

- an international mechanism – which would require approval of the international community, probably the Security Council. Could continue with current Serious Crimes process or set up an International Tribunal as in Rwanda, Yugoslavia, or Sierra Leone, or continue the process under the jurisdiction of a third country.
- or a national mechanism – which would require amendment of the Special Panels regulations (irrespective of whether the SPSC continued to be composed of national and international judges or changed to become solely national), or could transfer serious crimes cases to the ordinary panels of the Dili District Court.

Presenters explained that any change in how serious crimes matters are handled will require a change in the legal framework and the relevant regulations, laws and constitutional provisions.

Suzannah Linton, a legal adviser at CAVR, described to participants the mechanisms of an **international tribunal**, how it might function and the advantages and disadvantages of this proposal. Ben Clarke, from the Asia Pacific Centre for Military Law at the University of Melbourne, discussed the legal obstacles to the establishment of a tribunal, where it might be located, and what it could achieve. The Timor Leste National Alliance for an International Tribunal discussed their campaign and action plan for the establishment of a tribunal. Both the Chief of Staff to the Office of the President, Agio Pereira, and the Vice-Minister for Foreign Affairs and Cooperation, Olimpio Branco, said Timor Leste would be ready to cooperate with an **International Commission of Experts** if and when such a Commission is established by the UN in relation to the serious crimes process in East Timor. They encouraged civil society to present their opinions to the Commission of Experts.

The US Ambassador to Timor Leste, Grover Joseph Rees, and Agio Pereira and Olimpio Branco all discussed the establishment of a possible **international truth commission**. There is as yet no consensus on the precise scope and function of the proposed commission.

Aniceto Guterres, Chief Commissioner of CAVR, discussed the possible **expansion of the mandate of the CAVR**, that is, whether the community reconciliation process could both continue **and** be expanded to include more serious crimes.

Aderito Soares discussed **other options**, including a public indictment and reparations, but stressed that these options should be seen as complementary to formal options and that Timor Leste should continue to demand an international tribunal.

Workshop discussions were held and, as reflected in the Conference Declaration, **participants agreed that the most important mechanism of justice for dealing with past international crimes in Timor Leste is an International Tribunal**. Participants also supported the arrival of a Commission of Experts and thought that the establishment of a Commission of Experts, and consideration of the adequacy of the Serious Crimes processes both in East Timor and in Indonesia by the Commission, would be a pre-requisite to the formation of an international tribunal. Participants also thought the process of the Special Panels for Serious Crimes should continue, preferably with international actors and through a UN process. However, this process should not prejudice an International Tribunal and all possible efforts should be made to try those currently indicted and residing outside of Timor Leste in order to ensure that the perpetrators of serious crimes in Timor Leste do not enjoy impunity.

This document represents a compilation of documents submitted at the Conference together with transcripts of Conference proceedings. Except for the Conference program, workshop issues for discussion, background paper on reparations and press release, which were authored by JSMP, all of these materials were either produced by other persons or organizations, or are transcripts of actual proceedings at the Conference. This collection of materials is therefore simply intended to serve as a record of Conference proceedings in the hope of promoting national dialogue on the future of the serious crimes process in Timor Leste. It is not an independent JSMP analysis of the issues which were the subject of those proceedings.

2. CONFERENCE DECLARATION

Justice for Timor Leste: Civil Society Strategic Planning for the Future of Serious Crimes

**Conference: 23 – 24 September
Organized by the Judicial System Monitoring Programme**

CONFERENCE DECLARATION

Participants agreed that the most important mechanism of justice for past international crimes in Timor Leste is an International Tribunal. This was agreed to by all of the working groups discussing the various issues at the conference. It was agreed that any options discussed below (that are supported in certain circumstances) are only supported in the knowledge that an International Tribunal will be strived for and that these other options are complementary to the establishment of an International Tribunal.

The cost of an International Tribunal is acknowledged by the participants in the Conference, but seen as secondary to the overwhelming need for formal justice in a credible international institution. It is hoped that this process is not an issue of contention for governments of Timor Leste and Indonesia but is a process undertaken by the international community and therefore allows these governments to continue building their strong relationship and also allows both countries to follow and demonstrate the need for adherence to the rule of law and to stop impunity for serious crimes.

The need for, and imminent arrival of, a Commission of Experts is supported unanimously. It was agreed that the Commission of Experts is encouraged to come and assess the work of the Special Panels for Serious Crimes and Ad Hoc Panels in Jakarta but must have within its frame of reference the International Tribunal. The conference welcomed the support from the President's office and the Office of the Ministry of Foreign Affairs and Cooperation for this Commission to assess the situation of Serious Crimes in Timor Leste and encouraged the provision of information to the Commission of Experts.

As a complementary process to the International Tribunal, the process of the Special Panels for Serious Crimes should continue and possible consideration should be given to the option of the Special Panels for Serious Crimes continuing with the presence of international actors, and preferably through a UN process. Consideration must be given urgently to cases in which investigations have not been completed or trials that will not be completed by May 2005, to ensure the continued stability of the justice process in Timor Leste. Again, this process would not prejudice an International Tribunal and all possible efforts, international and bi-lateral agreements, should be made to try those currently indicted and residing outside of East Timor.

More information about the International Truth Commission is required before a possible assessment of this option can be made. Some participants did not agree with this option because they did not think it was necessary. The establishment of such an International Truth Commission as a quasi or non-judicial body was also considered as possibly unconstitutional.

The possibility of continuing the CAVR process was widely supported but expanding the CAVR mandate to include more serious crimes was not supported.

Civil Society, and particularly the families of victims, welcome the opportunity to discuss the above options with the Commission of Experts and the government of Timor Leste. It was proposed at the conference that a National Dialogue be held to discuss the issue of Serious Crimes in Timor Leste.

It was decided that the papers from this conference, and the individual comments as recorded would be made available to the Commission of Experts when formed, and this statement sent to the governments of Timor Leste, Indonesia, the UN, CAVR, and speakers at the conference.

3. CONFERENCE PROGRAM

Thursday 23 September

8:30 – 9:30am	<p>Formal opening, explanation of conference format, aims and purpose</p> <p>Mr Tiago Sarmiento – (Director, JSMP) Explanation of conference aims and format Mr Sukehiro Hasegawa – (UN Special Representative of the Secretary General) General Overview of the Serious Crimes Process</p>
9:45 – 10am	<p>Presentation on Commission of Experts</p> <p>Mr Ben Clarke (Lecturer in law at Notre Dame University, PhD candidate at the Asia Pacific Centre for Military Law,University of Melbourne)</p>
10 – 11am	<p>Presentation on future of Special Panel for Serious Crimes</p> <ul style="list-style-type: none"> • Cases completed, investigations unfinalised, current caseload • Future after May 2005 • Possibility of a solely Timorese process <p>Judge Philip Rapoza (Judge Coordinator, Special Panel for Serious Crimes) Judge Maria Perreira (Judge,Special Panel for Serious Crimes) Mr Essa Faal (Senior Prosecutor, Serious Crimes Unit)</p>
11 – 11:15am	<i>BREAK</i>
11:15 – 11:45am	Workshop discussion on Special Panel for Serious Crimes
11:45 – 12:30pm	<p>Presentation on International Tribunal</p> <ul style="list-style-type: none"> • Explanation of how an International Tribunal could be established and how it would function • Discussion of what an International Tribunal could realistically achieve? <p>Ms Susannah Linton (Legal Adviser, CAVR) Mr Amando Hei (representative of the National Alliance for an International Tribunal) Mr Ben Clarke</p>
12:30 – 1:30pm	<i>LUNCH</i>
1:30 – 2pm	Workshop discussion on International Tribunal
2 – 2.30pm	<p>Views from the President’s Office</p> <p>Mr Agio Pereira (Chief of Staff of the Office of the President of the Republic of East Timor)</p>
2.30 – 3.30pm	<p>Presentation on International Truth Commission</p> <ul style="list-style-type: none"> • Explanation of the proposal <p>Mr Olimpio Branco (Vice Minister for Foreign Affairs and Cooperation) Ambassador Grover Rees (United States Ambassador to East Timor)</p>
3.30 – 4pm	Workshop discussion on International Truth Commission
4 – 4.15pm	<i>BREAK</i>
4.15 – 5pm	<p>Presentation on extending CAVR Community Reconciliation Process (CRP)</p> <ul style="list-style-type: none"> • Possibility of extending and widening CRP mandate to include more serious

	<p>crimes</p> <ul style="list-style-type: none"> • Pros and cons of such a proposal <p>Mr Aniceto Guterres (Chairperson of CAVR Commissioners)</p>
5 – 5.30pm	Workshop discussion on CAVR proposal

Friday 24 September

8:30 – 9am	Recap previous day and explain objectives for the day
9 – 10:15am	<p>Presentation on Other Options:</p> <ul style="list-style-type: none"> • Reparations • Civil Society Initiatives, eg public indictments <p>Mr Aderito Soares (member of National Alliance for an International Tribunal)</p>
10:15 – 10:45am	Workshop discussion on Other Options
10:45 – 11am	<i>BREAK</i>
11 – 12:15pm	<p>Reporting back on Workshop Discussions</p> <ul style="list-style-type: none"> • 15 minute presentations by Steering Committee on each workshop session
12:15 – 12:30pm	Steering Committee suggested priority of future options
	<i>LUNCH</i>
1:30- 2:00	Presentation by the National Alliance on Action Plan for International Tribunal
2:00 – 2:30pm	<p>Open debate on suggested priority of options</p> <ul style="list-style-type: none"> • Consensus building on which options are favoured • Objective to reach agreement on the way forward
2:30 – 3:30pm	<p>Debate on Action Plan</p> <ul style="list-style-type: none"> • What do participants want to achieve? How will this be done? • Effective techniques for lobbying Government, UN and international community • Division of responsibilities among all participants
3:30 – 3:45pm	<i>BREAK</i>
3:45 – 4:30pm	<p>Debate on Conference Resolution and finalisation of Action Plan</p> <ul style="list-style-type: none"> • Drafts of both documents circulated for comments
4:30 – 5pm	Close and participants to sign both Conference Resolution and Action Plan

4. WORKSHOP ISSUES FOR DISCUSSION

- **Workshop discussion on Special Panels for Serious Crimes**

- Should the Special Panel for Serious Crimes (or similar separate body) continue after May 2005?
- What further cases should be considered by this Tribunal? Only cases in which indictments have been filed? Investigations completed?
- If so, should that body only be considered with UN participation?
- If UN participation is not possible, should a Timorese Tribunal (possibly with international experts-funded bi-laterally) be considered?
- Should there continue to be pressure on the RDTL and Indonesian governments to co-operate and work together to extradite indictees from Indonesia?

- **International Tribunal**

- Should the aim of an International Tribunal be pursued (considering possible detriment to relations with Indonesia and political difficulties in achieving it)?
- If so, who should the International Tribunal seek to prosecute (e.g. limited to numbers of indictments sought, focusing only on the principal high-level perpetrators)
- Where should this Tribunal be located? (A third country/ East Timor?)

- **International Truth Commission**

- Would the participants support this process?
- Under whose authority would the Commission operate- who would be the commissioners?
- What powers would the commission have?
- What results/ benefits would the commission bring and how would this differ from what is already within the scope of CAVR?

- **CAVR (Extension of mandate of CAVR or follow-on institution to do community reconciliation)**

- Is there a perceived need for the continuation of a community reconciliation process?
- If there is no institution to replace the SPSC, should the community reconciliation process be continued?
- If so, could the community reconciliation process include more serious crimes?
- If so which crimes should be included and which crimes should be excluded?
- Should this process be linked with formal justice system to provide amnesty from prosecution?

- **Other Issues**

- Reparations**

- Is there a perceived need for reparations in communities?
- Should this process only be considered together with a continuation of a formal justice process for Serious Crimes?
- For which crimes should people be provided reparations?
- Who would administer the funds- UN, RDTL government other organisations?

- Public indictment / Alien Tort claims**

- Is there a need for more symbolic quasi legal processes in the community?
- If so, who should be part of the process, where should it take place?

5. OPENING ADDRESSES

5.1 Opening address by Tiago Sarmiento – Deputy Director of JSMP

I would like to welcome all of the participants who have come from the 13 districts of East Timor, and all the other guests who are attending today.

Today, JSMP has invited all of you to this Conference to think about how to look for justice for East Timor.

Objectives of this Conference

- Determine if the need for justice in East Timor for crimes against humanity has been met. This involves an evaluation of the justice processes to date and the formulation of a strategic plan for justice for East Timor with broad based support.
- Evaluation of the Special Panel for Serious Crimes, Ad hoc Human Rights Court in Jakarta, CAVR and their inter-relationships and the combined results for East Timorese society.
- Overall evaluation of all processes by civil society to determine whether what has been achieved is sufficient, and what is required for the future.
- Discuss the needs of victims and how these can be met through future processes.
- Discuss and formulate an action plan for the future of the serious crimes process.
- Evaluation of future options, including consideration of international tribunal, commission of experts, truth commission, national justice system, trials in third countries, etc
- Provide an opportunity for civil society, government and major stakeholders to engage in debate over future options, including proposals such as the International Truth Commission.

As you know, over the last four years some of the serious crimes cases which were committed prior to the vote in 1999 have been tried in the Special Panels in Dili. The Special Panels received support from the UN. There is also the CAVR which is now about to finish its work and write the final report. In addition, some of the serious crimes cases have already been tried in the Ad Hoc Tribunals in Jakarta. But many people think that the process of the Ad Hoc Tribunal in Jakarta is unsatisfactory and has not yet delivered justice to the victims in East Timor.

We have also heard that the UN already has a plan to send a Commission of Experts to investigate the work of the two tribunals on Serious Crimes: the Ad Hoc Tribunal in Jakarta and the Special Panels. This UN proposal is in accordance with the primary responsibility which the international community bears to ensure ongoing justice for all of the people of East Timor who have been waiting until now.

JSMP has prepared the following agenda for the conference [please see previous documents].

Through this Conference, JSMP hopes that all the participants will give their ideas about how to look for a way to find justice for the people of East Timor. The people of East Timor continue to wait for justice night and day.

I would now like to introduce the SRSG, Mr Hasewaga, who will speak first at this Conference.

Thank you

5.2 Special Representative of the Secretary-General for Timor-Leste, Sukehiro Hasegawa, The Future of the Serious Crimes Process in Timor-Leste

His Excellency, Vice Minister Olimpio Branco
Members of the Diplomatic Corps
State representatives and Parliamentarians
Participants from the districts of Timor Leste
Ladies and Gentlemen

I would like to commend the Judicial System Monitoring Program (JSMP) for demonstrating the initiative to organise this two-day conference on the Future of the Serious Crimes Process in Timor Leste.

