

INTERFET DETAINEE MANAGEMENT UNIT IN EAST TIMOR



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"As far as the question of treatment of detainees is concerned, the conduct of INTERFET has been exemplary. The delegation met with detainees in conditions in which it could be confident that the detainees would have no fear of speaking frankly of any complaints as to their treatment. There were none. ICRC, which has full access, confirmed that it too had received no complaints from any of the detainees. The tone was set by the Force Commander who, especially in the beginning, established the pattern by personally visiting the detention area. The establishment of the detention-management team also acts as a safeguard against abuse (1)."

Introduction

In disrupted states, military forces involved in peace keeping and peace enforcement are often required to undertake a law and order role. This was the case with the International Force in East Timor (INTERFET) deployment after the Indonesian authorities withdrew from East Timor. This paper's aim is to briefly describe the legal regime put into place by INTERFET to deal with persons detained by INTERFET or UN Civilian Police.

To achieve this aim, the paper is divided into four parts: In order to deal with certain preliminary issues, Part I will outline the background of INTERFET's deployment and the law and order issues that gave rise to the creation of the Detainee Management Unit (DMU) on 21 October 1999. Part II will focus on the DMU by examining the Detainee Ordinance, the classes of detainees, and the process for dealing with the detainees. Part III will examine the Force Detention Centre (FDC) where persons other than members of INTERFET were detained and the Orders for the Force Detention Centres. Part IV will outline the process of handing-over to the Civil Judiciary for East Timor prior to the disbandment of the DMU on 12 January 2000.

Part I Background

The United Nations (UN) Security Council in Resolution 1246 (1999) (2), recalling the Agreement of 5 May 1999 between the: (1) Governments of Indonesia and Portugal on the question of East Timor; and (2) United Nations and the Governments of Indonesia and Portugal regarding the modalities for the consultation of the East Timorese through a direct ballot and security arrangements (3) decided to establish a United Nations Mission in East Timor (UNAMET) to "...organise and conduct a popular consultation...on the basis of a direct, secret and universal ballot, in order to ascertain whether the East Timorese people accept the proposed constitutional framework providing for a special autonomy for East Timor, leading to East Timor's separation from Indonesia...".

The ballot, conducted on 31 August 1999, resulted in the East Timorese rejecting autonomous integration within the Republic of Indonesia. After the UN announced the results of the ballot on 4 September 1999, there was "...a campaign of violence, looting and arson in East Timor by pro-integration militias, at times with the support of elements of the Indonesian security forces" (4). The Indonesian authorities were unable to restore order and consequently, the Government of Indonesia formally requested the Security Council to deploy an international force to East Timor (5).

INTERFET's Deployment

With the deteriorating security situation resulting in a deepening humanitarian crisis in East Timor, the Security Council, acting pursuant to Chapter VII of the UN Charter, adopted Resolution 1264 (6). That Resolution condemned all acts of violence in East Timor and authorised the establishment of a multinational force under a unified command structure. This international force (INTERFET) was mandated to (1) restore peace and security in East Timor; (2) protect and support UNAMET in carrying out its tasks; and (3) within force capabilities, facilitate humanitarian assistance operations.

Following discussions between the United Nations, Australia and Indonesia, INTERFET began deployment to East Timor on 20 September 1999, under the command of Major General Peter Cosgrove AM, MC (COMINTERFET). Based on these discussions the Indonesian Armed Forces undertook to cooperate with INTERFET in the implementation of Resolution 1264. That Resolution made it clear that the Government of Indonesia, taking into account INTERFET's mandate, would continue to have responsibility for peace and security in East Timor until Indonesia's authority was transferred to the United Nations (7).

In order to fulfil its mandate of restoring peace and security in East Timor INTERFET troops found it necessary to detain a number of East Timorese within hours of deploying. For example, it was reported on 22 September 1999, that

INTERFET had "arrested eight East Timorese – including members of the militia – for carrying weapons in the capital Dili" (8). COMINTERFET directed that detainees were to be conveyed to the FDC as soon as practically possible, preferably within 24 hours, but no later than 36 hours after being apprehended. Within 72 hours of a detainee's arrival at the FDC, the Senior Legal Advisor at the INTERFET Combined Legal Office was to review the detainee's case and where appropriate make arrangements for the transfer of the detainee to the appropriate Indonesian authorities. However, handing detainees to the Indonesian civilian police proved unsatisfactory because of the collapse of the civil administration (including the judiciary and court system) in East Timor. INTERFET soldiers were becoming frustrated at seeing the same militia back on the streets almost as soon as they were handed over to the police (9).

On 4 October 1999, the Secretary-General reported:

"The Indonesian police... appear to have withdrawn from the territory [East Timor]. In Dili, there is a token presence of 12 persons, comprising of senior officers, investigators and basic administrative staff... . The Indonesian police have confirmed that the judicial and detention systems are not operating. With regard to detainees, the multinational force has established basic, short-term legal and practical provisions for preventive detention, in consultation with UNAMET and the International Committee of the Red Cross (ICRC)" (10).

The "basic, short-term legal and practical provisions for preventative detention" referred to by the Secretary-General involved INTERFET troops temporarily detaining persons where there were reasonable grounds to suspect a serious offence (11) had been committed, was being committed or was about to be committed.

The collapse of the judicial and detention systems gave rise to the problem of how INTERFET was to balance the rights of detainees to natural justice and due process against the need to detain. On 21 October 1999, INTERFET addressed this balance through the establishment of the DMU.

Part II The DMU

The Nature of the DMU

The DMU reviewed 60 cases between 21 October 1999 and 12 January 2000 when a civil judiciary assumed responsibility for persons arrested/detained in connection with criminal offences. The reviews conducted were akin to a bail hearing; albeit conducted on the basis of written submissions. The DMU did not conduct any trials.

The DMU consisted of a Reviewing Authority, Prosecutor, Defending Officer, two Visiting Officers and a Police Expert. The Reviewing Authority, Prosecutor, Defending Officer and one Visiting Officer were Australian Defence Force legal officers. The other Visiting Officer was a lawyer from the Philippine Armed Forces. The Police Expert was a civilian consultant employed by the Australian Department of Defence to provide the DMU with advice on such matters as the Indonesian Criminal Code and police investigative standards. With a view to emphasising the independent nature of the review, the Reviewing Authority was selected from the Australian Judge Advocates' Panel (12) established under the *Australian Defence Force Discipline Act*, 1982. Members of that panel exercise their judicial functions unfettered by command direction.

