



The Judicial System Monitoring Programme's  
Submission to the United Nation's Commission of Experts

*'The United Nations and its member states are obligated to see that justice is done for the crimes against humanity committed in Timor Leste. It is time for a more determined, direct international role in ensuring accountability through the creation of an international tribunal.'*

Dili, Timor Leste, April 6<sup>th</sup> 2005

## 1. Introduction

Following the widespread and flagrant violations of human rights and international humanitarian law committed in Timor Leste from the illegal invasion and occupation by Indonesia in 1975 and leading up to and following the referendum for independence in August 1999, the need for justice was clearly and universally acknowledged.

The Security Council in Resolution 1264 of 15 September 1999 demanded that those responsible be brought to justice. On 25 October 1999 the Security Council adopted Resolution 1272 in relation to Timor Leste condemning “all violence and acts in support of violence in Timor Leste” and further, and importantly for the purposes of the Commission’s role, demanded that “those responsible for such violence be brought to justice”. The Security Council stressed “that persons committing such violations bear individual responsibility”.

The Secretary General wrote, on 31 January 2000, “I have also been strongly assured by [the Indonesian] Foreign Minister Alwi Shihab of the [Indonesian] Government's determination that there will be no impunity for those responsible”.<sup>1</sup> The United Nations High Commission of Human Rights (UNHCHR), at a special session convened in September 1999, adopted a resolution affirming that the international community would exert every effort to ensure those responsible for the violence are held accountable.<sup>2</sup> The UN's International Commission of Inquiry on Timor Leste (ICIET) and three UN Special Rapporteurs in late 1999 clearly documented the systematic and widespread intimidation and terror, destruction of property, violence against women, forced displacement, and attempts to destroy evidence.<sup>3</sup>

Negotiations between the UN, Indonesia and Timor Leste led to the establishment of the Ad Hoc Human Rights Court on Timor Leste in Jakarta (the Ad Hoc Tribunal) and the Special Panels for Serious Crimes (SPSC). Both these two institutions have unequivocally failed to fulfill their mandates. The processes of the Ad Hoc Tribunal were highly irregular and critically flawed. The SPSC has been under-resourced and starved of international political support and cooperation.

The United Nations and its member states are obligated to see that justice is done for the crimes against humanity committed in Timor Leste. It is time for a more determined, direct international role in ensuring accountability through the creation of an international tribunal.

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<sup>1</sup> See Letters dated 31 January 2000 from the Secretary-General Addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission On Human Rights

<sup>2</sup> The UN CHR in its special session of 23-24 September 1999 affirmed “*that all persons who commit or authorize violations of human rights or international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to ensure that those responsible are brought to justice, while affirming that primary responsibility for bringing perpetrators to justice rests with national judicial systems.*” Resolution adopted by the Special Session on Timor Leste. UN Doc. E/CN.4/S-4/L.1/Rev.1, para 4.

<sup>3</sup> See Amnesty International and JSMP report “Indonesia, Justice for Timor Leste: the Way Forward”, p. 7

## **2. Failure of the Ad Hoc Tribunal**

The Ad Hoc Tribunal was established in 2000 pursuant to Indonesian Act No. 26/2000 on the Human Rights Tribunal. According to section 4 the Ad Hoc Tribunal has jurisdiction to investigate and determine cases in which there have been a serious violation of human rights. In the case of Timor Leste this is only for violations which took place between April and September 1999. Human rights violations are defined as being the crimes of genocide and crimes against humanity according to section 7. The Ad Hoc Tribunal commenced its work on 14 March 2002.

Of the 18 persons indicted under the auspices of the Ad Hoc Tribunal, 12 were acquitted and 6 convicted at first instance. All of the convicted suspects have appealed, either to the Court of Appeal or to the Supreme Court, the final court of review in Indonesia. Five of these convictions have been overturned. The sixth appellant, Eurico Guterres, remains free pending determination of his appeal by the Supreme Court. **Only one of the suspects tried by the Jakarta Tribunal has been convicted and there is a strong possibility that this will be overturned.**

There is overwhelming evidence indicating that the Ad Hoc Tribunal either failed in or was prevented from discharging its responsibilities in accordance with international human rights standards:<sup>4</sup>

**Limited Scope.** The Indonesian authorities investigated only some of the crimes recommended for prosecution by the Commission of Inquiry on Timor Leste (KPP HAM). This has meant that a number of high level military leaders, alleged by KPP HAM to bear primary responsibility for crimes committed in 1999, have escaped investigation and indictment.