I would like to begin by referring to the recent speech of President Gusmao on the occasion of the Opening of Parliament on 21 September. In his address, the President of the Republic characterised the question of Justice in the form of an International Tribunal as dividing Timorese society due to the clash of many opinions on this most important and sensitive subject-matter. What I would like to convey to you is President Gusmao's recognition of the "extreme need" for Timorese leaders and politicians, representatives of the church and civil society and the people of Timor Leste to debate this issue "with maturity".

It is encouraging to see district communities here together with national leaders and parliamentarians as well as human rights activists and members of the international community prepared to discuss these issues over the next two days.

This morning, I will make a general introduction to the current status of the Serious Crimes Process in Timor-Leste from the perspective of the United Nations and the international community. On the future of the Serious Crimes process in Timor Leste, I can only inform you of the short-term future as provided by the Security Council in the UNMISSET mandate until May 2005. I am not in a position to provide recommendations for the future of the process as this decision rests with the Secretary-General of the United Nations and the Security Council. I can only inform you of some of the options and possible mechanisms being discussed for the way forward beyond May 2005.

I would like to inform you that the Serious Crimes issue continues to be of much significance not only to the UNMISSET mission and among the diplomatic community of Dili and Jakarta but also to the Secretary General and the United Nations Security Council as representative of the international community at the highest political level.

As the Special Representative of the Secretary-General of the United Nations for Timor-Leste, I would like to convey to you that the Secretary-General continues to follow closely the issue of the Serious Crimes process in Timor Leste and the Ad Hoc Human Rights Tribunal in Jakarta. In the most recent report of the Secretary-General to the Security Council on the Progress of UNMISSET as submitted in August 2004 the Secretary General recognises that formal legal processes represent a crucial aspect of efforts to move beyond the violence that occurred in 1999. In the report, the Secretary- General states that "those responsible for committing serious crimes in Timor Leste during 1999 should be held to account and that justice [should be] seen to be done in these cases."¹

The Security Council adopted Resolution 1534 on 14 May 2004 which extended the mandate of UNMISSET in Timor Leste by one year until May 2005 but also reaffirmed the need to fight against impunity in relation to cases of serious crimes from 1999. In Resolution 1543, the Security Council again reaffirms the importance of the international community to lend its support in the fight against impunity.

The question of justice and reconciliation for Timor Leste remains a great concern for, and is most pertinent to, the international community. At the latest meeting of the Security Council on Timor-Leste, held on 24 August, the issue of serious crimes committed in 1999 in then East Timor was prominent in the discussion. Some delegations made strong statements, expressing their disappointment at the overturning by the Indonesian Appeals Court of the

¹ S/2004/669 III. A. Paragraph 2. Section 20

verdicts by the Ad Hoc Human Rights Tribunal on East Timor, acquitting the four military and police personnel. Indeed, some of those member states indicated that the flawed process resulted in a failure to ensure justice, which was unacceptable to the international community. The Ad Hoc Human Rights Tribunal in Jakarta completed its trials in August last year, and only two of its verdicts have thus far been upheld in the appeals process. As a result, only two civilians who are Timorese, namely, former Governor Abilio Soares and former militia leader Eurico Guterres, have been convicted, while other military and police personnel have been acquitted.

The Serious Crimes Process

In a brief assessment of the current status of the Serious Crimes Process, it will be recalled that following the terror and the violence in East Timor before and after the popular consultation on 30 August 1999, the UN Security Council emphasised the importance of establishing a process to bring the perpetrators of serious crimes in 1999 to justice. The Special Panels for Serious Crimes were established in 2000. Since trials began in 2001, 58 accused persons have been brought to trial with 55 persons convicted mostly of crimes against humanity and with 3 acquitted. Currently, 29 defendants present in Timor-Leste face trial at the Special Panels. Another 279 accused persons who are indicted are believed to be outside of Timor-Leste including a number of high-ranking Indonesian military commanders and officers who are accused of crimes against humanity.

It is not possible to claim that there has been full justice delivered for crimes committed in 1999. After all, only a limited number of perpetrators have been convicted in Timor-Leste. Many observers consider those convicted as the "small fish". However, it is important to recognise that at the district level in the victim communities these convictions are significant and represent formal justice being carried out. Let us not forget there have been many important crimes against humanity convictions of several East Timorese members of the Indonesian military and many East Timorese district and subdistrict militia commanders as well as one Indonesian militia company commander. The representatives from the district communities will know that there have been important convictions as they will know there are many suspects at large outside Timor Leste.

In this respect, I would like to take this opportunity to reaffirm my belief that the establishment of Special Panels for Serious Crimes in Timor-Leste by UNTAET has represented an important ongoing process in Timor- Leste in assisting the healing of some victims and victims' families and the reconciliation between communities.

The Serious Crimes Process until May 2005

At present, the investigation of serious crimes in Timor-Leste from 1999 and the process of bringing perpetrators of serious crimes to justice continues in Timor- Leste through the Serious Crimes Process. The Serious Crimes Investigation and Prosecution Unit is under the legal authority of the Prosecutor-General of the Republic and the Special Panels for Serious Crimes continue to conduct trials within Dili District Court - that is the national courts of Timor-Leste. The Serious Crimes Process is almost entirely funded through the contribution of UNMISSET to Timor-Leste.

The Serious Crimes Unit estimates that more than 1400 people were killed between January and October 1999. At present, the murders of more than 100 victims are currently under investigation by the Serious Crimes Unit. The investigations of many more murders, rapes and incidents of torture have already been investigated and mostly charged as crimes against humanity by prosecutors.

However, the investigations and trials at the Special Panels in Timor-Leste in the current form have restricted time and resources. As I mentioned before, Security Council Resolution 1543 extended the mandate of UNMISSET by one year until May 2005 and thereby provided further support for the realisation of justice in the area of serious crimes. The Security Council also emphasized in the Resolution that the Serious Crimes Unit should complete all investigations by November 2004 and should conclude trials of around 30 or more defendants by 20 May 2005 when the current UNMISSET mandate is completed.

These limitations and challenges are also clearly recognised in the report of the Secretary General to the Security Council from August 2004: "The serious crimes process may not be able to fully respond to the desire for justice of

those affected by the violence in 1999 within the limited time and resources which remain available to the serious crimes process."

The planned end of UN funding of the Serious Crimes Process in May 2005, raises many questions such as what will happen to the large number of indicted persons who remain outside Timor-Leste and the issue of the crimes from 1999 pending investigation and the potential subsequent trials. With many of the accused former military soldiers and militia members believed to be in Indonesian West Timor, the question of how to deal with such cases has the potential to persist for many years requiring dialogue and consultation to reach a mutually beneficial position without allowing impunity for crimes.

The Way Forward

As most of you who are present at this conference know, the current Serious Crimes process is expected to continue until the UNMISSET mission ends ultimately in May 2005. Today I would like to clarify the approach being taken by the United Nations with regard to various options available for the period beyond May 2005. First, I would like to stress that until now, neither the Secretary General nor the Security Council has taken any formal decision on the future of the process. For the Security Council to make any conclusive decision, it will require a great deal of time with substantive discussions and consultations.

Secondly, although the JSMP invitation to this event identifies the International Commission of Experts as one of the five main options, I need to clarify that it is not one of the options for the continuation of the serious crimes process per se. The Commission of Experts is an institutional arrangement to enable a group of independent experts to assess the progress made in the two judicial processes going on in Indonesia and Timor-Leste in bringing to justice those responsible for serious violations of international humanitarian law and human rights in Timor-Leste in 1999. The proposal is under active consideration but I must stress that the Secretary-General has not taken any formal decision regarding the establishment of the Commission of Experts pending receipt and review of a comprehensive report from the United Nations High Commissioner for Human Rights.

The United Nations High Commissioner for Human Rights is currently preparing the comprehensive technical report and is expected to submit it to the Secretary-General within next few weeks. The report will assist the Secretary-General to decide whether or not to establish the Commission of Experts.

Should the Secretary-General decide to establish the Commission, it would most likely review the serious crimes processes in Dili and Jakarta from their experts' perspective first, and then assess whether these processes have been able to bring the perpetrators to justice, as I mentioned before. The Commission could then recommend to the Secretary-General, as appropriate, further measures and mechanisms to ensure accountability.

I would now like to briefly introduce some of several possible options for the way forward without any preference for any specific option. This conference, I understand, will later discuss the main options for the continuation of the Serious Crimes Process and will hear presentations by international experts on some of these options.

1. Closure of the Serious Crimes Process

It may be decided by the East Timorese and the international community to end the Serious Crimes process in May 2005.

2. Continuation of the Serious Crimes Process

If the decision is taken to continue the formal investigations and judicial process in Timor-Leste such as the Serious Crimes Process, then this could be achieved through an international mechanism or a national mechanism for bringing to justice the perpetrators of serious crimes in 1999.

International Mechanisms

In order for trials to continue through an international mechanism there would be the requirement of approval of the international community, mostly likely the United Nations Security Council. Such an international mechanism to continue the process could take on different forms:

- The continuation of the Serious Crimes process in Timor-Leste under the auspices of the United Nations.
- An International Tribunal for Timor-Leste in the model of the International Tribunals for Rwanda and the former Yugoslavia.
- The International Criminal Court, which was established in 2002 under the Rome Statutes, cannot prosecute cases from before that date of establishment.
- The continuation of the process under the jurisdiction of a third country as the majority of the crimes charged by the Prosecutors of the Serious Crimes Unit are for crimes against humanity, that is to say international crimes of universal jurisdiction.

National Mechanism -

In order for trials to continue through a national mechanism there is a need for amendment to the regulations of the Special Panels where now the panels are required to be composed of one national East Timorese judge and two international judges. It may be possible to establish an arrangement whereby international judges may sit with East Timorese judges on such panels at the National Courts providing they are sworn in as judges in the national judicial system. However, this may not be considered as a national mechanism in a sense that foreign judges will actually be playing a major part in the decision making process.

3. Alternatives to Judicial Process: National and International Truth Commissions

During this two-day conference, I understand there will also be discussion of non-judicial mechanisms such as International and National Truth Commissions as a way forward for Timor Leste. The Chief of Staff of the President and the Vice Minister for Foreign Affairs will present their positions on the future of the Serious Crimes Process to this conference in terms of describing how the establishment of truth processes could function and also ensure a degree of accountability for the crimes committed.

- **International Process**

There is discussion among some international community members in favour of establishing such an International Truth Commission or International Truth and Reconciliation Commission, or a International Truth and Accountability Commission to deal with the unresolved cases of crimes against humanity and serious crimes through non-judicial mechanisms. The United States has recently indicated its support for a proposal for an independent international truth commission at a meeting of the Security Council on 24 August 2004.

- **National Process**

There is some preliminary discussion emerging among researchers regarding the potential for the expansion of the current cases of serious crimes to be transferred to the community reconciliation process as developed by CAVR.

Concluding Remarks

It can be seen that the options for the way forward for the processes are extensive with many complexities and will result in many challenges and difficulties in the search for justice, truth and reconciliation. It is equally important to carefully consider and address how the complementary approach of justice and reconciliation as adopted in the context of Timor-Leste will also support future nation-building. There remain practical challenges in the implementation of the complementary processes of justice and reconciliation. The pragmatism of *realpolitik* and systemic limitations have created situations that have challenged the conventional wisdom and continue to challenge the approach developed in Timor- Leste.

Durable solutions to these complex issues to ensure sustainable peace for Timor-Leste will require careful dialogue and serious consultation in order to find mutually beneficial solutions, without allowing impunity and ignoring human rights violations as recognised in the United Nations Charter. Yet, I am confident that the leaders and the people of Timor-Leste will travel wisely the road to justice and reconciliation that may remain a long and difficult one for this country.

As I said in my introduction, I thank the organisers of the event for having brought district community members, leaders, parliamentarians, politicians and representatives of civil society together.

I wish you every success in your mature debate of these important issues.

Thank you.

5.3 SRSG's opening address (notes)

Mr Hasegawa referred to the recent speech by President Xanana Gusmao at the opening session of parliament on 21 September. In this speech he raised the question of justice in the form of an international tribunal as something dividing Timorese society due to the clash of many opinions on this subject. I want to convey to you today President Xanana's acknowledgement of the need for East Timorese to debate this sensitive issue with sensitivity.

I want to give a general introduction to the current status of serious crimes process in Timor Leste from the perspective of international community. The Serious Crimes process continues to be a serious issue for Secretary General and Security Council of the UN.

As the Special Representative of the Security General I wish to convey to you that the Security General Kofi Anan continues to follow the Serious Crimes process in Timor Leste.

I would like to share with you some of my own thoughts in terms of how we can move forward. I wish to first stress the fact that neither the Secretary-General nor the Security Council has taken any formal decision yet on the future of the serious crimes process in this country. For the Security Council to make any conclusive decision it will require a great deal more time and substantive discussions about this important issue.

1. Closure of Serious Crimes Process – may be decided to end serious crimes process in May 2005.

This would mean that between 55 and 100 possible convicted persons would remain serving sentences as already handed down by the Special Panels since May 2001 and 280 persons who remain outside Timor Leste would not be indicted. I understand that the majority of these 280 persons are former East Timorese milita members as well as another 40 indicted Indonesian members of the Security forces, and 60 East Timorese members of the Security forces.

2. Possibilities of either having a national or international mechanism.

1. Continuation of serious crimes process in Timor Leste solely under the ownership of the UN – this would of course require transformation of the current system. I believe Judge Rapoza will give you an idea of how difficult it is to do so. This would require the consent of the East Timorese leadership and also the consent of the international community and the Security Council. A similar arrangement has been made in Sierra Leone where the UN has concluded an agreement with the Sierra Leone authorities. I do not want to raise expectations too fast as this approach may not bring solutions to the problem – that is, to bring the indicted person to Timor Leste.
2. Ad Hoc International Tribunal – in the model of the Yugoslavian and Rwandan Tribunals.

The idea for this particular approach has not received much support from key members of the UN due to the enormous cost that they have to bear due to enormous cost and limited success. We have had numerous people come here from New York and they have defended the efficient and impressive work carried out by the Serious Crimes Unit and Special Panels for Serious Crimes and they make that assessment against the cost that member states have to bear.

3. Taking it to the International Criminal Court that was established in 2002. But the International Criminal Court does not have mandate to prosecute crimes committed in East Timor in 1999. Some people have suggested these restrictions can be lifted by the Security Council. I am sure you can gain some understanding of the enormous difficulty in this approach

3. Non-judicial options

In discussing non-judicial options we are broadening our concern from the pursuit of justice, to the future state of the relationship of the perpetrators of crimes and the victims. They may be indeed between the two individuals and their families or the two communities or two nations.

And here I think we have three options:

- International Commission of Truth
- International Truth and Reconciliation Commission
- International Commission of Truth and Accountability

I think you can discuss what each of the three means to you.