The legal basis for the establishment of the DMU was Security Council Resolution 1264. INTERFET's mandate to restore peace and security coupled with the collapse of the Indonesian judicial and court system led to the creation of the DMU as an interim judicial system pending the re-establishment of a civil judiciary. The DMU provided a review of detention independent of command direction and consistent with principles of international law. In particular, the DMU used the framework of the Fourth Geneva Convention of 1949 Relative to the Protection of Civilian Persons (GC IV). GC IV was designed to "...regulate the relationship between foreign military forces and a civilian population where the force exercises sole authority or is the only agency with the capacity to exercise authority in a distinct territory." (13) GC IV provided a particularly useful framework when Indonesian authority in East Timor collapsed because INTERFET was left with little choice but to exercise its authority to maintain law and order. While it is true that GC IV did not apply *de jure* in this situation because the Indonesian Government had consented to INTERFET's deployment, the Convention did provide a helpful framework for the regulation of the relationship between INTERFET and the civilian population in East Timor. Consequently, many of the provisions of the Detainee Ordinance and the Force Detention Centre Orders were based on the provisions of GC IV that deal with the maintenance of security and the handling of detainees by a military force. The DMU was established following consultation with both the UN and the ICRC.

The law applied by the DMU was Indonesian Law. There is an argument that the applicable law in East Timor should have been Portuguese Law because Indonesia was an occupying force in East Timor and therefore Indonesia was required, pursuant to GC IV, to continue the legal system applicable prior to their occupation (14). However, because Indonesia did not permit the East Timorese to apply Portuguese Law and had applied Indonesian Law throughout the 25 years of Indonesian occupation of East Timor, it was clear that Indonesian Law was the prevailing *de facto* legal regime. As the intention of GC IV is to avoid retrospectivity and ensure that people are familiar with the law, it was also considered efficacious to rely on Indonesian Law. It should also be noted that the UN Secretary-General, in his report on the situation in East Timor of 4 October, assumed that the applicable law at the time was Indonesian Law (15). For these reasons the DMU operated on the basis that Indonesian Law was the applicable law for alleged offences.

By 27 November 1999, UNTAET also ratified the application of Indonesian Law in East Timor, in so far as those laws did not conflict with internationally recognised human rights standards and the mandate given to UNTAET by Security Council Resolution 1272 (16). The mandate given to UNTAET, in broad terms, is to administer East Timor by exercising "...all legislative and executive authority, including the administration of justice" (17).

The Detainee Ordinance

The Detainee Ordinance was signed by COMINTERFET on 21 October and came into effect on that date (18). Its framework, based on GC IV, provided INTERFET with the ability to assist UNAMET with orderly governance of East Timor, and to ensure the security of persons and property in East Timor. The Ordinance was to be complied with subject to the exigencies of the situation prevailing in East Timor from time to time (19) and any law or provision applying in East Timor with regard to detention or arrest inconsistent with the Detainee Ordinance was suspended (20).

As stated above, the Ordinance also provided that the law applicable was to be Indonesian Law. In particular, it required the Reviewing Authority to have regard to Book I – General Provisions on the Indonesian Penal Code, namely Articles 44, 45, 48, 49, 50 and 51 (21). Furthermore, the Ordinance defined a 'serious offence' as an offence against certain chapters of the Indonesian Penal Code (22) - essentially offences attracting a maximum sentence on conviction of more than five years imprisonment.

The Ordinance established some limitations upon the operation of the DMU. The first of these was that the DMU would only consider the continued detention of persons held on suspicion of having committed a serious offence. If the offence was not a serious one, the detainee was to be released. This limitation was based partly upon the need to prioritise effort to deal with only serious matters, but also to ensure that persons were not being deprived of their liberty for substantial periods after committing minor offences.

The second limitation of note was that the DMU would only consider the continued detention of persons alleged to have committed serious offences after the deployment of INTERFET on 20 September 1999. Article 70 of GC IV prohibits the Occupying Power from prosecuting and punishing protected persons for acts (other than breaches of the laws and customs of war) that they are alleged to have committed before the territory was occupied. Furthermore, in light of the agreements of 5 May 1999, the Indonesian Government had continued responsibility for the maintenance of law and order until INTERFET's arrival. For these reasons, it was argued that any offences that were committed prior to 20 September were a matter for the Indonesian authorities or the civilian judiciary that would be established by UNTAET.

Permitting persons accused of committing offences prior to 20 September 1999 to remain at large in East Timor was seen as encouraging the East Timorese to take the law into their own hands and this in turn was likely to impact upon INTERFET's mandate to restore peace and security. Consequently, COMINTERFET decided that anyone accused of committing offences prior to 20 September 1999 might be held as a security detainee by INTERFET and would be handed over to the civil

judiciary in East Timor once it was established. This class of detainee was recognised under the Ordinance but not dealt with by the DMU. The security detainee regime was to be governed by the relevant GC IV provisions (23) with access to detainees being provided to ICRC delegates. These detainees would be held until local courts could deal with them when these were established.

Classes of Detainees

A detainee was defined as any person, other than a member of INTERFET (24), deprived of personal liberty by INTERFET except as a result of a conviction for an offence. A person could only be held as a detainee if they fell under one or more of the following classes identified by the Ordinance:

- a. a person detained on suspicion of the commission of a serious criminal offence;
- b. a person committed for trial in connection with the alleged commission of a serious offence;
- c. a person detained as a voluntary detainee (25); and
- d. a person detained as a security risk (26).

The bulk of the DMU's work consisted of dealing with persons detained on suspicion of the commission of a serious criminal offence – murder, rape, maltreatment (serious assault), kidnapping and arson. The Ordinance also envisaged dealing with detainees committed for trial in connection with the alleged commission of a serious offence on the basis that the Reviewing Authority was satisfied that there was sufficient evidence to provide reasonable grounds for believing that the suspect had committed a serious offence.

Using the framework of GC IV (27), INTERFET also detained a number of persons on the basis that they were obstructing and interfering with its task to restore peace and security in East Timor and, therefore, posed a security risk. These detainees included persons accused of committing offences prior to 20 September 1999. The notion of voluntary detention, which was also based on the framework of GC IV (28), allowed a person at his/her own request to seek INTERFET protection where the person believed that his/her security may be threatened by hostile actions committed by the public.