**Prosecutorial process seriously flawed.** The indictments on which the prosecutions were based were weak and fundamentally flawed, failing to take into account the organized, systematic nature of the violence of 1999 and prosecute defendants for more serious charges supported by the available evidence. Indictments were often prosecuted in the manner of ordinary criminal charges and not with the urgency or the importance which cases of this nature demand<sup>5</sup>. The prosecution failed to utilize available evidence which would have strengthened their cases and significantly increased the possibility of convictions.

**Inadequate resources.** Both prosecutors and judges were severely under-resourced, particularly with respect to critical information technologies. Defendants, on the other hand, were invariably better resourced, with far more lawyers available for their defense in comparison with the prosecution.

**Judicial incompetence and lack of independence.** The judges were not familiar with applicable principles of international law. Judges often failed to rigorously and properly apply the relevant legal principles which inevitably affected the quality and reliability of the decision-making. The secretive process by which judges were appointed also raises questions as to whether there were any political appointments to the Ad Hoc Tribunal and whether this impacted on their ability to impartially preside over politically-sensitive cases.

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<sup>4</sup> See generally *Joint Amnesty International-JSMP Report*, 'Justice for Timor Leste: The Way Forward'; JSMP Press Release, 'Court in Jakarta Completes Theatrical Performance', 6 August 2003; David Cohen, *Intended to Fail: the Trials before the Ad Hoc Human Rights Court in Jakarta*, International Centre for Transitional Justice, August 2003.

<sup>5</sup> This is not surprising given that, according to section 104.1 of Act No. 39/1999 on Human Rights, ordinary rules of criminal procedure are applicable to the prosecution of serious human rights violations.

### **3. Failure of the Special Panels for Serious Crimes**

Section 2 of UNTAET Regulation 2000/15 provides the SPSC with exclusive jurisdiction with respect to war crimes, crimes against humanity, genocide, murder, sexual offences and torture but, in the case of the latter three crimes, only if committed between 1 January and 25 October 1999. Jurisdiction lies in respect of the other crimes regardless of where and when they were committed. The SPSC were therefore conferred with broad jurisdiction, in accordance with principles of international criminal law, to enable them to prosecute perpetrators of crimes committed in relation to the Indonesian occupation of Timor Leste. The SPSC are consequently empowered to bring to justice those responsible for perpetrating serious crimes committed in Timor Leste during the entire period of the occupation as well as in 1999.

#### **Statistical Summation of Performance**

Number of Indictments Issued	95
Number of Persons Indicted	391
Number of Indicted Persons Beyond Jurisdiction	303
Number of Persons Processed by CAVR but Recommended for Indictment	84
Number of Convictions	75
Number of Active Indictments Pending Trial/Decision	2
Number of Acquittals	3
Approximate number of murder victims in 1999	1400

The vast majority of indicted suspects were never brought before the court for trial. In addition, JSMP is aware that 84 persons sought amnesty under the Commission of Truth, Reception and Reconciliation process, however, as their confessions related to serious crimes they were recommended for prosecution by the SPSC. As far as JSMP is aware, none of these suspects have been indicted. Furthermore, JSMP is aware that a significant number of the serious crimes within the jurisdiction of the SPSC have not even been *investigated* by the Serious Crimes Unit, with scant regard paid to the numerous offences committed prior to 1999<sup>6</sup>. The SCU has therefore identified only a small proportion of suspects from the potential total which was within its jurisdiction to investigate and has in turn only been able to prosecute approximately 25% of this reduced number of suspects of which all were low level militia or Indonesian military personnel.

Consequently, despite the number of positive features of the SPSC's work, they have been unable to properly discharge their mandate and satisfy the demands imposed by Security Council Resolution 1272:

**More than 75% of indicted suspects were not tried** for the reason that they were beyond the SPSC jurisdiction. Most of these suspects were senior Indonesian military officers alleged to bear primary command responsibility (the Ad Hoc Tribunal failed to prosecute any of these individuals, either at all or to a standard which accords with applicable international law.)

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<sup>6</sup> JSMP Press Release, 'UN Sacrifices Justice for Dollars', 6 May 2004. There are no statistics available with respect to these investigations; however, JSMP understands that the Serious Crimes Unit will be presenting statistics on the number and nature of its investigations to the Commission of Experts. JSMP has been informed that the SCU has completed approximately 500 investigations.