So in concluding today I would like to emphasise that options for moving forward are very expensive and they will result in many challenges and difficulties in the search for truth and reconciliation.

It is equally important to examine how the process of justice and reconciliation will contribute to the building of relationships between victims and those who perpetrated the violence and the countries which harbour them.

I do not believe that we should not pursue justice for those generals who committed serious crimes for fear of jeopardising the relationship with that country.

After World War II, some 60 years ago, my own country, after its own role of expansion was brought down to its knees, the allied forces came and held the Tokyo trials. They found key generals guilty and they were executed. And similar process was carried out in Germany. But yet you know that the relationship between my country and those allied powers are quite sound and therefore the relationship remains.

So these issues of reconciliation and justice require careful dialogue and deep thinking, as President Xanana Gusmao said, that only maturity in our thinking can bring about. I am confident that leaders and the people of this country will examine the issue carefully and will travel wisely the road to justice, reconciliation and peace. However, that road remains a long and a difficult one. Timor Leste has emerged as one of the most inspiring and progressive post war countries. Please go to New York. They are full of praise for what has been accomplished. So I hope this conference will deepen yours, and our thoughts, into this issue of justice, reconciliation and peace and one which as the Special Representative for the Secretary General I pledge I will convey to the highest authority in New York.

6.2 Ben Clark's comments on Commission of Experts

In addition to gathering evidence it is also an opportunity for the people of East Timor to tell the Commission what they want, particularly if the Serious Crimes Panels are going to end this year.

A Commission of Experts can be set up under the SC or under a treaty system, but not in this case because the relevant parties have not signed a treaty, so the establishment of an ICE would require the support of an SC resolution.

Because members of the Commission are of high standing, its recommendations will be given great weight by the SC. So the Commission will pave the way for a potential International Tribunal for East Timor.

It will then be necessary to determine if trials to date are acceptable under standards of international law.

This is an important question because as you know it is a fundamental foundation of justice that you cannot be tried twice for the same crime, but that is not the case if the original prosecution of the crime in question was a sham.

The examination of the trial process in Jakarta will be crucial in terms of determining whether the people who have faced trials in Jakarta, and even if convicted, if those sentences were manifestly inadequate, that person could face justice again, but the second court would have to take into account the time they've already spent in jail.

This is an opportunity for NGOs and others who have done a lot of ground work to forward their information on to the Commission of Experts which they can include in their report.

The investigation of serious crimes in East Timor is a lot more advanced than it was in Yugoslavia when the Commission of Experts recommended there be an international tribunal there.

It is important this Commission of Experts have the opportunity to travel widely in East Timor.

The only way in which high level perpetrators living in other states could ever be compelled to face trial outside their country would be if there was an International Tribunal.

Because this Commission of Experts has not yet been established, its mandate has not yet been framed. It could potentially consider crimes committed not just in 1999 but also throughout the occupation.

Even if the SC agreed and provided a mandate for an international tribunal, there would still need to be cooperation from Indonesia, or it would be difficult to get these generals to face trial.

Personally I think the Commission of Experts is able to draw on the framework that exists with the Special Panels and also the CAVR because it would have a broad range of options, including being able to recommend a tribunal.

The final point I wish to make is whether you need to be asking the Commission to have a mixed international tribunal like in Sierra Leone, or a full international tribunal like in Yugoslavia.

7. PRESENTATIONS ON THE FUTURE OF THE SPECIAL PANEL FOR SERIOUS CRIMES

7.1 Prepared Comments by Judge Phillip Rapoza, Coordinator of the Special Panels

SERIOUS CRIMES PROCESS

I. Purpose

The primary purpose of the Serious Crimes Process is to ensure that:

1. Perpetrators responsible for serious crimes and gross violations of human rights during the period 1 January 1999 and 25 October 1999 are held accountable for their actions and brought to justice; and
2. There is an end to impunity for such perpetrators.

II. Elements

A. Serious Crimes Unit

1. Deputy Prosecutor General (under the Prosecutor General)
2. Countries currently represented: Bulgaria, Burundi, Gambia, Kenya, Malaysia, Poland, Portugal and USA (Prosecutors)

B. Defense Lawyers Unit

1. Head Attorney
2. Countries currently represented: Australia, Cape Verde, Columbia, Germany, India, Macedonia, Malaysia, South Africa and USA (Defense counsel)

C. Special Panels for Serious Crimes (within the Dili District Court)

1. Judge Coordinator
2. Countries represented: Timor-Leste, Cape Verde, Germany, Italy, Sri Lanka and USA (Judges)
3. As required by law, the court sits in three-judge panels: two international judges and one Timorese judge

III. Jurisdiction

The Special Panels for Serious Crimes have "exclusive jurisdiction" over the following offences:

1. Genocide
2. War crimes
3. Crimes against Humanity
4. Murder
5. Sexual Offences
6. Torture

With respect to the crimes of murder, sexual offences and torture, the Special Panels have exclusive jurisdiction only with respect to those crimes when "committed in the period between 1 January 1999 and 25 October 1999."

IV. Applicable Law

The applicable law for the Serious Crimes Process consists of the following:

1. UNTAET Regulations and directives;
Note: All UNT AET Regulations pertinent to the Serious Crimes Process continue in force as provided in Article 2, Section 3(c) of Law No. 10/2004 (10 December 2003) of the Democratic Republic of Timor-Leste.
2. The law of Indonesia as applied in East Timor prior to 25 October 1999, to the extent that it is consistent with UNT AET Regulations and internationally recognized human rights standards; and
3. Applicable treaties and recognized principles and norms of international law, including the established principles of international law of armed conflict.

V. Case Statistics

Since the inception of the Serious Crimes Process in 2000 to date:

1. Number of indictments filed by the Prosecutor: 82
2. Number of defendants charged: 373
3. Number of defendants outside East Timor: 279
4. Number of cases decided after trial: 58 defendants
5. Number of convictions: 55 defendants
6. Number of acquittals: 3 defendants

7. Number of pending cases: 11 indictments with 29 defendants
8. Number of appeals pending: 3

VI. Future Plans -During UNMISSET

A. A limited number of additional indictments may be brought to the extent necessary to ensure the integrity of the Serious Crimes Process and to see that justice is done.

Pursuant to Security Council Resolution 1543, "the Serious Crimes Unit should complete all investigations by November 2004."

B. The emphasis during the consolidation phase of the mission will be placed on the orderly and successful conclusion of the 11 pending cases and any additional indictments that are filed.

Pursuant to Security Council Resolution 1543, the Special Panels for Serious Crimes "should conclude trials and other activities as soon as possible and no later than 20 May 2005."

VII. Post-UNMISSET Issues

A. Pending Cases -Indictments pending against approximately 279 defendants, primarily located in West Timor.

B. Options within the national court system

1. Maintain the Special Panels without involvement of a UN mission, but with continued participation of international judges.

a. Constitution of Timor-Leste, Section 163(1): "The collective judicial instance existing in East Timor, composed of national and international judges with competencies to judge serious crimes committed between the 1st of January and the 25th of October 1999, shall remain operational for the time deemed strictly necessary to conclude the cases under investigation."

b. UNTAET Regulation 2000/15. on the establishment of panels with exclusive jurisdiction over serious crimes, Section 22.1: "[T]he panels in the District Court of Dili shall be composed of two international and one East Timorese judge."

c. UNTAET Regulation 2000/15. on the establishment of panels with exclusive jurisdiction over serious crimes, Section 22.2: "[T]he panels in the Court of Appeal in Dili shall be composed of two international judges and one East Timorese judge."

2. Maintain the Special Panels without involvement of a UN mission, but with participation of national judges only.

3. Abolish the Special Panels and transfer serious crimes cases to the ordinary panels of the Dili District Court.

VIII. Importance of the Success of the Serious Crimes Process

A. Ensure that justice is done in the cases brought before the Special Panels;

B. Promote reconciliation by providing a forum where the truth can be made known and where accountability can be imposed;

C. Promote confidence in the judicial system and the rule of law;

D. Develop capacity within the national judicial system; and

E. Reinforce the message that those who perpetrate serious crimes will not enjoy impunity.

7.2 Presentation by Judge Rapoza

(Note: In the absence of a formal text, the following is a summary of the remarks of Judge Rapoza during his presentation. Although accurate, it is not a verbatim transcript of his comments.)

The purpose of my remarks is to provide an overview of the Special Panels for Serious Crimes. I also intend to describe the steps required to continue the serious crimes process once the mandate of UNMISSET expires in May 2005.

I would like to make a cautionary remark before I begin. Judges cannot comment either on the cases that come before them or on judicial policy. Nor can they comment on cases they may be called upon to decide in the future. In such matters judges not only must remain impartial in fact, but also they must maintain the appearance of impartiality. They must avoid any public statement that would put that impartiality in question.

Nonetheless, judges may be a source of information about the courts and the manner in which they function. Thus, they have a role in educating the public and providing information about how the system of justice works. It is in that spirit that I am here today.

The Security Council has stated in Resolution 1543 that all serious crimes trials should be concluded no later than 20 May 2005. If the work of the Special Panels ends completely in May 2005, some difficult questions will be presented at that time:

- What will be the mechanism for prosecuting the perpetrators of serious crimes who are currently outside of Timor-Leste but who later re-enter the country and are apprehended?
- What will be the mechanism in the future for bringing and prosecuting new charges relating to serious crimes for which no indictment has yet been brought?
- More specifically, after UNMISSET withdraws its support from the Special Panels, what tribunal will conduct trials of defendants who are currently under indictment but who are apprehended only after the Special Panels close in May 2005? What tribunal will be used to try defendants who are apprehended after that time?
- Similarly what of those who have already been convicted, but are eligible for parole after they have completed two thirds of their sentence? Under current law, these functions should be performed by the judges of the Special Panels. Will Timorese decision makers have the foresight to change this particular law before May 2005? Or will these people remain in jail?

These are only some of the many questions that must be answered in light of the withdrawal of UNMISSET financial support after May 2005.

It is clear that the mere fact that the Special Panels will close does not mean that the problems that the Special Panels were designed to address will also go away in May 2005.

There is a significant number of indictments pending before the Special Panels for Serious Crimes in which the defendants are believed to be outside of Timor-Leste, primarily in West Timor. Indictments have been filed with the court by the Serious Crimes Unit (SCU) against 373 persons, with 279 of those accused still not arrested, presumably because they are outside the national jurisdiction. These figures may increase if additional indictments

are filed prior to November 2004. It is a distinct possibility that in the future some of the Timorese defendants now residing in West Timor may re-enter East Timor and be taken into custody. How will these people be tried if there are no Special Panels to try them?

Under current law, crimes against humanity, war crimes and torture are not subject to any statute of limitation. As a result there is a possibility of future arrests and future prosecutions of suspects, even though no indictments have yet been brought against them. How will these defendants be prosecuted if there are no Special Panels to conduct this work?

The questions that I have asked are to help illustrate that despite the end of the UN mission in this country, the serious crimes issue will remain. The large number of outstanding indictments, the likelihood of defendants re-entering the country at any moment and the possibility of new arrests and prosecutions taking place, all indicate the need for a continuing strategy to deal with serious crimes.

I would like to discuss three options for continuing the process here in East Timor. I realize that there are other options that will be discussed, such as an international tribunal, the truth and reconciliation concept and other proposals as well. I am operating on the conservative assumption that we must, at a minimum, complete the process that we have begun.

There are three basic options for completing the serious crimes process as expressed through the Special Panels:

1. Maintain the Special Panels without the involvement of a UN mission, but with the continued participation of international judges.
2. Maintain the Special Panels but without the involvement of international judges and including only the participation of national judges
3. Abolish the Special Panels and transfer serious crimes cases to the ordinary panels of the Dili District Court.

The legal framework that is currently in force in Timor-Leste defines the serious crimes process. These provisions (both constitutional and legislative) determine all aspects of the process, from the definition of serious crimes and the exclusive jurisdiction of the Special Panels to the insertion of international judges at both the trial and appellate levels. Consequently, any change in how serious crimes matters are handled will require a change in the legal framework and the pertinent regulations, laws and constitutional provisions. .

1. Maintain the Special Panels without the involvement of a UN mission, but with the continued participation of international judges.

One option is simply to maintain the current legal framework for the prosecution and trial of serious crimes cases. At present, Serious Crimes Unit indictments are filed with the Dili District Court and then distributed to the Special Panels for Serious Crimes, which form a part of that court. The Panels exercise the Dili District Court's exclusive jurisdiction over genocide, war crimes, crimes against humanity, murder, sexual offences and torture. See Section 9 of UNTAET Regulation 2000/11.

This option would require ongoing support from the international community, although it would not require the existence of a UN mission to provide such assistance. At a minimum, international judges would need to be supplied to hear serious crimes cases. This is because the current law governing such proceedings requires that the panels with jurisdiction to try serious crimes "shall be composed of two international judges and one Timorese judge.": Section 22.1 of UNTAET Regulation 2000/15.

The present legislative framework similarly requires that appeals in serious crimes cases shall be heard by a panel of the Court of Appeal that is also composed of two international judges and one Timorese judge. See Section 22.2 of UNTAET Regulation 2000/15.

The continued retention of mixed panels of judges at the trial and appellate levels, however, would not require an international presence with respect to the Prosecution and Defense teams. Although both groups are currently led by internationals, there is no legal requirement that this be so. For example, Section 14.6 of UNTAET Regulation 2000/16 states that the prosecutorial staff “shall include, but not be limited to, one or more public prosecutors and a Prosecution Support Unit consisting of East Timorese and International experts, as necessary.” Accordingly, the use of international staff is permitted, but not required, and must be maintained only as deemed “necessary.” Nonetheless, a switch from international to national actors would require careful planning and a consideration of issues of training, experience and professional capacity.

Finally, the retention of the current legal framework along with the specialized panels would also presumably conform to the provisions of Section 163 of the Constitution of Timor-Leste, thereby avoiding the necessity of amending the Constitution. Section 163 is more fully discussed in the next section.

2. Maintain the Special Panels but without the involvement of international judges and including only the participation of national judges

A second option is to maintain the current legal framework in terms of keeping specialized panels to hear serious crimes cases at both the trial and the appellate levels. The revision would be in staffing those institutions exclusively with national judges. Accordingly, the Special Panels would consist of three national judges and a panel comprised in the same manner would hear appeals.

Minimal legislative changes would be required to reduce or eliminate the presence of international judges in the serious crimes process either at the trial or the appellate levels. In large part this is due to the fact that this reform would keep the institutional structure of the specialized panels in place and would involve merely a change in staffing. Thus, the primary provision that would need to be amended would be Section 22 of UNTAET Regulation 2000/15, which requires that both the trial and appellate panels established to consider serious crimes “shall be composed of two international judges and one East Timorese judge.”