The Process of Dealing with Detainees

The Ordinance provided for the process of delivering a detainee to the Force Detention Centre (FDC) (29); the procedure to be adopted where a detainee was held on suspicion of having committed an offence; and the committal procedures that were to apply where an investigation of the alleged offence had been completed (30). The Ordinance also created procedures if the detainee was classed as a security risk or a voluntary detainee (31). Other provisions of the Detainee Ordinance dealt with the powers of the Reviewing Authority; intentionally giving false evidence to the DMU or Reviewing Authority (32); and immunities of the Reviewing Authority, Prosecutor and Defending Officer. INTERFET troops who had taken a person into custody were required to deliver that person to the Force Detention Centre (FDC) in Dili within 24 hours of the

detention. For the first 96 hours after detention, the decision to hold a detainee was an exercise of COMINTERFET's discretion arising from INTERFET's mandate. The DMU was informed of any decision affecting the detainee's continued detention or release (33). The period of 96 hours was adopted as being a reasonable time during which detention should remain at the discretion of COMINTERFET to accommodate legitimate military/security interests, including the preliminary investigation of the allegations against the detainee. If within the 96 hours it became apparent that there would not be sufficient evidence or military purpose to hold a detainee, the detainee was released.

At the expiry of 96 hours, the Officer-in-Charge of the FDC advised COMINTERFET and the DMU Prosecutor whether the detainee in question was still in detention. The Prosecutor notified the Reviewing Authority if a detainee continued to be held on suspicion of having committed an offence (34). The Reviewing Authority received a written brief from the Prosecutor outlining the date of the alleged offence, details of the alleged offence and the evidence against the detainee.

Within 24 hours of the notification by the FDC of whether the detainee in question was still in detention, the Prosecutor informed the detainee and the Defending Officer of the reasons for the detainee's detention (35). The Defending Officer having explained to the detainee his/her rights and after receiving an authority to act (36) was able to make written submissions to the Reviewing Authority (37). The Reviewing Authority then exercised his powers to:

- a) order that a detainee be released with or without conditions;
- b) order that a detainee be held in detention pending trial by a competent court or other tribunal; or
- c) order that a detainee be held in detention pending trial by a competent court or other tribunal or for a fixed period of time, which ever would occur first.

Based on the written material provided by the Prosecutor and the Defending Officer, the Reviewing Authority applied a two-limb test in determining whether a detainee should continue to be held in detention pending completion of the investigation into alleged offences. First, he needed to be satisfied that there was a reliable and consistent body of material that tended to show that the suspect might have committed a serious offence. Secondly, he had to assess whether continued detention was necessary to prevent the escape of the suspect, injury to or intimidation of a victim or witness or the destruction of evidence, or to be otherwise necessary for the conduct of the investigation. If he was satisfied that these standards had been met the Reviewing Authority could extend the period of detention in 30 day periods for a period not exceeding 90 days.

For those cases where the investigation was completed and the Reviewing Authority was satisfied that there was reasonable evidence to believe that the detainee had committed a serious offence, the Ordinance provided that the detainee should be committed for trial. As it turned out, no cases reached this

stage prior to the appointment of the civil judiciary. Having regard to the fact that the civil law judicial system to be applied in East Timor did not have the common law concept of committals, the Reviewing Authority relied upon the exigencies of the situation provision in the Ordinance to continue the detention beyond the 90 days for the purpose of referring the matter to the new judiciary.

If the above mentioned tests were not satisfied, the Reviewing Authority ordered the detainee's release either conditionally or unconditionally. Conditional releases were ordered where the detainee undertook to be of good behavior, report regularly to United Nations Civilian Police (UNCIVPOL) and appear before a court to be tried if and when required. Eleven detainees were released on these conditions. Unconditional releases were ordered where the alleged offence was not serious or where there was insufficient evidence to meet the tests mentioned in the Ordinance. Twenty-one detainees were released unconditionally.

Security Detainees

Security detainees were subject to a 'show cause' procedure that was regulated and managed by INTERFET and not the DMU because these detainees were detained for imperative reasons of security (38). If a security detainee was held for more than 96 hours COMINTERFET or his delegate was required to certify that the risk posed by the detainee warranted that the detainee be held for a longer period. Prior to issuing the certificate, and within 144 hours of being detained, COMINTERFET informed the detainee in writing of the grounds on which the certificate was to be issued. The detainee was given up to seven days, or such longer time as COMINTERFET considered reasonable, to show cause why a certificate should not be issued. The show cause provided the detainee with the grounds for his or her detention and the material considered by COMINTERFET for continuing the detention. A detainee could either indicate in writing that he or she did not intend to respond to the show cause, or show cause why he or she should not be held in detention. The DMU Defending Officer was available to assist the detainee to respond to the show cause. On a number of occasions the defending officer was successful in having a security detainee released by establishing that there was insufficient evidence against the detainee.

Voluntary Detainees

COMINTERFET, or his delegate, could 'approve' the detention of a voluntary detainee after being satisfied that the person had sufficient grounds for the request. The grounds required for the request being met included the detainee having a reasonable belief that his or her security may be threatened by hostile actions committed by the public. The FDC had at least one voluntary detainee who requested that he be detained for his own safety because he had been closely associated with the Indonesian military. At his request he was released after a few days.

Part III Force Detention Centre

COMINTERFET established a Force Detention Centre (FDC) where persons, other than members of INTERFET, were detained. As an interim measure, the East Timor Tourist Office in Dili was used as the FDC. That building housed the

detainees and the Military Police that were tasked to administer and provide security to the FDC. The detainees were detained in five rooms with the majority of them kept in three large rooms. Considerable effort was made to separate security detainees from those accused of committing serious offences. Two isolation rooms were also used to hold individual detainees as the need arose. Most dealings with detainees were conducted with the assistance of local interpreters or interpreters from the Malaysian military contingent.

The 'Orders for the Force Detention Centres' of 21 October 1999 (39) (the Orders) ensured that detention in the FDC complied with international law standards. Using the framework of GC IV (40) the Orders provided for:

- a. notifying the detainee's family of the detainee's whereabouts (41);
- b. the duties of the Officer-in-Charge of the FDC (42) and the Visiting Officer (43); and
- c. visits by the ICRC (44), a medical officer, chaplain, legal practitioner, and members of the detainee's family (45).

The Orders stipulated standards to be maintained in searching (46) and accommodating detainees (47). Provisions also existed as to a detainee's cleanliness (48), meals (49), purchases (50), exercises (51), religious activities (52) and medical treatment (53).