Furthermore, the East Timorese government fearful of the political costs of pursuing senior Indonesians has not supported the SPSC and interfered in the prosecution process<sup>7</sup>.

**Functional weaknesses in the quality of trials.** First, the SPSC have at times relied on flawed judicial reasoning and application of laws in reaching its decisions, for example in relation to acceptance of guilty pleas<sup>8</sup>, jurisdiction to withdraw indictments<sup>9</sup> and pre-trial detention decisions<sup>10</sup>. Second, equality of arms was doubtful in some cases, with defense lawyers denied the administrative support accorded the prosecution and, at times, demonstrating limited experience or expertise in international criminal law<sup>11</sup>. Third, interpreter services were frequently absent or inadequate.

**The avenues of appeal were unsatisfactory**<sup>12</sup>. For example, the Court of Appeal was not functioning for a period of 18 months prior to July 2003, which seriously undermined the right of suspects to appeal<sup>13</sup>. Furthermore, the Court of Appeal's reasoning and application of legal principle, particularly in relation to international law, has on a number of occasions been significantly flawed<sup>14</sup>.

**Serious lack of resources**<sup>15</sup>, including a lack of judges and court personnel together with basic court equipment such as computers and legal resources. This was particularly acute in the early stages of the SPSC operations and with the downsizing of the Serious Crimes Unit as of August 2003<sup>16</sup>. This had a significant impact not only on the quality of trials but also the speed with which they were conducted<sup>17</sup>.

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<sup>7</sup> *JSMP Press Release*, 'The Wiranto Warrant: Political Interference in the Serious Crimes Process', 22 June 2004; Katzenstein, Suzanne, 'Hybrid Tribunals: Searching for Justice in East Timor', 16 *Harvard Human Rights Journal*, 245

<sup>8</sup> *Justice Update*, No 12/2004, 'Seven Convicted of Crimes Against Humanity'; *JSMP Report*, 'The Lolotoe Case: a Small Step Forward'.

<sup>9</sup> See for example *Justice Update*, No 2/2005, 'Aprecio Guterres – Special Panels for Serious Crimes'

<sup>10</sup> *JSMP Report*, 'Justice for Timor Leste: The Way Forward'.

<sup>11</sup> *JSMP Report*, 'The Lolotoe Case: a Small Step Forward', July 2004.

<sup>12</sup> *JSMP Report*, 'Justice for Timor Leste: The Way Forward'.

<sup>13</sup> *JSMP Press Release*, 'East Timor urgently needs Court of Appeal to guarantee fundamental human rights', 14 October 2002.

<sup>14</sup> *JSMP Press Release*, 'Court of Appeal decision raises National and International Concern', 17 July 2003; See also *JSMP Report*, 'Report on the Court of Appeal Decision in the Case of Armando dos Santos', August 2003; *JSMP Report*, 'Overview of the Jurisprudence of the Court of Appeal in its First Year of Operation since East Timor's Independence', August 2004.

<sup>15</sup> *JSMP Report*, 'Justice for Timor Leste: The Way Forward'

<sup>16</sup> *JSMP Report*, 'The Future of the Serious Crimes Unit', January 2004.

<sup>17</sup> *JSMP Press Release*, 'East Timor Special Panels for Serious Crimes: More Postponements than Hearings', 11 October 2002; *JSMP Press Release*, 'More Delays Hamper Lolotoe Trial', 28 October 2002, *JSMP Report*, 'Justice for Timor Leste: the Way Forward'.

#### **4. Implications - Impunity and its Consequences**

The direct consequence of the withdrawal of the United Nations mission without any other additional measures is very clear: those who bear the primary responsibility for crimes committed in Timor Leste during 1999 will not be held to account for their acts. Thousands of victims will have no recourse to justice.

**International obligations.** The United Nations has a clear obligation to ensure accountability for perpetrators of serious crimes committed in Timor Leste. As noted above in resolution 1272 of 25 October 1999, the UN Security Council condemned all acts of violence in Timor Leste, demanded that those responsible for such acts be brought to justice stressing that those people who committed those crimes bear individual responsibility, and recognized its responsibility to ensure that justice for those crimes was delivered.

The Secretary General in his cover letter accompanying release of the international inquiry report in January 2000, announced that he would "closely monitor progress" of the response to the crimes in Timor Leste to see that it is a "credible response in accordance with international human rights principles." Inaction would seriously compromise UN credibility and undermine the authority of the Security Council.