The option of keeping the specialized panels would be of value in terms of maintaining the integrity of the serious crimes process apart from the one involving ordinary crimes. Also, if panels with specialized jurisdiction were retained, national judges with the ability to serve in that capacity could be specifically assigned to sit on those panels. The opportunity to make such judicial assignments would presumably not exist in circumstances where serious crimes enter the general mix of cases in the Dili District Court and would be assigned in a normal rotation by the Judge Administrator.

(We have several Timorese judges who have served on the Special Panels at either the trial or the appellate level and they have been excellent representatives of this country and its judiciary. Those judges would no doubt be capable of discharging this serious responsibility in the future.)

Although the maintenance of nationalized special panels would require a minimum of legislative or regulatory change, it would nonetheless implicate a significant constitutional provision. Section 163 (1) of the Constitution of Timor-Leste states as follows:

The collective judicial instance existing in East Timor, composed of national and international judges with competencies to judge serious crimes committed between the 1st of January and the 25th of October 1999, shall remain operational for the time deemed strictly necessary to conclude the cases under investigation.

Thus, the national Constitution provides that the mixed composition of the Special Panels and its appellate counterpart shall be maintained “for the time deemed strictly necessary to conclude the cases under investigation.”

Amend Section 22.1 of UNTAET Regulation 2000/15, the provision that states that panels with jurisdiction to try serious crimes “shall be composed of two international judges and one Timorese judge.”

In any event, a resolution that would avoid the need for constitutional revision is to be preferred.

3. Abolish the Special Panels and transfer serious crimes cases to the ordinary panels of the Dili District Court.

This option contemplates a new legislative framework in which the specialized panels would be abolished and the remaining serious crimes indictments would be transferred to the Dili District Court. The ordinary panels of that court, in turn, would conduct any resulting trials and appeals would go to a regular panel of the Court of Appeal.

This option would require legislation by Parliament as well as a consideration of other issues. If the serious crimes process is fully integrated into the routine criminal process of the Dili District Court the Timorese people will need to address issues such as the capacity of the judicial system to cope with such matters.

I should also note that although my comments throughout have been directed to the actions of the judiciary, issues of capacity would need to be considered in the performance of both the prosecution and defense functions as well.

I am sure that these issues will be discussed in the workshops this afternoon.

Conclusion

The need to address the serious crimes process will not disappear at the conclusion of the UNMISSET mandate. Timorese decision makers and the Timorese people will need to consider some imposing issues:

- The large number of outstanding indictments involving defendants who are absent from the country
- The likelihood of defendants re-entering the country at any particular moment and the possibility of new serious crimes arrests and prosecutions, especially in the absence of a statute of limitations.
- The need to address future parole requests from serious crime defendants who are currently in prison.

All of these matters have direct implications for the Timorese judicial system, especially as the Special Panels for Serious Crimes conclude operations in concordance with Security Council Resolution 1543.

Before that point in time is reached there should be a thorough consideration of the issues involved.

I want to congratulate JSMP for starting the process whereby we can discuss these important issues.

I also want to congratulate all of you, and to thank all of you, for being here today. The issues that I have raised will not solve themselves. However they are to be resolved, they will best be settled when the widest possible audience is discussing them. By your presence here today you ensure that this process has begun.

7.3 Judge Maria Pereira's (Judge in the Special Panel for Serious Crimes) comments

did Judge Maria not speak for longer?

Option 1 – to maintain the Special Panel without UN involvement but with international judges. I support this option, but the problem is, how to continue with participation of international judges. Eg give them a contract of one year or more?

Option 2 – to continue with this option, would have to change laws in force at the moment, or defendants could complain that the law is not being followed.

Option 3 – there are similarities with the second option. Changing the law is not a huge problem, but the problem is the resources. These are not simple cases, these are complex cases. One case may involve up to 15 witnesses.

International Truth Commission – this would be unconstitutional as it would contravene Article 160 of the RDTL Constitution. "Acts committed between 25 April 1974 and 31 December 1999 that can be considered crimes against humanity of genocide or of war shall be liable to criminal proceedings with the national or international courts." So that's why I say it is unconstitutional. It's not just a case of saying sorry. As a Timorese judge sitting here the first thing I must respect is the Timorese constitution. It is true that other articles of the constitution speak about reconciliation.

In regards to other possibilities, for me as a judge the most important thing is that justice is served.

Judge Rapoza – in light of Judge Maria's comment concerning Article 160 of the constitution, if that article might prevent certain other options in the serious crimes process, those options could only proceed if Article 160 was amended or removed using the process described by Judge Maria. Also looking at Article 154 of the Constitution, the constitution cannot be amended until 6 years have passed since its adoption. In order to amend the Constitution earlier 80% of the National Parliament must agree it is necessary to amend. If it does not receive 80% support, that provision will remain in the constitution.

7.4 Presentation by Mr Essa Faal – Prosecutor for the Serious Crime Unit

Two mechanisms were set up to bring justice. One mechanism was the Ad Hoc Tribunal in Jakarta. Many people would agree that the ad hoc tribunals were a failure in the sense that they did not meet the international standards of justice.

The other mechanism is the serious crimes process in East Timor. This process has met significant successes. But a lot of work is yet to be done. At the SCU approximately half of the murder cases have not been investigated. A lot of torture cases, destruction of property, and sexual assault cases, have also not been investigated. There are also some districts in which only limited investigations have been carried out.

According to the UN Security Council Resolution 1543, the SCU should end all investigations by November 2004, and all prosecutions must end by May 2005. This means that by May 2005, almost half the murder cases committed in East Timor in 1999 will not have been investigated.

People from the districts of Ermera, Same and Ainaro would remain dissatisfied, because most of the cases from those districts have not been investigated. Could we at that stage say that the quest for justice has been satisfied? Could we really say that the objective to end impunity would have been met? My view is that the answer to both questions would be no. The question Timor Leste and the international community is now faced with is what to do with such an unsatisfactory situation. Should we continue to search for justice or should we say enough has been done?

The question is, what do you do with 279 individuals who have been indicted? What do you do with those whose cases are currently being investigated but have not been indicted? What is to be done with the other important cases which have not been investigated because of the limitations of the SCU? These questions must be answered by the people of Timor Leste and the international community. But my personal view is that the search for justice must be considered. I wish to consider the various options.

International commission of inquiry – it has already been explained how this would work. I wish to highlight that prior to the establishment of the SCU there was an international commission of inquiry established by Mary Robinson. I just wonder if this would not amount to a duplication of the process.

The best model established by the international community to deal with violations of human rights is an international tribunal. But these have been criticised as being very expensive and unnecessarily large. The international community has also expressed an unwillingness to establish any other international tribunals.

A less expensive and a good model would be the model in Sierra Leone. That model has some advantages over the model that is currently used in East Timor. Its structure ensures the independence of the prosecutor. It also places an obligation on Sierra Leone to cooperate with the tribunal. It also places an obligation on the government of Sierra Leone to support the arrest and extradition of these persons. Unfortunately it has one important limitation: it cannot operate without the cooperation of other countries. If a model like that was to be established for East Timor perhaps it could be strengthened to ensure cooperation of other countries.

The third option is to continue with current model. Problems: it does not have resources, independence, or support from the government. So I have doubts that if this process were to continue that it would be able to ensure the participation of the 279 remaining indictees because the most important thing here is to be able to bring to justice those who bear ultimate responsibility for those most responsible for crimes in 1999. Any mechanism that does not bring those most responsible to justice is likely to fail.

The fourth option: a purely East Timorese tribunal. But it takes more than two judges to run a serious crimes process. Undoubtedly, the court would have to deal with very complex facts. So one would have to consider whether Timor Leste has the legal personnel to operate the entire serious crimes process. The most important consideration would be whether a purely Timorese court would be able to meet the international standards of justice that would be required and also whether it would be able to secure the cooperation of Indonesia. It could be very effective in dealing with accused persons who cross the border, but it is unlikely to have access to those who remain in West Timor.

So in my view an international tribunal would be the best thing, but it is not likely to happen. So I would settle for the second option, which is a strengthened Sierra Leone model. If such a tribunal is strengthened it might be able to guarantee good cooperation with Indonesia.

8. INTERNATIONAL TRIBUNAL

8.1 Suzannah Linton, Legal Adviser to CAVR

Good morning, distinguished guests, friends and respected participants. It is a great honour to be here to speak to you today as part of this crucial effort to engage civil society in the issue of what to do about Justice for East Timor. Thank you very much to Tiago for the kind invitation to come today.

My task this morning is to set the framework for further speakers. A lot of people are talking about an international tribunal as an option for East Timor, but I believe that not everyone is clear about what this mechanism is, how it functions or what it is supposed to do, or the advantages and disadvantages of this model. I will start with an introduction on the different types of international court that there are, and then focus more on the two ad hoc courts -the International Criminal Tribunals for the former Yugoslavia and Rwanda. After I am finished, time permitting, I'll be pleased to take questions.

DIFFERENT TYPES OF INTERNATIONAL COURTS

1. International Court of Justice
2. International Tribunal on the Law of the Sea
3. The Ad Hoc Tribunals
4. International Criminal Court
5. Others: Special Court for Sierra Leone

The International Court of Justice deals exclusively with disputes between States. The International Court of Justice is also called the World Court and it is the venue where Portugal brought a case against Australia in relation to its entering into the Timor Gap Treaty with Indonesia. The court is an organ of the United Nations and can only deal with matters where the States involved agree to its jurisdiction. Although many people talk about sending war criminals to the International Court of Justice, this court does NOT deal with any cases concerning individuals - it is not a criminal court.

The International Tribunal on the Law of the Sea is another variety of international court that only deals with disputes between States -in this case, it deals with disputes under the Convention on the Law of the Sea. It does not deal with any criminal cases.

There are two ad hoc international tribunals in existence. One deals exclusively with events in the former Yugoslavia (ICTY), and the other deals with events that occurred in Rwanda in 1993 (ICTR). These are criminal tribunals which try individuals accused of war crimes, crimes against humanity and genocide, and these are the models that people mean when they talk about a tribunal for East Timor.

The International Criminal Court only came into existence on 1 July 2002. It is, as the name makes clear, a criminal court, and it has jurisdiction over crimes of aggression, crimes against humanity, war crimes and genocide. This court cannot take jurisdiction over events that occurred before the court came into being, i.e. it cannot have retroactive jurisdiction over crimes committed before 1 July 2002.

The Special Court for Sierra Leone was established on 16 January 2002. It is the result of an international agreement between the government of Sierra Leone and the United Nations. This court only deals with crimes committed in Sierra Leone.

None of the above mechanisms have the jurisdiction to deal with what occurred in East Timor between 1974 and 1999. So what some people would like to see is the creation of an ad hoc tribunal for East Timor, like the ones that were established for the former Yugoslavia and Rwanda.

AD HOC TRIBUNALS

Why and how were the two tribunals created?

Both tribunals were created as a direct response to shocking atrocities. The first was the ICTY, and it was established following international concern over the shocking atrocities committed in the course of fighting that broke out as the country that used to be the Socialist Federal Republic of Yugoslavia disintegrated in 1991. Conceptual approval was given by the Security Council in Resolution 808 in February 1999 and on 26 May 1993, the Security Council drew on its powers under Chapter VII of the United Nations Charter to declare the situation in the former Yugoslavia to be a threat to international peace and security, and adopted Resolution 827 establishing the first international war crimes tribunal since the Second World War. .

The precedent set by the establishment of the ICTY and the appalling carnage in Rwanda, which saw up to a million people killed in some three months, led to international pressure for a similar mechanism to be set up to bring those responsible to justice. In November 1994, on the basis of the recommendations of a Commission of Experts, the Security Council again drew on its Chapter VII powers under the United Nations Charter and passed Resolution 955, which established an international tribunal to prosecute persons responsible for genocide and other serious violations of international law during the Rwanda conflict in 1994.

What do the two existing tribunals do?

Both tribunals only have jurisdiction over individuals in relation to their personal actions, whether they actually committed, ordered, aided or abetted or had command responsibility in relation to crimes within each tribunal's mandate. .

The ICTY prosecutes genocide, crimes against humanity, grave breaches of the Geneva Conventions, and violations of the laws and customs of war (war crimes) committed in the territory of the former Yugoslavia since 1 January 1991.

The ICTR has jurisdiction over genocide, violations of Common Article 3 of the Geneva Conventions of 1949 and Additional Protocol II of 1977, and crimes against humanity committed in Rwanda in 1994, as well as over acts of Rwandan citizens responsible for genocide and other crimes against humanity committed in the territory of neighboring states during 1994.

Neither tribunal has jurisdiction over the crime of aggression.

The Security Council, in establishing the two tribunals, provided for both of them to have primacy over national courts, both in the former Yugoslavia, Rwanda and the rest of the world. This means that the tribunals can request national courts to halt proceedings against a war crimes suspect and hand the suspect and evidence over to the Tribunal.

Who controls the tribunals?

The two tribunals are run by the United Nations.

Where are the two tribunals located?

The ICTY (dealing with crimes in the former Yugoslavia) is based in the The Hague, The Netherlands.

The ICTR (dealing with crimes in Rwanda) is based in Arusha, Tanzania with its prosecutor's office based in Kigali, Rwanda

How do they function?

There are three sections in each of the Tribunals:

- *Judges Chambers*

Each tribunal has permanent judges from all over the world (except the countries directly affected – ex Yugoslavia for ICTY and Rwanda for ICTR) who are elected for four year terms by the United Nations General Assembly. Each permanent judge has a four year term. The permanent judges elect a judge who will serve as the Tribunal's President. The tribunals also have access to *ad litem* judges, who are not permanent but only serve as judges when they are sitting on a case.

There are Trial Chambers and an Appeals Chamber, where the judges sit in panels of 3 or 5. Some matters may be heard by an individual judge. Both the ICTY and ICTR share a common Appeals Chamber.

- *Office of the Prosecutor*

Each Tribunal has a separate Prosecutor (they used to share a single Prosecutor), who has an office that investigates allegations of crimes, drafts indictments, and prosecutes cases. Investigations are only possible on the territory of a State with the permission of the State.

- *Registry*

Each tribunal has a Registry, which is the administrative office that keeps the tribunal functioning. The Registry deals with personnel issues, procurement, logistics, budgetary and finance matters, victim and witness protection, the detention unit, defence counsel and judicial support services such as translation and transcription of trial proceedings.

How does the process work?

The procedure is one of criminal justice - people are investigated, charged, tried, judged and if found guilty, punished. The basic principles and processes are the same - the difference is that it is on an international level.

Until recently, the prosecutor has had full discretion to determine what to investigate and prosecute, and what not to. This has recently been restricted at the ICTY but not at the ICTR. That being said, prosecutions can be initiated at the prosecutor's discretion or on the basis of information received from individuals, governments, international bodies or non-governmental organisations.