The Officer-in-Charge of the FDC was responsible to COMINTERFET for the management, control and security of the FDC and the welfare of those detained. He interviewed a detainee as soon as practicable after the detainee was admitted to the FDC and visited each part of the FDC and each detainee every day. He also notified the ICRC mission in Dili of the arrival of each new detainee. He had responsibility for the FDC registration book in which details of the detainee's identity, reasons and authority for their detention, the day and hour of their admission and release, and the detainee's medical fitness on admission and release were kept (54).

A Visiting Officer visited the FDC daily and spoke with detainees to enquire whether they had any complaints as to their treatment. If there were any complaints the Visiting Officer reported directly to COMINTERFET in a daily report.

Part IV Civil Judiciary for East Timor

Pursuant to Security Council Resolution 1272 (1999) (55) and by Regulation 1999/3 (56) UNTAET established a Civil Judiciary for East Timor on 7 January 2000 (57). Using the framework of GC IV (58), the DMU handed over its detainee files to UNTAET so that the Civil Judiciary could deal with the detainees. As a part of the hand-over procedure, the DMU conducted a two-phased seminar and workshop over three days. During Phase I, the concept of the DMU was explained to members of the judiciary, prosecutors and defence counsel. During Phase II, the DMU Prosecutor, UNCIVPOL and INTERFET Military Police case investigators explained to the East Timorese prosecutors the evidence and case against each

detainee. The DMU Defending Officer, having sought permission from his clients, also handed-over detainee files to the appropriate East Timorese Defence Counsel. The Reviewing Authority discussed matters of law relevant to his review of the evidence against the detainees with the judicial panel and investigating judges. The INTERFET Combined Legal Office also handed-over the security detainee files to the East Timorese prosecutors.

On 12 January 2000, COMINTERFET ordered that the DMU be disbanded (59). Using the 'exigencies of the situation prevailing in East Timor' provision in the Ordinance; the Reviewing Authority conducted a final review of all cases before the DMU on 11 January 2000. For cases where there was sufficient evidence he extended the detention until 11 February 2000 or until such earlier time as the Civil Judiciary made a contrary order. This was done to enable the new Judiciary to take control of cases on a 'case by case' basis over a thirty-day period. On 11 January, there were 26 detainees ordered to remain in detention pending orders by the Civil Judiciary. The Ordinance was not revoked by COMINTERFET thus permitting the Civil Judiciary to use the Ordinance as an interim measure until a more formal judicial process had been settled upon.

Conclusion

The DMU provided COMINTERFET with a mechanism to ensure that the ongoing detention of individuals was not arbitrary, but rather, the subject of review according to legal principles. The challenge for the DMU was to balance the military imperative, as stated in Security Council Resolution 1264, to restore peace and security, with the need to ensure that individual detainee rights to natural justice and due process were not abused.

NOTES

- 1) A/54/660, 10 Dec 1999, UN General Assembly, "Situation of Human rights in East Timor", Fifty-fourth session, Agenda item 116(c), paragraph 64.
- 2) S/RES/1246 (1999), paragraph 1.
- 3) These Agreements are annexed to the report of the Secretary-General S/1999/513, 5 May 1999.
- 4) S/1999/1024, 4 October 1999, Report of the Security-General on the Situation in East Timor, paragraph 3.
- 5) Statement by the Secretary-General on the announcement of the Government of Indonesia, 12 September 1999 (<http://www.un.org/News/press/docs/1999/19990912.sgsm12.htm>).
- 6) S/RES/1264 (1999) 15 September 1999.
- 7) S/RES/1264 (1999) 15 September 1999, paragraphs 5 and 8.
- 8) Max Blenkin and John Martinkus, "Militia disarmed: Peacekeepers arrest eight", *The Daily Telegraph*, (1st Edition), 22 September 1999, page 3.
- 9) A correspondent in Dili, "Terror table turns militia", *The Australian*, 27 September 1999, page 12.
- 10) S/1999/1024, 4 October 1999, paragraph 13.
- 11) A serious offence included murder, manslaughter, grievous bodily harm, rape, possession of a weapon with intent to injure, carrying a weapon with criminal intent, causing an explosion likely to endanger life or property, kidnapping, and looting.

- 12) The Judge advocates' panel is made up of officers who are enrolled as legal practitioners in Australia for not less than five years. These officers are nominated by the Judge Advocate General and appointed to the panel by either the Chief of the Defence Force or a service chief.
- 13) Michael J. Kelly, "Responsibility for Public Security in Peace Operations", in Helen Durham and Timothy L.H. McCormack (eds), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law*, 141-172 at 151.
- 14) GC IV, Article 64 states: "The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention."
- 15) See S/1999/1024 4 October 1999, paragraphs 32, 53-56. For example, paragraph 54 states: "UNTAET will initiate a process to amend current legislation in East Timor, as necessary including criminal law, the law on internal affairs and the law on public peace and order, in a way consistent with the mandate and purposes of UNTAET and international human rights standards, and in consultation with the East Timorese".
- 16) Regulation No. 1999/1 (27 November 1999), section 3 states: "Until replaced by UNTAET regulations or subsequent legislation of democratically established institutions of East Timor, the laws applied in East Timor prior to 25 October 1999 shall apply in East Timor insofar as they do not conflict with the standards referred to in section 2 [observance of internationally recognised standards], the fulfillment of the mandate given to UNTAET under United Nations Security Council resolution 1272 (1999), or the present or any other regulation and directive issued by the Transitional Administrator".
- 17) S/RES/1272 (1999) 25 October 1999, paragraph 1.
- 18) **(Attached)**
- 19) Ordinance clause 7. This provision permitted INTERFET some flexibility to administer detainees within operational constraints. For example, it was recognised that, while INTERFET would make every effort to ensure that detainees were delivered to the FDC within 24 hours of detention, this was not always possible to achieve because transport assets were often required for other more urgent operational tasks. Any non-compliance with the Ordinance would have to be justified.
- 20) Ordinance clause 3.
- 21) Ordinance clause 33. These articles deal with criminal responsibility.
- 22) Ordinance clause 1.
- 23) Article 78 and Section IV
- 24) Members of INTERFET were not dealt with by the Detainee Ordinance. In accordance with general principles of privileges and immunities accorded to military forces members of INTERFET who were alleged to have committed offences were dealt with under their national laws.
- 25) A voluntary detainee was defined as a person held at the FDC at that person's own request (Ordinance clause 1). There was at least one voluntary detainee held in the FDC.
- 26) Ordinance clause 12.
- 27) See for example, GC IV, articles 42 – Grounds for internment or assigned residence - and 78 – Security measures:

Article 42(1) "The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes the order necessary.