**Continuing the culture of impunity.** Only a handful of alleged perpetrators have appeared before the SPSC. It's absolutely necessary to continue to conduct full and transparent investigations into all allegations of human rights violations by a credible and impartial mechanism, establishing the identity of the perpetrators and those who have supported and aided them, using and putting laws vigorously into effect.

Until now, Timor Leste has an unimpressive record in bringing to justice those responsible for gross human rights violations: only a handful of alleged perpetrators have been held to account. The only solution to an alarming pattern of human rights violations is to ensure that perpetrators are held accountable through proper judicial process.

**No future plans** post 20 May have yet been publicly articulated. Of the cases which have already been the subject of investigations, 303 people are under indictment but out of jurisdiction. They may return due to family ties, however, the likelihood of them facing trial will decrease after 20 May. Therefore, some questions remain unanswered: which court will have jurisdiction to try those cases? Is there effective judicial capacity to try them? Who will try them? Will the alleged perpetrators be held in jail? In case of incapacity to try those cases and subsequent delay of the trial, how long will the perpetrators be held in jail? These are some issues that need to be seriously addressed not only by the East Timorese judicial system, but also by the international community.

The Serious Crimes Unit completed all investigations as of 30 November 2004 and no more indictments have been filed since. The SCU has only two cases still pending in the SPSC and has started its handover process. JSMP understands that all untried cases will be handed over to the National Prosecutor who does not have the capacity to prosecute those suspects in accordance with international standards.

**Continuing social trauma.** The failure of the Ad Hoc tribunal and the SPSC will affect the victims, their families and the community as a whole psychologically and sociologically. Without justice citizens have no sense of truth and no hope. Public confidence in the judicial system and in the rule of law will be affected. People's confidence in the state's capacity to deliver justice and establish the truth will be seriously affected. This is a critical factor of concern in an emerging democracy. The potential return of the perpetrators to the villages will be a source of social tension and conflict.

**Regional political instability** will remain an issue in the absence of justice. Where there is no justice there can be no peace. It will convince many that they enjoy impunity to continue human rights abuses, and it will convince victims, particularly those who are in areas where rising tension threaten stability, that the state cannot protect them. As recent events in Aceh, West Papua and Maluku reveal, the legacy of impunity for Indonesia's security forces is not only the repetition of old patterns of human rights violations, but also the widespread atmosphere of mistrust and fear. There is a need for accountability not only in Timor Leste but also in Indonesia, too. Indonesia and Timor Leste are currently consolidating democratic developments. Adherence to, and development of, the rule of law are critical components of this process requiring a higher degree of international engagement. Ending impunity for perpetrators of human rights abuses in both Indonesia and Timor Leste is in itself a fundamental step in the development of the rule of law in these countries.

## **5. Recommendations**

**5.1 An INTERNATIONAL TRIBUNAL is the only mechanism** to bring to justice those most responsible for the international crimes committed in Timor Leste from 1974 – 1999. Only an international tribunal will have the authority to actually try and punish those who committed crimes against humanity or had command responsibility for these crimes.

**An international tribunal was recommended by the International Commission of Inquiry on Timor Leste (ICIET)** in its report of January 31, 2000.<sup>18</sup> Doubts about the capacity or willingness of Indonesia to bring the perpetrators to justice led both ICET and the three UN Special Rapporteurs to recommend the establishment of an international tribunal to bring to justice the perpetrators.<sup>19</sup> It was put on hold at the request of the Indonesian government while it pursued justice in its own courts.

While the establishment of an international tribunal was not foreclosed, it was removed from the agenda pending the outcome of the Indonesian process. The UN Secretary-General personally conveyed this message to the Indonesian government during a visit to Jakarta in February 2000. At the time the Indonesian government appeared to accept that failure to deliver justice through the national system would result in the establishment of an international tribunal.<sup>20</sup>

However, the results of the Ad Hoc Tribunal in Jakarta show that Indonesia was not serious about prosecuting the most senior culpable military and police officers, or even lower level suspects.

The Serious Crimes Unit and Special Panels for Serious Crimes have (although with some difficulty) carried out good investigations of some of these crimes, and tried a number of minor perpetrators. Although indictments have been issued by the SCU against some of the major perpetrators, the SPSC has not been able to try these people because they have remained outside of the SPSC's jurisdiction, and the political will has been lacking on the part of the East Timorese and Indonesian governments to allow them to be tried.