The law governing the work of each tribunal is contained in its Statute and Rules of Procedure and Evidence, as well as the laws and customs of International Law, more specifically International Humanitarian Law, International Human Rights Law and International Criminal Law. Once the prosecutor decides to indict a person, an indictment is presented with supporting evidence to a judge of the tribunal. The judge may issue or reject the indictment. If issued, it is either kept under seal (secret) or made public. If a warrant of arrest is issued along with the indictment, it then becomes the basis for the arrest of the person, in order that he or she may be brought before the tribunal to answer the charges in the indictment. Neither tribunal has a police force so it is difficult to obtain custody over a person unless a State cooperates or the person surrenders.

When an accused first appears at the tribunal, he or she is required to enter a plea to the charges in the indictment. If the person pleads guilty, there is a special process for handling guilty pleas, that works rather like a mini-trial. If the accused pleads not guilty, the case will go to trial before a Trial Chamber. The Rules of Procedure and Evidence that apply to the trial are a combination drawn from civil and common law systems. The Rules of Procedure and Evidence require that ICTY proceedings adhere to internationally recognised standards of due process and fair trial. To meet this obligation, the legal aid programme provides counsel for indigent defendants at the expense of 'the Tribunal. Other important elements include the presumption of innocence, the right to be tried without undue delay, the right to examine adverse witnesses and the right of appeal. Witnesses may testify in private session or testify without their faces or identities being publicly revealed.

Trial takes place at the seat of the tribunal, but may involve the judges visiting the crime scene and other relevant locations. Following trial, there is a right of appeal, which will be heard by the Appeals Chamber if it determines there are valid grounds of appeal. Sentences following conviction are served in countries that have volunteered to allow the convicted person to serve sentence in the courts of that country.

What have been some of the advantages and disadvantages of trials before an international tribunal?

Advantages

- Accountability serves justice in the individual case and re-establishes the Rule of Law, through holding individuals responsible for their actions.
- International trials satisfy the fundamental right to an effective remedy for gross violations of human rights, as well as the duty of the international community to investigate prosecute and punish international crimes.
- The tribunals have reinforced the notion that decision makers may be held ultimately responsible, even if they personally did not commit the crime. There have been charges brought, or proceedings underway or completed against persons who have at some time served as senior officials of States or non-State entities: Prime Ministers (Kambanda), President of National Assembly (Krajisnik), Presidents (Milosevic, Plavsic, Karadzic), Military Commanders (Blaskic, Alagic, Krstic, Bizimungu, Kabiligi etc.), mayors (Dokmanovic, Kovacevic, Akayesu, Bagilishema etc.).
- The tribunals emphasise the notion of individual responsibility versus collective responsibility. For example, it was not all Hutus who committed Genocide, but certain individuals; it was not all Serbs who committed atrocities, but certain individuals.
- Trial and punishment serves as potential deterrents of further criminal acts.
- Accused have been tried pursuant to higher standards of due process and fair trial than would have been possible in the countries of the former Yugoslavia and Rwanda and, at the time of establishment of the tribunals, the option of trials in these countries just did not exist.
- Facts about events in the former Yugoslavia and Rwanda have been established by strict evidentiary standards, and the innocence or guilt of a person has been resolved in accordance with international standards of due process and fair trial.
- The tribunals have the potential to contribute towards peace and security, as well as reconciliation.
- They provide international recognition of the immense seriousness of what happened in the former Yugoslavia and Rwanda.
- They jump-started the process of international justice and set the framework that made the establishment of the International Criminal Court possible. Development of very important jurisprudence and precedent, especially in relation to international standards of due process and fair trial.
- Generally able to attract high calibre personnel to contribute towards a high standard of proceedings.

Disadvantages

- Length of proceedings - issues of impact upon the right to expeditious trial. Cannot be used for processing large numbers of accused.
- The location of the tribunals out of the territory where the crimes took place, and the non-involvement of locals (as victims, perpetrators and witnesses) has resulted in an inability for many of the affected populations to relate to what is being done in The Hague and Arusha.
- If the 'big fish' accused are unavailable, the tribunal may have to work with the 'small fish', which is felt by some to be a waste of resources.
- Both tribunals have created immense bureaucracies. Cost: The ICTY's 2004-2005 budget is \$271,854,600. It started in 1993 with a budget of \$276,000. When States do not make their contributions, that directly affects work. For example, there has been a recent recruitment freeze at the ICTY because of funding problems.
- The tribunals are dependent on State cooperation, of which there is no guarantee. Neither tribunal has its own police force, its staff have no power to enter a country at will and arrest persons within its jurisdiction. For the ICTY (not its fault), it is a major disappointment that Mladic and Karadzic are still at large, 9 years after being indicted.
- Some element of show trial (Milosevic).

- Creation of an expectation that that deserving victims across the world will get a tribunal as did the people of the former Yugoslavia and Rwanda. The political realities are that these mechanisms were exceptions and the international community is unwilling to create any more.
- Some people feel that the promises that trials will bring justice and reconciliation, 'fix' the wrongs that have been done and repair a society torn apart by conflict have not been met.
- Lack of/reluctant support from the countries most directly involved. Dissatisfaction with the performance of ICTR In Rwanda, hostility towards ICTY from not insignificant sectors of society in the Balkans. Not enough impact upon the process of change in the Balkans.
- International trials are generally felt to be not enough in their own right to deal with the complex issues facing societies in transition from repression or mass violence. The trial will only uncover what is relevant to the case being tried and the individual's role in what happened. It is designed to establish the facts by strict evidentiary standards, and is not aimed at therapeutic unburdening for victims, creating a narrative of the whole story of what happened, or understanding the big picture of why things worked out the way that they did or recommending ways to prevent it happening again.

8.2 Reading of letter to Kofi Annan by Timor Leste National Alliance for an International Tribunal

Secretariat: HAK Office, Rua Governador Serpa Rosa T -09, Farol, Dili, Timor Leste
 Contact person: Rosentino Amado Hei (+ 6707237172/ Indonesian version) & Joao Sarmento (+670 723 50 43/ English version).

17 September 2004
 His Excellency Mr. Kofi Annan
 Secretary General of United Nations

Dear Mr Annan,

We, the undersigned below, are members of the Board of Timor Leste National Alliance for an International Tribunal, which since 2001 has actively campaigned for the establishment of the international tribunal for crimes against humanity in Timor Leste, in the year 1999. On this occasion, we once again express our feelings and thoughts on the justice process in Timor Leste. We wish that our expression would find a place in the United Nations during discussion processes related to the resolution of the 1999 crimes against humanity in Timor Leste.

The performances of the Indonesian Ad Hoc Tribunal in Jakarta and the Special Panel for Serious Crimes in Dili have indicated to the public that both means of legal instruments are no longer effective in bringing justice to the victims of the 1999 crimes against humanity. The Jakarta trial has openly showcased to us all that it was no more than an act of "wiping off blood" for the prime perpetrators - an act we have predicted from the very beginning. Meanwhile, the Dili panel has also lately indicated its confusion in its work while receiving no attention whatsoever from the responsible authorities. It is so ironic that the institutions responsible to uphold justice and human rights are actually manipulating the suffering and pride of the victims.

It is often argued that establishing an international tribunal requires a lump sum of money. But huge amount of money, energy and thoughts have also been wasted for the "dramas" in the trials in Dili and Jakarta, acted out by politicians. The rhetoric of human rights, peace and justice were called out as commodities to achieve credit points for those wanting to come out as "stars" in their countries or in the international level. Vested interests of certain groups have entered the mechanism and the tradition of the international laws, simply ignoring the interests of the greater population.

The argument that there is little money to fund such an international tribunal is baseless. If the superpowers could afford the warfares in Afghanistan and Iraq, how come they are reluctant in reaching their wallets to fund an

international tribunal? Weren't those wars part of the acts against humanity which clearly contradict the United Nations conventions? Were those wars more noble than organising a tribunal which follows all the international principles and values? What has happened to the moral of the international community these days? Does the international political stage now favour anti-humanity politicians?

We are very concerned with the development of the trend where the United Nations is struggling to present its true self-image. The essence of the United Nations convention principles are being challenged and tempted -making the irregularity of the international norms and laws normal. Certain groups, representing the interests of the very small minority, have integrated their ideas and suggestions, courtesy of their United-Nations-type talks and symbols. If such trend continues, it would become a new tradition for the United Nations mission, which would lead to the destruction of humanity. The United Nations would simply become a tool for legitimating inhumane acts and preserving the chain of impunity.

In the 1999 crimes against humanity in Timor Leste, the victims were not merely Timorese. In fact, there were also other nationalities, including staff members of the United Nations mission at that time (UNAMET). The United Nations not only was a witness, but it was also a victim in this case. However, as many are witnessing, this world's top body is conducting the justice process "half-heatedly". The two main governments, Indonesia and Timor Leste, are seemingly unconcerned, showing little seriousness in ensuring an international standard process of justice. The rejection of the United Nations in the conviction of General Wiranto, as stated by UN spokesperson Fred Eckhart, indicates evidence of the United Nations' undetermined effort. On the other hand, there is also no serious effort made by the United Nations to convince to the two countries (Indonesia and Timor Leste) that the obligation for a county-to-country cooperation requires also trials for past crimes against humanity, as arranged by the international laws.

This state of abandonment has fostered the perception between politicians in the two countries, as well as some groups in the international community, that bringing forward the perpetrators of the 1999 crimes against humanity would spark a new conflict, rather than put a stop to the crimes which are currently being repeated in other parts of Indonesia, such as in Aceh.

Poverty in Timor Leste has also been used by certain parties in Indonesia to terrorise groups campaigning for justice. There seems to be no respect for the dignity and integrity of Timor Leste as an independent state, although it must be noted that impoverishment was driven by the 24-year Indonesian military occupation of Timor Leste which has destroyed the cultural dignity and nature of the country. Arrogantly, several Indonesian politicians used Timor Leste's "dependency" for Indonesian commodities to pressure the Timor Leste government from supporting an international tribunal for the sake of good relations between the two. There is no clarity to what values were used as the basis of those good relations. In fact, there are only propagandas, suggesting that an international tribunal carries a motive of vengeance. Such attempt is clearly an effort to distort the essence and meaning of the tribunal which aims to prevent impunity and promotes human rights –a concept still believed by the modern society of this period.

Once again, the United Nations must face this challenge. This problem does not belong only to Timor Leste and Indonesia, however it is also the responsibility of the international community. If the United Nations and the international community in general fail to resolve this dispute over a tribunal, then it would be a huge loss of investment for what has been spent in the international "pilot project" mission in Timor Leste. Furthermore, it would have also proved that the United Nations is not viable in keeping world peace, indicated by the failure to place sustaining justice and peace for such a small country like Timor Leste.

When such condition is in place, a precedent would also emerge from the failures of Timor Leste and Indonesia, where the law and the principles of democracy would only serve as a "lips service" used by the ruling regimes. The refusal of justice for the perpetrators of the 1999 crimes against humanity, called out by the leadership of the Timor Leste government, does not only oppose the spirit and principles of various international agreements, but it also violates the RDTL Constitution (article 160).

We truly hope that there are groups in the United Nations, as well as within the international community, who are still committed to uphold the values of humanity.

Cooperation between various elements must be established in order to save the mission of the United Nations. To put on trial the perpetrators of the 1999 crimes against humanity would not only advantage Timor Leste, however it would also benefit the promotion of democracy in Indonesia and put a stop to future human tragedies from the face of planet Earth.

By means of this statement, we thankfully appreciate your attention.

Board of Timor Leste National Alliance for an International Tribunal

Representative of Victim Families

Representative of Students

Representative of the NGOs

Forward:

Presented to the Honorable:

1. President of the Democratic Republic of Timor Leste, Mr. Xanana Gusmao
2. President of the National Parliament, Democratic Republic of Timor Leste, Mr. Francisco Guterres Lu olo
3. Prime Minister of the Democratic Republic of Timor Leste, Mr. Mari Alkatiri

Members; Ratelaek- Liquica, Novi Novi-Maliana, Materestu-Suai, Victims 1999-Dili, Families of Victims Oecusse, Ainaro, Manufahi, Uatulari, Manatuto, AKKOH, FSSO, Centro Feto Enclave, Lao Hamutuk, HAK, JSMP Sahe Institute Caritas Australia, Council of Student, GFFTL, Radio Rakambia, KSI, Fortilos, APCET, LBH "URA", LABEH, PSMTL, KLESBO, UEDA, KUESVIQ, ETWAWWE, CIIR-TL, and individuals.

8.3 Presentation by Ben Clark, University of Melbourne

As time is limited and many of the speakers have covered many of the areas, I would like to address three issues with regard to an International Tribunal. These being:

What are the legal obstacles to setting it up?
Where it may be located?
What could be achieved?

1. What are the legal obstacles to setting it up?

The first way is through the Security Council resolution and second by negotiations between Indonesia and East Timor to agree on a tribunal.

Only the first option is realistic and to achieve it there is a strong need for international support. Getting the Security Council to agree involves persuading permanent members to agree. But there is a lot of international support for international tribunals and prosecutions- as demonstrated by the fact that 90 countries have agreed to join the International Criminal Court in a very quick time. If a Tribunal was agreed to by the Security Council – Indonesia would be required to cooperate fully and ultimately if they did not cooperate to hand over people who have been indicted then theoretically sanctions could be imposed by Security Council. One difficulty is double jeopardy for someone being putting on trial twice, but this depends on a number of factors and the quality of the original trial.

2. Where should it be established?

The best forum is East Timor because most of the witnesses are here and crime scenes are here. But, as we have heard, in other cases international tribunals have not been established in the places where the crimes were committed. But it may be the case that Tribunal could be established here and in doing so would save costs.

3. What could it achieve?

It has already been noted that International Tribunals bring a high standards of justice and objective legal process. But such a process would also help Indonesia with capacity building with its judicial system through the employment and expertise of international judges. In my view it offers the only real opportunity to have prosecution of high level perpetrators; in other circumstances people who are convicted of genocide and crimes against humanity have faced 20 years gaol.



9. INTERNATIONAL TRUTH COMMISSION

9.1 Presentation by the US Ambassador, HE Grover Joseph Rees

I am reluctant to speak first because the international truth commission is an idea that is supported by America but it was not first thought of by America. It was proposed by the Foreign Minister Ramos-Horta and we have decided that it is the best route to take. I do not want to say what the position of Timor is but want to say that it is not an idea that is not being imposed by foreigners but is an idea that came from East Timor and we think it is a very good idea.

The idea of an international truth commission starts from two points - we need to do something. The Serious Crimes Unit (SCU) process is not completed. They will only be able to investigate and prosecute a small number of cases and they cannot get jurisdiction over the most important perpetrators. The ad hoc tribunal in Indonesia has not worked. It was not successful and they did not do justice. So we have to do something. We do not believe that the international tribunal is the best answer because we do not think that it will work. We don't think it will work for two reasons. We have tried them in Yugoslavia and Rwanda and Sierra Leone but I think SCU has worked better than what has occurred there because those tribunals have sometimes only convicted a small number of people and therefore the SCU has done more and cost much less. The International Tribunal would do no more than has already been done.