Article 78(1) "If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most subject them to assigned residence or to internment"

- 28) See for example GC IV, article 42(2): "If any person, acting through the representatives of the Protecting Power, voluntarily demands internment, and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be".
- 29) Ordinances clause 8-11.
- 30) Ordinances clause 15-21.
- 31) Ordinances clause 22-24.
- 32) Ordinance clause 25.
- 33) FORM 1 – Detention Report. **(Attached)**
- 34) FORM 3 – Review by Reviewing Authority. **(Attached)**
- 35) Ordinance clause 11. See also FORM 2 – Notification of Basis for Detention. All the detainees used the defending officer provided by the DMU. **(Attached)**
- 36) Rights of a Detainee and Authority to Act. **(Attached)**
- 37) All the detainees chose to use the defending officer provided by the DMU.
- 38) This 'show cause' procedure was based on GC IV, article 78 – Right of appeal: "(2) Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right to appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said power".
- 39) **(Attached)**
- 40) See for example GC IV, Article 76 – Treatment of detainees:
- "(1) Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein. They shall, if possible, be separated from other detainees and shall enjoy conditions of food and hygiene which will be sufficient to keep them in good health, and which will be at least equal to those obtaining in prisons in the occupied country.
- (2) They shall receive the medical attention required by their state of health.
- (3) They shall also have the right to receive any spiritual assistance which they may require.
- (4) Women shall be confined in separate quarters and shall be under the direct supervision of women.
- (5) Proper regard shall be paid to the special treatment due to minors.
- (6) Protected persons who are detained shall have the right to be visited by delegates of the Protecting Power and the International Committee of the Red Cross, in accordance with Article 43.
- (7) Such persons shall have the right to receive at least one relief parcel monthly".
- 41) Order 10.
- 42) Orders 3-6.
- 43) Orders 21 and 22.
- 44) Orders 2.
- 45) Orders 23-26.
- 46) Order 7.

- 47) Orders 11-16. Provisions were made for detaining men and women in separate quarters and for detaining persons under the age of 18.
- 48) Order 16.
- 49) Order 17.
- 50) Order 18.
- 51) Order 19.
- 52) Orders 23-26, and 27.
- 53) Orders 23-26, and 29.
- 54) Order 28.
- 55) Security Council resolution 1272 (1999), 25 October 1999.
- 56) Regulation No. 1999/3 (3 December 1999).
- 57) S/2000/53, 26 January 2000, "Report of the Secretary-General on the United Nations Transitional Administration in East Timor, paragraph 44.
- 58) See GC IV, Article 77 – Handing over of detainees at the close of occupation : "Protected persons who have been accused of offences or convicted by the courts in occupied territory, shall be handed over at the close of occupation, with the relevant records, to the authorities of the liberated territory".
- 59) COMINTERFET Order of 10 January 2000. **(Attached)**

Strike cripples East Timor's legal system

East Timor's court system has been crippled by a strike launched by 45 legal staff including judges and prosecutors.

The action, initiated by the head of the Dili District Court was launched on Friday, protesting against a massive pay discrepancy between local and international legal practitioners in East Timor.

East Timorese prosecutor, Ruis Pereira says locally-employed staff earn around \$US340 a month while their UN employed counterparts earn up to \$US12,000 a month.

"One judge has got a wife and two children, with this salary they cannot buy anything because all of the prices have become high because there are a lot of internationals here," he said.

A spokeswoman for the United Nations Transitional Authority in East Timor says the authority is meeting with the striking lawyers to try to resolve the conflict.

Barbara Reece says funds for East Timorese legal practitioners contribute to more than just salaries.

"Most of that is for capital meaning, it's money to rebuild prosecutor's houses and courtrooms," she said.

"Of course the salaries of the East Timorese civil servants will never match the salaries of people who are coming here for a few months and who left their countries."

HOW NOT TO RUN A COUNTRY LESSONS FOR THE UN FROM KOSOVO AND EAST TIMOR

by Sergio Vieira de Mello*

In late 1999, the dream of some, the nightmare of others came true: First in Kosovo then in East Timor the UN was asked to take on the functions of a Government. For decades the United Nations have advised, indeed lectured Governments on how to best go about their business. Now, the organization finds itself in the awkward position of being called upon to practice what it has been preaching.

The results are less than the optimists among us would have hoped for. In Kosovo continued inter-ethnic intolerance makes lasting peace and reconciliation seem remote. In East Timor the pace of building a new country from the ashes and establishing a national administration from scratch has been painfully slow, causing frustration and growing popular discontent (- not least among the UN staff working there!).

Nevertheless, there is a general consensus among staff in both operations that those of us in East Timor have the easier task. In the midst of Pristina a UN staff member was shot dead for speaking Serbo-Croat, the language of the former rulers. On February 29, 2000 when Indonesian President Wahid addressed the people of Dili in the language of those who had illegally occupied East Timor for 24 years - an occupation that led to tens of thousands of dead and culminated in a grim orgy of destruction and murder - those who had recently been victims chanted, "Viva Indonesia". In Kosovo the elderly relatives of Serbs who were responsible for some of the crimes committed against the Albanians are hunted down and killed. In East Timor, former militia members are for the most part welcomed back in to their communities.

Another difference between Kosovo and East Timor is the attitude of local leaders towards the UN administration. In Kosovo, competing local administrative structures are in place. The Kosovars built up parallel structures as part of their resistance to Serb rule. These structures do everything from policing to registering of births. They can actively undermine the UN administration, which is seen by many as an impediment to self-rule. In East Timor by contrast, there is (still...) a general acceptance of the UN's authority and a collaborative effort to develop a joint administrative system.

Relative peace in East Timor and continued hatred and violence in Kosovo have reinforced prejudices among observers about the Balkan mentality and the supposed predilection of its peoples to ethnic intolerance, hatred and revenge. But the differences have less to do with mentality than with the clarity of Security Council mandates and with the issue of sovereignty.

The Security Council resolution mandating the UN administration in East Timor in contrast to the resolution on Kosovo, clearly spells out that East Timor will be independent. Resolution 1242 establishing the interim Administration in Kosovo (UNMTK) leaves the end state of Kosovo undetermined. The resolution is at best ambiguous: It reaffirms the sovereignty of the Federal Republic of Yugoslavia (FRY) over Kosovo and then in effect, suspends the sovereignty by giving the UN powers equivalent to those of a near-sovereign government. The resolution has thus been dubbed an effort to combine motherhood with virginity.