**Victims and civil society have also persistently called for an international tribunal** to ensure justice for Timor Leste. Participants in JSMP's Conference "Justice for Timor Leste: Civil Society Strategic Planning" 23 – 24 September 2004, declared that "the most important mechanism of justice for past international crimes in Timor Leste is an International Tribunal".

A number of different models of international tribunal are currently being applied by the international community to provide justice for past grave human rights violations in various settings. Experience shows that justice can never been delivered quickly or cheaply. It is essential, therefore, that a decision as to the model of international tribunal to apply in Timor

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<sup>18</sup> It has also been called for by: Human Right Watch see Human Rights Watch written statement to the Commission on Human Rights, Fifty-seventh session, 18 January 2001. The Report of the Commission on Human Rights on its Fourth Special Session, (Geneva, 23-24 September 1999) also "*Affirmed that all persons who commit or authorize violations of human rights or international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to ensure that those responsible are brought to justice, while affirming that the primary responsibility for bringing perpetrators to justice rests with national judicial systems.*"

<sup>19</sup> The three Special Rapporteurs recommended that: "*Unless, in a matter of months, the steps taken by the Government of Indonesia to investigate TNI involvement in the past year's atrocities bear fruit, both in the way of credible clarification of the facts and the bringing to justice of perpetrators – both directly and by virtue of command responsibility – the Security Council should consider the establishment of an international criminal tribunal for the purpose*" (para. 74.6).

<sup>20</sup> see Amnesty International and JSMP report "Indonesia, Justice for Timor Leste: the Way Forward", p. 9

Leste not be driven by budgetary factors or dictated by short term planning. Similarly, the integrity of the legal process should not be jeopardized by allowing international or national political factors to influence the decision.

**5.2 THE SPECIAL PANELS FOR SERIOUS CRIMES SHOULD CONTINUE** with the presence of international actors (judges, prosecutors and defense lawyers), and preferably through a UN process as a complementary process to the international tribunal. The SPSC should be provided by the UN Security Council with both the mandate and resources necessary to complete the investigations into all the crimes on which it is able to gather evidence and to bring to trial all of those suspects who it can feasibly apprehend.

This would require ongoing support from the international community. 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”.<sup>21</sup>

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.<sup>22</sup> However, the current composition of the Court of Appeal (at least for appeals from SPSC cases) needs to be changed as it is necessary to have judges hearing appeals in these cases who have studied and have a basic understanding of international law.<sup>23</sup>

**5.3 REPARATIONS should be paid to compensate the victims.** For states to provide reparations for any harm or damage caused by a wrongful act or omission on the part of that state is a well established principle of international law, and a corollary of the legal doctrine of state responsibility<sup>24</sup>. 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 law<sup>25</sup>. 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*<sup>26</sup>.

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;

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<sup>21</sup> See Section 22.1 of UNTAET Regulation 2000/15.

<sup>22</sup> See Section 22.2 of UNTAET Regulation 2000/15.

<sup>23</sup> See JSMP report “The Paulino de Jesus Decisions” for a discussion of the problems arising with appeals to the current Court of Appeal in serious crimes cases.

<sup>24</sup> *Factory at Chorzow*, Jurisdiction, Judgement No. 8, 1927, P.C.I.J., Series A, no. 17, p. 29

<sup>25</sup> 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)*, judgment of 27 November 1998, para. 106.

<sup>26</sup> 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

rehabilitation; satisfaction and guarantees of non-repetition<sup>27</sup>. 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 satisfaction<sup>28</sup>

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. Section 75 of the *Rome Statute* is a good example.

**Funds for reparations could 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. This model has either been tried or adopted in El Salvador<sup>29</sup>, 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, which is the case in Timor Leste.

**There are numerous precedents for the establishment of international reparations funds** administered under the auspices of the UN<sup>30</sup>. 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 UN for the establishment and financing of a UN-administered fund.

**It is clear that both the Ad Hoc Tribunal and the SPSC have failed to satisfy the demands of the Security Council, as represented by Resolutions 1264 and 1272, to bring to justice those responsible for human rights violations committed in Timor Leste. Only a properly empowered and resourced international tribunal will have the capacity to successfully ensure accountability for these crimes. The United Nations and its member states are obligated to see that justice is done for the crimes against humanity committed in Timor Leste.**

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<sup>27</sup> van Boven, Revised set of basic principles and guidelines, at 2.

<sup>28</sup> Brownlie, at 445

<sup>29</sup> 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.

<sup>30</sup> 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](http://www.redress.org/reports.html)).