The other reason that an International Tribunal will not work is because the same reason that the SCU cannot get jurisdiction over the perpetrators. While the International Tribunal could bring knowledge and show the international community cared it would not actually bring more perpetrators to justice.

I admit one clear disadvantage with an international truth commission- it would not be able to punish anyone. The commission could make clear the facts but then it would be up to each individual government, the government of East Timor and the government of Indonesia to do something after the Truth Commission declared the facts. We think the International Truth Commission will also be successful because of this fact, because it would not have to punish anyone to do its work and, because it does not have to have custody of anyone to do its work.

But other people in Indonesian have suggested that the Special Panel for Serious Crimes process is biased and they do not have to pay attention. Some people in Indonesia still believe that what happened in East Timor was just East Timorese killing each other and with the truth commission the reality would then be difficult for them to dismiss. The other advantage would be that by declaring the facts and making clear that it is up to each government to deal with it there would be a list of people who would be responsible, it would shift the responsibility to each of the States. Possibly as Indonesia progresses towards full democracy the people in Indonesia would pressure the government to do something about those people. And East Timor would also have to choose what to do with those people who were named. And also other countries like us could decide not to let these people into military training schools, I don't know exactly what we would do but these are options and decisions for governments.

Let me also raise a number of a questions about the commission that need to be considered if it is going to be a success. Who would be its members? It should be composed of people with impeccable reputations, some people from the region, at least one prominent Indonesian, and balanced between religions. All the members would have to be people of impeccable diligence and intelligence.

Finally I have a question for the government of East Timor. What do we do about the fact that the Serious Crimes Unit will have only done investigations for 40% or less of the crimes and therefore investigations for more than 1000 murders have not been done? Will the investigations continue with the international truth commission? We need to ensure that this is considered and that these investigations may be part of the responsibility of the International Truth Commission.

9.2 Presentation by Agio Periera, Chief of Staff Office of the President

I am here representing the Office of the President. As the President said in the Parliament, there is a need for civil society to debate the issues related to serious crimes and options regarding this issue. In the presidential election in April 2002 the President spoke about justice and said we must consider "what is the meaning of justice?" – justice is not revenge and there is a need to look at the history of the country. And who should be prosecuted for justice and who should not? The rights to seek and find justice need to be protected.

Who is going to define the mandate of the International Truth Commission? If they have the power to give amnesty that will have consequences.

In regard to the international Commission of Experts, we all know that the UN will make an announcement about the composition of this panel and the mandate of the panel and they will have ample opportunities to make these recommendations. Civil society should continue with these debates in order to deal with the issue of serious crimes and to give its opinions to the Commission of Experts.

9.3 Presentation by Olimpio Branco, Vice-Minister for Foreign Affairs and Cooperation

So far only Timorese have been convicted on trial in East Timor and in Indonesia.

Indonesia has recently established a Truth and Reconciliation Commission to deal with all situations under the dictatorship in the regime. I was just talking with the US Ambassador and he said "maybe it can only achieve reconciliation not truth" and I agree with him. Many facts remain obscure and unclear but this situation is a very complex one.

We should never create an environment of impunity

The intention of establishing a Truth and Reconciliation Committee was a idea that came from our Minister Ramos Horta but there is not yet consensus between all of us as to what this Committee would do.

We are happy to cooperate with the UN and personally with the Secretary General Kofi Annan in regard to the process of establishing a Commission of Experts. I feel that when it is established and starts to do its work many possible recommendations can be delivered to the Commission. This will be a good opportunity for the Community to participate in the process. Whatever the recommendations chosen by the UN, the Timor Leste government will cooperate with the UN. My feeling is that in the next week the UN will be ready to announce the composition of this Commission.

10. EXTENDING THE CAVR

10.1 Prepared comments by Aniceto Guterres, Chief Commissioner, CAVR

Extend community reconciliation through the CAVR in relation to serious crimes.

- Reconciliation must be based on justice. Reconciliation will not be possible without justice. This is a fundamental principle of reconciliation. This principle is also based on statements obtained from people from all over Timor Leste, in particular those who were victims of past crimes committed in the context of political conflict.
- However there are many questions that need answering. What type of justice do East Timorese people want? Justice for whom? And there are many more questions.
- However if we say that justice means accountability and that justice means taking people to court and punishing those who commit crimes, then how are East Timorese people going to obtain this form of justice?
- We know what the Ad Hoc Tribunals in Indonesia gave us and there is no certainty about the Serious Crimes Unit and the Special Panels and there is no guarantee that there will be any certainty after 20 May 2005. Also CAVR who managed less serious crimes through the Community Reconciliation Process finished its operations in March and will be completely shut down after it submits its final report.
- A discussion on past crimes committed in the context of political conflict does not just apply to crimes committed in 1999. We also have to consider crimes that occurred prior to 1999. The Serious Crimes Unit and the Special Panels will close soon and they only handle crimes that were committed in 1999, many of which are still pending. This means there is still a very large number of crimes which are yet to be brought to trial.
- This situation we face is problematic. Nevertheless, by adhering to the principle that justice must prevail, we have to find a way out and at the same time we have to stop those who want to put an end to justice.
- In such circumstances, I believe that we have a range of options, some of which are poor and some which are slightly more favourable in our search for justice.
 - a. Ignore or forget these crimes. The courts will only handle ordinary crimes that were committed from 2000 onwards. However, this is not what we want because this would mean total impunity which can generate new conflict and other forms of injustice in the future.
 - b. Bring all criminal cases to court, however we have to consider the capacity and the resources of the courts in Timor Leste, they will not be able to solve everything. If we force them to solve everything then we would be burdening the courts with an onerous task, which may in turn destroy the courts as important institutions of Timor Leste that are intended to uphold justice, freedom and democracy in the future.
 - c. Take these criminal cases before an International Tribunal. It is fair to say that this is the best option, however for this to happen the world would have to pay more attention to those crimes committed in 1999 and towards a small number of people, especially the principal perpetrators. For crimes that are not brought before an international tribunal, clearly we have to endeavor to find another solution.
 - d. If this is the case, then what other options are there?
- For a number of reasons some crimes will not be brought before national or international courts. And for these crimes we will continue to try and find alternative mechanisms or seek justice through our own means, without undermining the value of justice and without being totally dependent on the mechanisms and options that are available, or on foreign aid. This will show others that we can solve problems from our past, such as crimes that occurred in the context of political conflict, especially crimes that were committed by East Timorese.

- For the aforementioned reasons certain people have proposed that the Community Reconciliation Process should be conducted for serious crimes, and I think this is a good idea.
- I have experience with the CAVR process, which has its own shortcomings (as indicated in evaluation and research conducted by colleagues - which I acknowledge) however this process has positive aspects and strengths that can be enhanced to help us achieve justice.
- In Community Reconciliation Process hearings, the victim and deponent meet each other face to face and speak to each other, and the facts of each case are confirmed by the victim as well as members of the community who are also allowed to speak. A court isn't able to provide all of these things.
- During the Community Reconciliation Process the "truth" is revealed through a "public acknowledgement" which is similar to a "confession", which to some extent can heal the wounds of the victim or the community that were the result of acts committed by the deponent in the past.
- The Community Reconciliation Process includes a reparations program, although only on a small scale. Also the victim, deponent and panel form an agreement in relation to that case or issue, and then that matter can't be taken to court.
- Its fair to say that the Community Reconciliation Process is a mechanism purely designed to be accountable to, and reveal the truth for, the victim and community.
- The Community Reconciliation Process conducted by CAVR is not intended to replace the function of the courts, but rather to compliment the courts in settling matters with the objective of achieving reconciliation without undermining the very justice that people are seeking. The important question here is: can substantial justice be provided through a Community Reconciliation Process?
- In all judicial processes there is no such thing as being completely fair or 'absolute justice', however we are able to contemplate standards or degrees of justice. A desirable standard of justice is one where each person is satisfied with the process and the decision.
- It only relative for us to say whether or not a person is able to obtain substantial justice through a Community Reconciliation Process. It depends on the perspective of the individual.
- We can not forget that the Community Reconciliation Process conducted by the CAVR was designed for less serious crimes and not for serious crimes.
- Therefore, is it possible for us to hold Community Reconciliation Processes for serious crimes? Before responding to this question, we firstly must desire ownership of the Community Reconciliation Process as a means or mechanism of overcoming impediments to justice, and then we will be able to examine the possibility of conducting Community Reconciliation Processes.
- If we decide that the Community Reconciliation Process is a suitable mechanism, then clearly we need a new design which is based on past experiences and lessons learned.
- Before proposing ideas on a new design, we first need to categorize accurately and define crimes as either "extremely serious, very serious, serious, less serious, ordinary, of a minor nature, minor" etc. Then we can decide which categories of crimes can be taken before an international tribunal, a national court or a Community Reconciliation Process and which categories should be dealt with via other mechanisms. For example, sexual violations such as rape are considered as very serious crimes, which can not be dealt with through a Community Reconciliation Process, but rather must be taken to court.

- The decision to use a particular mechanism must be based on how a particular crime is categorized in terms of its type and nature, for example crimes which are organized and systematic, and those which are not. This categorization is also important for perpetrators, for example separate categories for principal actors or those in charge, field commanders, leaders and perpetrators, which will also take into account the nationality of the perpetrators. For instance an East Timorese militia member residing in Timor Leste who committed the crime of rape should be brought before a National Tribunal, and can not be dealt with through a Community Reconciliation Process. Whereas a member of the Indonesian Armed Forces (TNI) who committed a similar crime should be taken before an International Tribunal, and should not be dealt with through a Community Reconciliation Process or brought before a National Tribunal.
- Special consideration can also be made to deal with crimes categorized as serious through a Community Reconciliation Process when the victim(s) seek resolution via this process. This could include cases that are not categorized as crimes against humanity or war crimes which have exceeded the statute of limitations, or cases that have occurred within families as a result of threats or coercion from TNI. Also for other cases where the victim does not wish to re-open the issue.
- If dealing with serious crimes, then the Community Reconciliation Process must be redesigned to consider the reparations program for the victim that forms part of the sanctions imposed on the deponent.
- I have summarized the options available to us for overcoming the current dilemmas we face. It is clear that we have to assess our capacity and the resources available to facilitate or realize these ideas. It will not be easy to transform these ideas into tools or mechanisms, and maybe there is only a small amount of hope, but I think we must at least try to use this option, unpopular as it may be, to solve our problems gradually and obtain justice even in its smallest form, and therefore open the path towards reconciliation. It is better for us to have a narrow option, than none at all.

10.2 Presentation by Aniceto Guterres, Chief Commissioner CAVR

Expanding the Mandate of CAVR

We are currently facing a situation where by May 2005, SCU and Special Panels will close and there are still many cases that need to be dealt with. Justice still must be achieved.

One option would be to forget about all of the crimes that occurred in 1974 -99, so the national courts would just deal with crimes committed from 2002 onwards. But I feel that that's not what we want. That would create a situation of impunity which will lead to future conflicts. The second option is to take all of the cases to the courts, but we have to consider the capacity and resources of the current system. Otherwise we will place a huge burden on the courts, when the institution is supposed to be there to defend and protect justice. The third option is to take the cases to an international court of justice. However, for those cases that would not find their way to the international or national courts we would have to look for other ways to deal with them in order to achieve justice.

That's why some people have considered whether community reconciliation (PRK) could maybe include more serious crimes. My view is that this is a good idea, even if it is not CAVR itself. Although some people may have pointed out disadvantages to the CAVR process, there are also advantages in the CAVR process that could be developed further to seek justice in the future. In the process of community reconciliation run by CAVR, victim and offender face each other and there is a confirmation of facts and the community itself has an opportunity to speak, which you wouldn't find in a regular court. Also, a public confession takes place. Through that process the offender can be reintegrated. Thus, through PRK we can achieve accountability for the victim and provide truth for the victim and the community. The PRK process isn't something to replace the role of the courts, but to complement the process taken by the courts and achieve the aims of justice and reconciliation.

In regard to the question of whether the PRK can also deal with other serious crimes it is important to note that the PRK was designed with minor crimes in mind. If we were to include other more serious crimes it would have to be redesigned to take into consideration. And we can count ourselves fortunate that we have learned quite a few lessons from the PRK.

In my view the PRK process could deal with more serious crimes. In considering developing a new process of PRK we should first try to categorize the different kinds of crimes according to seriousness and see what types can be referred to the courts or the PRK. As an example, sexual violence is clearly a serious crime that must go to the formal justice system. Special consideration could also be give to those crimes that could also be classified as serious crimes but whose victims would like to take the case through the PRK. Also, in regards to other crimes not considered against humanity but having a statute of limitations, it might be better to go through PRK if there is a wish to do so.

Thus, I am advocating PRK as an alternative avenue to deal with other crimes that we believe should be given attention. Sometimes it might be better for us to use the smaller avenues to seek justice rather than having nothing because if we are left in uncertainty people with political interests may consider a solution that is not in accordance with our will.

11. OTHER OPTIONS

11.1 Presentation by Aderito Soares

People have spoken a lot about the costs of setting up International Tribunals. However, the money spent on these types of courts is nothing compared to the money spent on military.

Public Indictment – a similar body to a court but involving civil society and international judges. We would not take suspects before a court and its decisions would not be legally binding. Using a public indictment we could try Wiranto with international judges. The decision may not be binding but at least it is morally satisfying.

Reparations would be difficult. The Government is saying that we should be careful about the relationship with Indonesia but this not about claiming compensation from Indonesians.

These models do not stop us from exploring other formal options. We should look at these as complimentary to formal options. We should continue to demand an International Court in the future. It's a bit like our fight for independence. We could not see the end of the tunnel at a time. But we fought on and won. As someone who fights for international justice the fighting should continue. I have doubts about giving time to Indonesia. We have concerns about bridging and fixing relationship with Indonesia. We can't pursue a relationship by letting the generals and criminals go. While being concerned about good relations, impunity in Indonesia for crimes committed should not be allowed. **We should seriously look at formal options and disallow impunity. Non-formal options should be seen as complimentary to other formal options but not as an alternative.**

11.2 The Right to Reparations under International Law and in the Context of East Timor

The purpose of this briefing paper is to identify the legal principles to which the concept of reparations is subject and the practical issues which need to be addressed by Timor Leste if it is to pursue reparations in accordance with international law. It should be noted that this paper only considers the right to reparations in an international context. Consequently it will not address the issue of possible civil actions (either individually or as class actions) in the courts of Timor Leste or in the courts of any other national jurisdiction.