The Kosovars are still fighting for what the Timorese have managed to obtain. While in East Timor the UN is seen as a facilitator of independence, in Kosovo -- at least in the eyes of many Kosovars - the UN is perceived as an extension of Belgrade's sovereignty. Belgrade, for its part, lashes out at UNMIK regularly for allegedly promoting Kosovo's secession. The UN Administration in East Timor (UNTAET) draws its legitimacy from the 30 August referendum, where the population overwhelmingly opted for independence after a transition under UN administration. The outcome of the referendum was endorsed by Indonesia, the former occupying power. In Kosovo the UN functions on the basis of an uneasy and delicate, political compromise that has neither the support of the majority of Kosovars (who would opt for full independence) nor of the FRY (who continue to insist on the principle of territorial integrity, hence full sovereignty). To make this work smoothly on the ground would require - like the combination of motherhood and virginity - nothing less than divine intervention.

Another key difference between the operations is the legal basis on which international forces intervened in each operation. In Kosovo the responsibility for overall security remains in the hands of KFOR. This is a multinational force, made up mainly of NATO members whose presence was legitimized after the fact by the Security Council. In East Timor the multinational force, known as INTERFET, was authorized by the Security Council in September, prior to its intervention. It has now smoothly transitioned into a UN force. The establishment of INTERFET, its intervention and subsequent flawless integration into a comprehensive UN mission, represent an exceptional achievement in international diplomacy and peace-enforcement.

The flaws in the Kosovo mandate illustrate that there is little anybody could have done about some of the problems the UN faces on the ground, but other difficulties could have been prevented. For all the differences between East Timor and Kosovo, the two operations reveal some basic shortcomings in the UN's ability to take on the task of governing. These require addressing if the UN is ever to be made responsible for comparable operations in the future. Five basic lessons that have emerged from Kosovo and East Timor are:

ONE: BE PREPARED.

In East Timor it will take more than six months to recruit competent staff, establish communications between the Dili Headquarters and UN offices in the districts, set up living accommodation and office space and bring in sufficient numbers of vehicles for staff. In Kosovo, as representative of the Secretary-General, I led the first UN team to go in at the

heels of an impressive NATO deployment on 12 June 1999. It resembled an under-budgeted, high school outing. We had to borrow vehicles from a Swedish NGO. We depended for accommodation on the hospitality of an Albanian family, for food on the generosity NATO, for water and fuel on the charity of UNHCR, and for communications on the good will of the British Government's Foreign Aid Department, DFID.

Staffing in both missions has proved to be slow and unsatisfactory. Few UN staff from Headquarters in New York, Geneva and Vienna are willing to go on missions. Staffs who do go, receive no reward and miss out on promotion possibilities. A standard clause in UN contracts allows the Secretary-General to send staff wherever he wishes. Unfortunately this clause is seldom, if ever enforced. The UN has a large pool of potential candidates for field missions. Most of them however, are diplomats or generalists, who don't make the best administrators or managers. The UN has had great difficulty in finding candidates with the vital skills in public administration, law and order, power, water, agriculture, finance, procurement, audit, border-control, tax, -the skills actually required to run a country.

The UN Secretariat could learn a lot from the military and from some of the UN humanitarian agencies, who upgraded their emergency response capacity in response to criticism in the early nineties. Most of them now have stand-by agreements with a range of organizations able to provide specialized personnel that can be deployed at 24 hours notice. Similar arrangements exist to provide communications, vehicles and staff accommodation in emergencies.

The lack of personnel and essential start-up assets on standby for peace-building operations, means that the organization dedicates most of its energy and resources for the first six to twelve months of any such operation on establishing itself. This makes the UN appear slow and dedicated more to itself than those it is mandated to assist. An inadequate number of UN personnel with inadequate means work long hours at fire-fighting and improvising, while trying to uphold the good name of the UN. This is utterly demoralizing.

TWO: DEVELOP A MODEL FOR GOOD GOVERNANCE THROUGH BENEVOLENT DESPOTISM

A second lesson relates to the art of governing. The UN promoted decolonization with success. It now finds itself requested to act with mandates and powers comparable to colonial regimes. The UN Administrator is nominated by the Secretary-General with little or no consultation with those who are to be administered. Under Chapter VII of the UN Charter, the Chapter that provides a basis in international law for the use of force, the Administrator is authorized to impose directives and policies as well as to use force more or less at will. There is no separation of the legislative or judicial from the executive authority. There are no positive models on how to exercise such broad powers.

Both Security Council resolutions 1242 and 1272 stress the need for the UN "to consult and cooperate closely" with Kosovars and Timorese respectively. The involvement of local leaders is a pre-requisite for stability and sustainability of the UN administration. It is also

essential to prevent the emergence of parallel structures. But in the absence of elections, on what basis are leaders to be chosen?

Difficulties arise not only in the choice of local representatives but also in the delegation of authority to them. The more powers conferred on local representatives, the closer power is to the people and thus the more legitimate the nature of the administration. But conferring power on non-elected local representatives can also have the undesired effect of furthering a particular party. The inclination of the UN is thus to be cautious about delegating power in the interest of avoiding furthering any particular political party. There is consultation, but all essential decision making and executive authority remains with the UN. Is this appropriate?

In recent years a small industry has grown up around conferences and academic papers on governance and post-conflict peace building. The lessons of the seminars and papers seem very remote when one actually has to practice governance. The bottom line of most scholarly research is: Democracy is good. The question remains open how the UN can exercise fair governance with absolute powers in societies recovering from war and oppression.

THREE: RETHINK LAW AND ORDER.

A related problem is law and order. The UN's ability to uphold law and order in Kosovo and East Timor has proven seriously deficient. Unlike other nation-building tasks, the maintenance of law and order can not wait. If there is no law from day one, criminal activity thrives. Once established it is very hard to eradicate.

UN police are slow to arrive and seldom effective. They are made up of police officers from up to sixty different countries, all with their own attitudes towards policing, uneven training standards and varying levels of individual competence. Effective policing depends on strong links to the local community. International police are barred from the local community both by language and customs. Furthermore, they are deployed with agonizing delay. Four months in to the operation in East Timor less than a third of the 1600 police officers authorized by the Security Council had been deployed.

The alternative of establishing new, local police forces is essential but time consuming. In East Timor it has been calculated that it will take at least three years to train 1600 local police officers. The organization has shied away from the only other alternative: The use of pre-existing armed groups to undertake police related work, such as the KLA in Kosovo or FALINTIL in East Timor. These groups were trained in resistance and guerrilla war rather than policing, and in the case of the KLA at least, represented a specific faction.