1. Introduction

It is a well established principle of international law, and a corollary of the legal doctrine of state responsibility, that states are obliged to provide reparations for any harm or damage caused by a wrongful act or omission on the part of that state². Not only is this a fundamental principle of international law but it has also been recognised as a basic standard in any open and democratic society in which there is respect for the rule of law³. It is consequently a right which has been recognised under customary international law, numerous treaties and by various international and national judicial bodies and which has been codified by way of the the *Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*⁴.

² *Factory at Chorzow*, Jurisdiction, Judgement No. 8, 1927, P.C.I.J., Series A, no. 17, p. 29

³ Council of Europe, Resolution 78 (8) of the Committee of Ministers, cited by Meleander, G., "Article 8", in Eide et al. (eds.), *The Universal Declaration of Human Rights: A Commentary*, Scandinavian University Press (1992), p.143; *Blake v. Guatemala (Reparations)*, para.63; See also *Castillo Paez v. Peru*, (1997) 34 Inter-Am. Ct. H.R. (ser. C.), paras. 82, 83; *Suárez Rosero v. Ecuador*, (1998) 375 Inter-Am. Ct. H.R. (1985) 35 Inter-Am. Ct. H.R. (ser. C.) para 65; *Peru (Reparations)*, judgment of 27 November 1998, para. 169; *Castillo Paez v. Peru (Reparations)*, judgement of 27 November 1998, para. 106.

⁴ van Boven, T, 1996: *Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law*, prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117, U.N. Doc. E/CN.4/Sub.2/1996/17, 24 May 1996

2. Wrongdoing

There is no *legal right* to reparations in the absence of wrongdoing by another state or agents of that state. Strictly speaking, as a principle of the international law of state responsibility, it is therefore necessary to prove to an objective legal standard the causal connection between the wrongful state acts or omissions and the harm suffered. The forum for doing so would, theoretically and ideally, be the International Court of Justice⁵. For example, the state of Bosnia-Herzegovina commenced proceedings against Yugoslavia in the ICJ in 1993 seeking reparations for the acts of genocide and destruction perpetrated by Yugoslavia in the 90's. Other examples include the International Criminal Court (section 75 of whose Statute authorises reparations orders) or by way of an ad hoc court of arbitration agreed upon by the state parties.

Nevertheless, it needs to be emphasised that the international legal system has not reached a stage where states' rights and obligations are determined conclusively by independent international judicial institutions – that is, within legal limits, states remain free to pursue their own national objectives by diplomatic means⁶. Consequently, although as a matter of international law it is necessary to prove wrongdoing to receive reparations, in practice it is frequently possible to negotiate a reparations regime without the need for recourse to the courts or other formal international institutions. That being so, it remains open to Timor Leste to pursue a reparations package through diplomacy without the need to establish wrongdoing – although it must again be stressed that in this case reparations *will not be as of right*.

In short, diplomatic initiatives and international multilateral funding would be a lot less formal, quicker and more flexible means of seeking reparations than through formal international courts or institutions. These formal international processes will not be dealt with here for the reason that they will only become relevant in the event that an international tribunal or other quasi-judicial body is identified by Timor Leste as the best way of securing reparations.

3. Content of Reparations

Although the obligation for states to provide reparations in the event of proven wrongdoing is universally accepted there are differing interpretations of this requirement. It is nevertheless generally agreed that the right to reparations consists of the following: restitution; compensation; rehabilitation; satisfaction and guarantees of non-repetition⁷. Although not clear, it is arguable that these individual remedies are not mutually exclusive – for example, it may be possible to receive compensation in addition to measures of satisfaction⁸.

Restitution

The requirement to give restitution can be satisfied by any measures which restore the victim to the situation which they occupied prior to the act of wrongdoing (for example, return and restoration of foreign assets unlawfully expropriated by another state). Restitution would not be appropriate for East Timor given the widespread and systematic destruction of 1999 and it would consequently be near-impossible to restore the country's infrastructure and facilities nor would it be necessarily desirable – new institutions and infrastructure have been established in accordance with East Timor's status as a new, sovereign nation.

⁵ See Art. 36(2)(d) of the *Statute of the International Court of Justice*, which brings the issue of reparations within the courts' jurisdiction.

⁶ According to Brownlie "[i]n both national and international legal history, the mature judicial process develops out of relatively informal administrative and political procedures. International practice has long included negotiation...and mediation as informal methods of settling disputes": Brownlie, Ian, *Principles of Public International Law* (6th ed.), at 672.

⁷ van Boven, Revised set of basic principles and guidelines, at 2.

⁸ Brownlie, at 445

Compensation

Compensation refers to the right of the victim to receive money equivalent to the damage which they have suffered. The amount of compensation payable is determined according to usual legal concepts applied to the calculation of damages, for example, ensuring that there is a connection between the amount claimed and the act or omission in question. The scale of compensation will also be affected by the particular nature of the breach. For example, although the actual damages may in reality be the same, it is suggested that there will be a higher amount of compensation payable in respect of unlawful acts *intentionally* committed than for a *negligent* omission⁹.

Rehabilitation

The concept of rehabilitation refers to the requirement to provide general medical care, including psychological and psychiatric treatment, to victims of wrongful acts.

Satisfaction

Satisfaction is a broad measure defined as any step which the guilty party is required to take under customary international law or pursuant to an agreement with the other parties to the dispute other than restitution or compensation. The remedy of satisfaction is usually constituted by an apology or acknowledgement of wrongdoing by the guilty party (for example, erection of memorials, holding days of commemoration); punishment of the individuals responsible for the wrongdoing; taking steps to ensure that further unlawful acts of a similar nature do not recur in the future¹⁰. These steps can be adopted collectively if necessary. The measures of satisfaction must be in proportion to the injury and not take a form which is humiliating to the responsible party.

4. International Precedents for Reparations

International reparations systems can take numerous forms, reflecting the flexibility of the international diplomacy and negotiations on which they are often based. However, as explained in section 2, reparations are generally obtained either through:

- Formal judicial/quasi-judicial processes; or
- International negotiation and agreement.

The establishment of an international tribunal to prosecute crimes against humanity committed in Timor Leste would provide the opportunity to incorporate provisions for reparations in its founding statute. The scope of the tribunal's mandate will largely determine the nature of reparations payable and by whom, if anyone. As mentioned above, section 75 of the ICC Statute is a good example. It will of course be very difficult to negotiate for the establishment of an international tribunal and there are arguably easier means of seeking reparations.

In the event that reparations are pursued (if at all) through international agreement, it is clear that the primary issue for Timor Leste will be the negotiation and sourcing of funding for those reparations.

According to the International Centre for Transitional Justice, there are two main financial models for financing reparations¹¹. Firstly, reparations can be administered by way of a specially-created ad hoc fund financed through international resources, taxes, private sources, the sale of state assets, or the recovery of assets from perpetrators.

⁹ Brownlie, at 447.

¹⁰ Ibid, at 444.

¹¹ International Development Research Centre & International Centre for Transitional Justice, Symposium Summary, *Repairing the Past: Reparations and Transition to Democracy – Perspectives from Policy, Practice and Academia*, Ottawa, 11-12 March 2004, at 6.

This model has either been tried or adopted in El Salvador¹², Guatemala, Haiti, Malawi, South Africa and Peru. These funds rely to a large extent on international donations although in respect of the above countries this has been of a modest level. This reparations model is said to be appropriate *where the class of victims is large and difficult to define and the domestic economy weak*.

The second principal alternative is for reparations to be financed through ‘direct line items’ in state budgets, whereby monies are channeled via the responsible ministry (eg. Ministry of Health for financing mental and physical health programs). This model has been adopted in Argentina, Brazil, and Chile. It should be noted however that those were countries in which the state itself had perpetrated the crimes against its own citizens and so then assumed financial responsibility for sourcing and distributing the funds. It is clear that the state of Timor Leste bears no responsibility for the acts of destruction committed in 1999 and so cannot be expected to provide reparations out of its already meagre budget. Therefore, the provision of reparations in this way would be inappropriate for Timor Leste.

It is clear then that if a reparations fund were established for East Timor it would have to be roughly along the lines of the first model. Given the impoverished state of the country it is difficult to imagine that the state would be able to contribute anything more than a token amount to the fund – that is, nearly all funds would have to come from international donors.

As mentioned previously, there are numerous precedents for the establishment of international reparations funds administered under the auspices of the United Nations¹³. These include a number of official UN compensation funds (for example, the UN Voluntary Fund for Indigenous Populations and the UN Voluntary Trust Fund on Contemporary Forms of Slavery) which administer compensation to specific classes of victims from a fund to which member states voluntarily contribute. These, however, need to be distinguished from the ad hoc international funds created in respect of specific countries or historical events. Examples of these include the South African President’s Fund, the Iran-United States Claims Tribunal Security Account and the Holocaust Settlement Fund. These funds were established respectively pursuant to domestic legislation, international agreement and domestic (US-based) litigation.

It would seem that if Timor Leste was to pursue internationally-funded reparations (in the absence of an adequately empowered international tribunal or on the basis that the government of Timor Leste was neither able nor willing to provide reparations for acts for which it was not responsible) it would either have to seek international multilateral funding from appropriate target countries or lobby the United Nations for the establishment and financing of a UN-administered fund.

5. Reparations for Timor Leste: Issues for Discussion

The following critical issues need to be addressed when considering the question of reparations for Timor Leste:

- Is this an option which should be pursued, either on its own, in conjunction with other mechanisms relating to the serious crimes process, or at all?
- If pursued in conjunction with other mechanisms, what would the relationship be? For example, might the international community be willing to provide the funds required for reparations if Timor Leste agreed to withdraw support for future initiatives for the serious crimes process?
- How should the reparations be administered? By agreement with a bilateral donor country; by the Timor Leste government from its own funds; by way of an international fund established through multilateral aid; by way of a UN fund established through General Assembly resolution and donations from member states?
- What practical steps can be taken to lobby for the establishment of a fund and for donations to that fund?

¹² In the case of El Salvador the truth commission specifically recommended that international actors finance the reparations fund given the lack of national resources. This was, however, subsequently cited by the government as the reason for its inaction on the provision of reparations.

¹³ See generally *The ICC Trust Fund for Victims: Resource Materials on other Trust Funds and Compensation Mechanisms*, July 2002, Redress Publications (available online at www.redress.org/reports.html).

12. PRESENTATION ON THE PLAN OF ACTION BY THE EAST TIMOR NATIONAL ALLIANCE FOR AN INTERNATIONAL TRIBUNAL

Annual Strategic Plan: Heading towards an International Tribunal

Introduction

The National Alliance annual strategic plan came about during an annual meeting in Dare, held on 22-25 August 2004 which was attended by families of victims from districts, student organizations and NGOs. With the assistance of several guest speakers, namely Philip Rapoza (Special Panel), Cipriana (member of parliament - Fretlin), Aderito Soares (Human Rights Lawyer) and Aniceto Guterres (Chairman of the CAVR), the National Alliance analyzed the prevailing circumstances, including an analysis of international conditions and the internal conditions in East Timor which impact on the demand for establishing an International Tribunal and on the work of the National Alliance, examining the attitudes of those actors who have the potential to influence the establishment of an International Tribunal, both at the international level (such as the Security Council, the Secretary-General of the UN, the Human Rights Commission, and donor institutions) and at the national level (the stance and statements made recently by the political elite: President Xanana Gusmao, Ramos Horta, the East Timor Ambassador to Indonesia, the Parliament, the church, the courts, and certain political parties) in addition to the institutional circumstances of the National Alliance as a coalition of civil society organizations.

The National Alliance maintains its original demands, namely that an International Tribunal is a road to justice for victims and will end impunity for the perpetrators of crimes against humanity. Therefore the strategic plan and its associated activities constitute a strategic effort on behalf of the National Alliance to demand international and state responsibility for legal solutions towards the perpetrators of crimes against humanity in East Timor, 1975 - 1999, through the establishment of an International Tribunal.

The strategic plan is split into three parts in accordance with the intended goals of the National Alliance:

- A campaign at international and national levels
- Support members of the alliance, with priority given to victims
- Strengthen National Alliance work mechanisms

This paper only covers part of the National Alliance strategic work plan.

STRATEGIC ISSUES	STRATEGIC ACTIONS	ACTIVITIES	TARGETS
1. Campaign a. International	<ul style="list-style-type: none"> Establish an alliance with victims in Indonesia 	<ul style="list-style-type: none"> Organise meetings with East Timorese and Indonesian victims 	
	<ul style="list-style-type: none"> Support acts of solidarity for victims of human rights abuses in Indonesia 	<ul style="list-style-type: none"> Acts of solidarity (urgent appeals, statements, demonstrations) 	
	<ul style="list-style-type: none"> Re-strengthen old human rights organizations networks 	<ul style="list-style-type: none"> Exchange information 	
	<ul style="list-style-type: none"> Demand the UN and the international community to establish a commission of experts to evaluate the serious crimes process in East Timor and the Human Rights Ad Hoc Tribunals in Jakarta 	<ul style="list-style-type: none"> Statements Lobby Open letters 	<ul style="list-style-type: none"> The UN Security Council The UN Secretary-General The UN Human Rights Commission International NGOs
	<ul style="list-style-type: none"> Strengthen the coordination between the National Alliance and several regional NGO focal points and those in Indonesia (APCET, KontraS, PBHI, etc) 	<ul style="list-style-type: none"> Update information Facilitate meetings 	<ul style="list-style-type: none"> APCET PBHI KontraS Asian Human Rights Commission (AHRC)
	<ul style="list-style-type: none"> Strengthen the socialization of information through publications, meetings and other mediums 	<ul style="list-style-type: none"> Publish brochures Meetings 	<ul style="list-style-type: none"> International NGO networks