Problems of policing are compounded by problems regarding applicable law. What law applies in countries that do not yet exist? To avoid a legal vacuum the UN in both Kosovo and in East Timor insisted on the continued application of law that had been valid hitherto (in both cases the UN took the precaution of repealing any elements of this law which went counter to international standards.) In the case of Kosovo, this meant applying FRY law,

which inevitably was perceived to be a means of prolonging Serbian hegemony over the Province. In East Timor, we decided on the continued use of Indonesian law. It was previously applied in East Timor by Indonesian judges, lawyers and prosecutors. They have departed and the UN international staff are not familiar with it and for the most part, because of the language, even capable of reading up on it.

The problem of which law to apply is exacerbated in Kosovo and East Timor, by a lack of local judges, prosecutors and public defense lawyers. In Kosovo and East Timor for several months there were barely a dozen judges appointed by the UN administrator to listen to literally thousands of cases. This means that lesser criminals are released. In some cases, it can take weeks before a detained suspect is brought before a judge. The UN finds itself unwillingly breaking basic international standards of due process.

The UN is even more poorly equipped to run prisons. In East Timor when the UN took over this function from INTERFET, it was discovered that there was no budget to feed the prisoners and no provision made for prison guards. The police, all too sparse in numbers, took on this extra task. On the third night, three prisoners escaped through a hole they had made in a wall. There was delay in filling in the hole as there was no agreement against which budget the repairs should be charged. The single detention center quickly filled up and in one case a suspected rapist had to be released to make room for a murderer.

The UN should have a sizeable body of pre-trained, multi-national police who could be deployed with a week's notice. The police force should include a cross section of the variety skills that exist in most national law enforcement agencies: experts in organized crime and in drugs, investigators and not least, a correctional service.

The UN has been hesitant about using foreign judges. A lesson from Kosovo and East Timor is that at the outset of such operations such delicacy is not appropriate. In East Timor INTERFET, the multi-national force that preceded UNTAET, used army prosecutors and judges. This worked more effectively than our efforts to use local Timorese judges. The organization should also have judges, lawyers and prosecutors who could be called up at short notice. They should be trained to apply a standard body of applicable law for any case where the UN on an interim basis takes over the legislative and judiciary functions.

FOUR: INTERNATIONAL ORGANIZATIONS MUST LEARN TO WORK TOGETHER -UNDER THE UN

The international response in both East Timor and Kosovo has been weakened by turf battles between the major organizations involved. The issue is not so much competition over turf than the opposite: One organization accusing another of not doing what it was supposed to do and the other arguing in turn that it was not its responsibility.

In Kosovo, the UN administration is made up of four components each led by a different international organization. The UN proper deals with public administration, the Organization for Security and Cooperation in Europe (OSCE) with institutional capacity

building, the EU with reconstruction and UNHCR with humanitarian issues. Much time is spent in agreeing and then disagreeing on relative responsibilities.

In East Timor the mission is entirely in the hands of the UN. UN humanitarian and development agencies were the first to arrive and respond to the needs following the September violence, They have been slower however, at integrating themselves fully in to the UN administration and assuming full responsibility in their respective areas of expertise. Some have even argued that as the UN in East Timor represents something like a Government they can not be part of it, but must have their separate and distinct identities.

The ability of UN organizations to support the UN administration, in particular in East Timor is also related to resources and preparedness. Apart from the humanitarian organizations, none of the specialized agencies have experts who can be deployed at short notice nor funds to pay for such experts.

The level of cooperation between the UN and international finance institutions, notably the World Bank and IMF has been unprecedented in East Timor and Kosovo. In East Timor the first comprehensive needs assessment was undertaken jointly under World bank leadership by UN agencies and East Timorese experts. This allowed a single, comprehensive picture of needs to be presented to donors barely six weeks after the UN administration had started. Without the immediate deployment of the expertise and resources of international financial institutions, the massive task of building new financial systems, new tax and public payment operations, new economies in post-conflict situations is not feasible.

FIVE: CHANGE THE RULES TO SUPPORT THE MANDATES

One of the greatest obstacles in trying to administer for the UN, are the UN's own rules and regulations. UN administrative rules and regulations are out of sync with the new type of UN mandates. They prevent rapid and flexible response and seriously undermine the organization's ability to carry out an operational public administration mandate. The UN rules and regulations have accumulated over nearly forty years of bureaucratic and diplomatic activity. For the most part the rules are written and endorsed by staff and diplomats who have never been near a field mission.

Both resolutions for Kosovo and East Timor were passed under Chapter Seven of the United Nations Charter. This was vital to give both missions a credible deterrence capacity and sufficient authority. This also means that the UN Administrators in Kosovo and East Timor have quasi-dictatorial powers vested in them. They can launch military operations, detain and release murderers, appoint judges and fire mayors - all with the use of force if required. Paradoxically, UN rules however, tie their hands when it comes to internal management. Hiring and firing of staff, procurement and disbursement of funds, accepting of donations are all heavily centralized in New York and subject to complicated and slow procedures. It is like being asked to perform Olympic gymnastics and then being placed in a straitjacket.

UN rules make it difficult and sometime impossible to use UN funds and assets for any other purpose than to benefit UN staff. In UN mission in East Timor had over 500 vehicles for its staff, but it was only by breaking rules that a meager dozen vehicles could be released for Timorese political leaders. The UN spent millions of dollars on offices and accommodation for staff, but the rules had to be bent again to allow us to do up a limited number of public buildings which were not for use by staff. The rules also do not allow one to give lifts. In a country where transport is lacking, such rules (luckily often broken!) make the UN appear arrogant and egotistical in the eyes of those whom we are meant to help.

As the rules are highly complicated, they require an expensive bureaucracy to keep up with. In East Timor for every staff member fulfilling a substantive task in running the country, there is one administrator to ensure he or she upholds the rules. Staff with this experience and knowledge of the rules are in short-supply and thus missions are slow start-up because they lack the personnel who actually understand how to make the rules work.

Local people have little time for rules, they want results. Radical reform is required with a view to simplifying administrative procedures and delegating greater authority to the mission. The accumulation of rules and regulations has occurred not least due to the insistence of some Governments on greater UN accountability. Accountability is translated in to meaning more control, which too often means more expensive bureaucracy and less efficiency.