	<ul style="list-style-type: none"> Lobby as part of efforts to strengthen relationships between NGOs, the government and donor nations 	<ul style="list-style-type: none"> Lobby 	<ul style="list-style-type: none"> The government of East Timor Government representatives from donor nations in East Timor
b. National	<ul style="list-style-type: none"> Get behind meetings for families of victims 1975 - 1999 	<ul style="list-style-type: none"> Regular meetings 	<ul style="list-style-type: none"> Families of victims and sympathizers
	<ul style="list-style-type: none"> Lobby the government and government institutions 	<ul style="list-style-type: none"> Lobby Audience Dialogue Invite them to participate in National Alliance activities, for instance inviting state officials to join in the commemoration of incidents of human rights violation in the districts, the Kraras massacre, the Santa Cruz massacre, etc 	<ul style="list-style-type: none"> National Parliament President Prime Minister Judicial institutions
	<ul style="list-style-type: none"> Strengthen work networks in ET 	<ul style="list-style-type: none"> Consolidation meetings 	<ul style="list-style-type: none"> Human Rights NGOs and NGOs related to women's issues
2. Supporting members	<ul style="list-style-type: none"> All members of the National Alliance have to support families of victims to be able to organize themselves 	<ul style="list-style-type: none"> Training to become advocacy facilitators Invite experts in justice issues and international tribunals to participate in workshops etc 	<ul style="list-style-type: none"> Members of the National Alliance
	<ul style="list-style-type: none"> Strengthen victims organizations at the grassroots level 	<ul style="list-style-type: none"> Training in becoming facilitators 	<ul style="list-style-type: none"> Members of the national alliance
	<ul style="list-style-type: none"> Alliance activities must reach remote areas 	<ul style="list-style-type: none"> Provide supporting media, programs, organize meetings, build capacity (briefing & 	<ul style="list-style-type: none"> Members of the national alliance Non-members

		advocacy training)	
	<ul style="list-style-type: none"> Strengthen the capacity of the members in terms of investigative methodology 	<ul style="list-style-type: none"> Investigative training and documentation 	<ul style="list-style-type: none"> Members of the national alliance
3. Work Mechanisms	<ul style="list-style-type: none"> Strengthen alliance management 	<ul style="list-style-type: none"> Strengthen alliance management 	<ul style="list-style-type: none"> Board and member representatives in the districts
	<ul style="list-style-type: none"> Improve communication patterns amongst members 	<ul style="list-style-type: none"> Build capacity (facilitators, methods of mass communications and self organization) 	<ul style="list-style-type: none"> Organisers Board
	<ul style="list-style-type: none"> Strengthen coordination and internal consolidation 	<ul style="list-style-type: none"> Routine meetings Annual meetings 	<ul style="list-style-type: none"> Board with the support of all members
	<ul style="list-style-type: none"> Set up internal policy: registration and resignation, board duties and functions, and administrative matters 	<ul style="list-style-type: none"> Formulating internal rules 	<ul style="list-style-type: none"> Planning team from the 2004 annual meeting Board
	<ul style="list-style-type: none"> Members must set aside time for alliance activities 	<ul style="list-style-type: none"> Lobby Set membership rules, for instance rotation systems in delegating organizational staff 	<ul style="list-style-type: none"> All members of the national alliance
	<ul style="list-style-type: none"> Regular meetings of the board 	<ul style="list-style-type: none"> Regular meetings 	<ul style="list-style-type: none"> Board

13. WORKSHOP GROUP DISCUSSIONS ON THE OPTIONS

13.1 Presentations by Workshop Groups

GROUP 1

We discussed the Special Panels, International Tribunal and CAVR.

An **International Tribunal** can judge the perpetrators of the violence. But there are many problems with the tribunal.

The **Special Panel** should continue its work, because if it does not the crimes of 1999 will remain unresolved. To continue it will need:

1. a new UN resolution
2. to give mandate to the Special Panel to extradite those from outside the country.

If Special Panels do not continue what will happen?

Special Panel has worked with the District courts but the competency is not the same. Dili District Court does not have the competency to judge the crimes of 1999.

This is a very weak system. The capacity of court actors would need to be increased.

Truth Commission: This concept is not yet clear. If this is an alternative to the international tribunal this is a big problem because it is not a legal solution.

CAVR: Increase its capacity to judge these crimes. This would be a problem.

GROUP 2

Already have the **Special Panels** but until now many cases are unresolved from 1999. Why is this? Because there is no cooperation between East Timor and Indonesia.

The Special Panels should continue. But the mandate will have to be changed to give the panels power to extradite people from Indonesia. It will also have to work with the government of Indonesia and government of East Timor.

After May 2005 we recommend that an **International Tribunal** is set up.

Commission of Experts: We think the commissioners should come, but they should come before the UN mission has ended.

International Truth Commission: This Commission is a new idea. There has already been a CAVR. We already know what happened with the CAVR. But the "Truth" is a relative concept. After it hands down its report everyone will wash their hands of it.

GROUP 3

Special Panel: Mandate will finish in May 2005, but had not adequately treated serious crimes. eg. Wiranto case. This is a problem between the government of East Timor and the UN.

International Truth Commission: This is the mechanism which is more relevant to try the crimes of 1999. Can become an educational place to show that when people commit crimes they will have to face justice there. In the future hopefully this will reduce violations of justice.

Truth Commission: We think this is a political problem. But it is not relevant to justice. It is a problem of international relations.

CAVR: CAVR has been a good way. Can its work be extended to serious crimes? So far it has only been looking at small problems, not big ones.

Reparations: It is relative. But for the suspects, have to look at whether they can pay.

Then we looked at what was relevant for East Timor now.

Of all the solutions, we thought the **international tribunal** was the most relevant, because it can give justice. The Ad Hoc Tribunals and Special Panels have been inconsistent. If there is only a Truth Commission you may forget what actually happened here. We must look at the competency of the countries and the matter of extradition.

GROUP 4

If a **Commission of Experts** comes to East Timor we would be ready to meet them, because they would have two missions – to look at the work of the Ad Hoc Tribunal and the work of the Special Panel's and make recommendations to the UN.

If the **International Tribunal** is not set up in East Timor we believe that East Timor would not have the power to catch the people who are still in Indonesia. Need to work with Interpol. An International Tribunal is important because it is based in law. The people who do crimes can be judged in a tribunal and the victims must find justice.

The people who committed crimes from 1975 – 99 can be judged by the **Special Panel**. Then lighter cases could be processed in the district courts, and heavier cases could be tried in the Special Panels, especially crimes which occurred in 1999. In the Special Panels we can't just have Timorese judges, need Timorese judges too. In May 2005 the UN mission will be over. So then what will the UN do for us? They are not ready to resolve our problems.

CAVR: CAVR resolves small problems. In their final report they should define the cases which fall into the serious crimes category. These cases should be resolved through an international tribunal.

GROUP 5

Future of Special Panels: There was agreement that a special serious crimes jurisdiction should continue but it should not be by way of an international institution but a national institution. It should continue as a mixed court in the sense it would have international and national judges in the way that is provided under the constitution and UNTAET regulations at present. But if international judges continue to work with the serious crimes jurisdiction it should be a well organized and coordinated system by which international judges actively mentor Timorese judges to build their skills. There should be improved capacity building programs for prosecutors and defence. The number of international judges could be changed in the future by way of letters of

amendment, but it is important to bear in mind that there are constitutional problems with having an all Timorese serious crimes jurisdiction. But as Judge Rapoza argued yesterday there are strong arguments to say that any reduction in the number of international judges or the removal of international judges could be done via means of the constitution.

How should the serious crimes jurisdiction continue to deal with current cases and future cases? The first step should be a complete review of the process of prosecutions and the prioritization of cases. Most important is to continue with cases that have already been started but, because resources are not sufficient, have not continued. If those investigations reveal sufficient evidence that will lead to proper prosecutions. There also needs to be proper investigation into incidents which have not been investigated. Eg. There have been very few investigations in the districts of Same and Ermera.

It is also important to consider the CAVR process, because cannot only look at the serious crimes.

So serious crimes jurisdiction should continue, and with cases commenced or partially investigated.

International Tribunal: This should go ahead. This is obviously a big issue in the relationship between the Indonesian and East Timorese governments. But we do not think pursuing a tribunal should necessarily worsen those relationships.

As Aderito said this morning, Indonesia seems to be moving in the direction of a rule of law. So the East Timorese government and other international governments can suggest to Indonesia that the movement in the direction of an international Tribunal is a development in the direction of the path to the rule of law. So there are a number of diplomatic ways in which the issue of an international tribunal could be raised.

In terms of the mandate, should perhaps focus on top 10 most senior defendants responsible for crimes against Timor. It is not ideal but that is probably the best way of negotiating for an international tribunal. The important point is that the mandate of a tribunal will partly determine how successful the government is in pushing for its establishment.

We also feel strongly that any costs of setting up an international tribunal should not be the main factor. Governments all around the world spend millions of dollars on armaments on a daily basis.

We need an international commission of experts here first to review the trials in Timor and in Jakarta, and we see that as the first step towards an international tribunal.

So East Timor should actively lobby for its establishment if that is what East Timor wants.

International Truth Commission: As others have said it is still not clear what is meant by this. It seems to be something that will not involve a judicial process and will not involve a finding of guilt against any suspects. Any such commission should also not prevent the operation of a serious crimes panel. This commission may be beneficial in that it may finally mean senior Indonesian military will admit responsibility for the crimes committed in 1999. And that would lead to more healthy relations between East Timor and Indonesia. There is a serious risk that if East Timor and Indonesia agree to this commission, that the Indonesian government may well use tactics to avoid admitting responsibility, and once this commission is established that there would

never be more investigations of the crimes of 1999. So at the end of the day there needs to be an official position and model on what this commission would involve.

CAVR: We agreed the CAVR should continue its work. There are a lot of crimes in the districts which have not been addressed. If it did continue it could not continue properly unless it was with a serious crimes jurisdiction. Although the CAVR should continue it should continue to consider the smaller serious crimes it has considered until now. We do not think it is appropriate that very serious crimes should be considered by CAVR.

Reparations: This option could be pursued in addition to all or any of these other options. In order to provide reparations the money has to come from somewhere. East Timor obviously does not have enough to distribute reparations. Although it is highly unlikely the Indonesian government would provide money for reparations, there are examples of other countries in the world that have experienced civil war, to which international donors have provided funds. So there is a possibility for the government of East Timor to negotiate with international donors for the establishment of a reparations fund for East Timor.

We did not come up with any action plan further than that. But it was clear that there was strong support for the **continuation of the Special Panels and the establishment of an International Tribunal.**

13.2 Debate On Conclusions From Workshop Groups

All groups said we need an International Tribunal, but that there are many obstacles. We also have to be realistic.

The Ad Hoc Tribunals in Jakarta were not neutral.

We must stop impunity.

The International Tribunal cannot be set up in Indonesia.

Obstacles include:

- the government's position is not yet clear
- the tribunal would have to be set up by a resolution of the Security Council
- problems of finance
- problems in the relationship between East Timor and Indonesia

Continue the Special Panels with international people

The UN special panel is supposed to end in May 2005.

Have international and national judges working together to help increase the capacity of the East Timorese judges.

The Special Panels should continue as an organ of the UN only, not the East Timorese government.

Need a resolution from the UN to continue.

Look at the East Timor constitution – need to keep this in mind if making changes to the Special Panels.

If continue to work like this can't catch the main perpetrators, so some people said it is no longer necessary.

Increase the power of the Special Panels through Interpol's work so that the Panels can catch the main perpetrators.

Have to also look at the cost of financing the international judges for the Special Panels.

Could perhaps continue to have Special Panels run by the East Timorese government but these would need help from internationals for capacity building.

Commission of Experts

All groups agreed with having this Commission. The Commission must be established before UNMISSET finishes. It is important that the Commission of Experts meets with civil society and victims, and must go to the districts to meet with people in the districts.

International Truth Commission

Some groups said this was needed, some groups said it was not needed.

This concept is not yet clear, and the mandate of such a Commission is not yet clear.

Some groups said this Commission was not needed because there is already a list of crimes which occurred in East Timor.

CAVR

CAVR cannot look at serious crimes. It should continue with the process of PRK (reconciliation).

We need to look at the final CAVR report. CAVR is looking for the truth.

If the Special Panels do not continue after May 2005, should CAVR include cases of serious crimes? If there is no longer a serious crimes process can the PRK also include serious crimes?

Participants in Conference call for Establishment of International Tribunal

Participants in JSMP's Conference, Justice for Timor Leste: Civil Society Strategic Planning for the Future of Serious Crimes, agreed that the most important mechanism of justice for past international crimes in Timor Leste is an International Tribunal.

Over 200 people participated in the Conference on 23 – 24 September. Participants included victims and their families from the districts, members of government, members of Parliament, jurists from the Special Panels for Serious Crimes and district courts, members of the diplomatic community and UN agencies.

The Conference was addressed by SRSB Hasegawa, Vice-Minister for Foreign Affairs and Cooperation Olimpio Branco, the US Ambassador Grover Rees, the Chair of the CAVR Aniceto Guterres, the President's Chief of Staff Agio Pereira, judges from the Special Panels for Serious Crimes and NGOs and academics.

Participants particularly welcomed the SRSB's statement that "prosecuting Generals who had committed serious crimes should not be allowed to let go simply because of the fear of jeopardizing the relationship of countries in which they live".

After the formal presentations the participants split into workshop groups to discuss the options for the future of serious crimes. Participants agreed on the following statement:

Participants agreed that the most important mechanism of justice for past international crimes in Timor Leste is an International Tribunal. This was agreed to by all of the groups discussing the various issues at the conference. It was agreed that any other options are only supported in the knowledge that an International Tribunal will be strived for and that these other options are complementary to the establishment of an International Tribunal.

The cost of an International Tribunal was acknowledged by the participants in the Conference, but these costs are seen as secondary to the overwhelming need for formal justice in a credible international institution. It is hoped that this process is not an issue of contention for governments of Timor Leste and Indonesia. But is a process that is undertaken by the international community and therefore allows governments to continue building their strong relationship and also allows for both countries to follow and demonstrate the need for adherence to the rule of law and to stop impunity for serious crimes.

The need for, and imminent arrival of, a Commission of Experts was supported unanimously. It was agreed that the Commission of Experts is encouraged to come and assess the situations of the Special Panels for Serious Crimes and Ad Hoc Panels in Jakarta but must have within its frame of reference the International Tribunal. The conference welcomed the support from the President's office and the Office of the Ministry of Foreign Affairs and Cooperation for this Commission to assess the situation of Serious Crimes in Timor Leste and the participants of the conference welcome providing information to the Commission of Experts.

As a complementary process to the International Tribunal, the process of the Special Panels for Serious Crimes should continue and possible consideration should be given to the options of the Special Panels for Serious Crimes continuing with the strength of international actors, and preferably through a UN process. Consideration must be given urgently to cases in which

investigations have not been completed or trials that will not be completed by May 2005, to ensure the continued stability of the justice process in Timor Leste. Again, this process would not prejudice an International Tribunal and all possible efforts, international and bi-lateral agreements, should be made to try those currently indicted and residing outside of East Timor.

Participants thought that more information about the International Truth Commission is required before a possible assessment of this option can be made. Some participants did not agree with this option because they did not think it was necessary. The establishment of such an International Truth Commission as a quasi or non-judicial body was also considered as possibly unconstitutional.

The possibility of continuing the CAVR process was widely supported but expanding the CAVR mandate to include more serious crimes was not supported.

Civil Society, and particularly the families of victims, welcome the opportunity to discuss the above options with the Commission of Experts and the government of Timor Leste. It was proposed at the conference that a National Dialogue be held to discuss the issue of Serious Crimes in Timor Leste.

It was decided that the papers from the Conference, and the individual comments as recorded will be made available to the Commission of Experts when formed. The Conference declaration will be sent to the governments of Timor Leste, Indonesia, the UN, CAVR, and speakers at the conference.