Our critics need not have sleepless nights. It is unlikely that the UN will be asked again in the near future to assume such broad Governance mandates. The circumstances that led to UN Administrations in Kosovo and East Timor were unique.

In Kosovo the international community (or part of it) found itself much against its will occupying part of a country it had never really wished to occupy. Nobody else wanted to take on what was obviously going to be a thankless task. In East Timor, there was a very rare, almost unique agreement by the international community, or more importantly of all the major powers, on a single course of action involving the United Nations.

But recent history if nothing else has taught us, that what is unlikely usually happens. Should there be other mandates will the UN be better prepared? On March 7, the Secretary-General announced the new Study on UN peace operations, to be led by Lakhdar Brahimi. The aim of the study is to try and learn from the failures of the past. To date the UN, like many other large bureaucracies has proved more adapt at repeating mistakes, than at learning lessons. Time to change.

Notes:

Currently Special Representative of the Secretary-General and UN Transitional Administrator in East Timor. He established the UN mission in Kosovo. He is a career staff member of the United Nations and has served in a variety of humanitarian and political positions in Bangladesh, Susan, Cyprus, Mozambique, Peru, Lebanon Cambodia and the

former Yugoslavia. This article represents his personal views which do not necessarily reflect the policy of the organization.

EAST TIMOR NGO FORUM

BRIEFING PAPER TO INTERNATIONAL DONORS CONFERENCE CANBERRA June 2001

SUMMARY

Although there are many issues facing East Timor in relation to justice and human rights, the purpose of this briefing paper is to highlight some of the some of the most pressing needs that relate to the following areas:

- Reconciliation
- Administrative transition

Independent reports have consistently concluded that the violence of 1999 was planned, systematic and of a serious nature, involving the highest levels of Indonesian military and civilian command structure*, and yet to date, one and a half years later, only lower ranking militia men are now being prosecuted before the courts in East Timor.

However, there are serious concerns about the capacity of the new justice system in East Timor, particularly as it attempts to address the ongoing impact of the human rights violations that have taken place. Inadequate training and resources are hampering the administration of justice. Without a properly functioning justice system that has the trust of the community, true reconciliation based on respect for the rule of law and human rights cannot be achieved.

This is coupled with alarm on the part of the NGOs of East Timor, and the Timorese community in general, over the lack of progress in Indonesia. This concern has led to increasing calls for an international criminal tribunal for East Timor.

To this end, the NGO Forum recommends that donors direct funding toward:

1. A conference in Dili to examine the possibility of an International Criminal Tribunal for East Timor;
2. Immediately increasing capacity building efforts in the administration of the justice system.

1. Recent developments in East Timor

UNTAET Regulation 2000/15 of 25 July 2000 established Special Panels of the Dili District Court to hear Serious Criminal Offences, which are defined as genocide, war crimes, crimes against humanity and torture. The Special Panels also have jurisdiction over cases of murder and sexual offences committed in East Timor between 1 January 1999 and 25 October 1999.

Each panel is composed of one Timorese and two International judges. While there are three international judges who can rotate to form different panels, there is only one East Timorese judge who must sit on every case.

From January 2001 when the first trial was heard to the end of May 2001, the Special Panel for Serious Crimes has handed down 8 judgments including against 6 militia members and one against a former Falintil member. Except for two cases that have been dismissed on procedural grounds, all the cases that have proceeded to final judgment have resulted in guilty verdicts and the imposition of substantial prison sentences. In total over 25 indictments have been filed against over 40 individuals.

The vast majority of the serious crimes cases involve East Timorese militia members. Most of the accused have claimed that they committed crimes whilst under the command of superiors. Two cases involve East Timorese former TNI members. No Indonesian troops are in custody, and so far only 2 Indonesian officers have been indicted. They have, however, failed to appear at the preliminary hearings and it is therefore unlikely that they will face trial in East Timor in the foreseeable future.

It is clear that the fair and effective prosecution of these cases is extremely important for East Timorese reconciliation as well to the development of the justice system as a whole. However, there are serious obstacles to the achievement of these goals. The Special Panel faces significant problems in terms of:

- Lack of court administration and resources.
- Lack of cooperation by Indonesia regarding the memorandum of understanding

1.1 Lack of court administration and basic resources

An efficient court administration is the backbone of a functioning court system. The present official approach appears to be that a judicial system simply requires judges, without specialised judicial administration. Judges and lawyers are not necessarily equipped for this role. Many of the following problems could best be addressed by the provision of key staff with experience in court administration. To date, the Transitional Administration has failed to meaningfully build East Timorese capacity to run a justice system.

Courtroom facilities

Despite the seriousness of matters that come before the Special Panel, there are no means for the recording of trials such as tape recording or detailed minute taking. The Court clerk, who is not always present in Court, takes some notes but this is no substitute for professional transcription. The judges are therefore deprived of having an accurate record of the evidence presented during the trial when it comes to preparing a judgment. This seriously compromises the ability of either party to conduct an adequate appeal. The judges are forced to rely on their own notes taken on a laptop computer in court. In a recent judgment the Court made specific reference to the fact that they were forced to rely on their own notes as the authoritative record of the trial.

Court registry

Generally speaking, the registry of the court is unable to perform its basic functions,

including publicising court hearings and maintaining court files. The listing of cases happens in an ad hoc manner, with no centralised and easily accessible source for obtaining information about cases. Until recently, there was generally not even a list of the cases scheduled for the same day posted outside the court. However, even the prosecution and defense have little notice of forthcoming cases, with the public receiving no information at all. In cases of significant public interest, where family members and local communities often travel long distances to come to court, this is clearly inadequate.

Similarly, access to public court records, an important aspect of the human right to a fair trial, is virtually impossible. The registry does not even have a photocopier, and the nearby police office will only make copies if the registry brings its own paper. Lack of confidence in the court registry is illustrated by the facts that judges and prosecutors are hesitant to relinquish original documents to the registry, fearing that they will be inappropriately filed or otherwise misplaced.

Strong management and basic training in the importance and operation of court administration is desperately needed

1.2 Translation and language issues

There are 4 working languages in the Special Panel for Serious Crimes of the Dili District Court: English, Portuguese, Bahasa Indonesia and Tetum. However, in practice the working languages in the Court are English and Bahasa Indonesia. The international prosecutors, the international mentors for the defenders and the two international judges use English. The East Timorese defenders and the East Timorese judge use Bahasa Indonesia, or Tetum when addressing a defendant or witness who only speaks Tetum.

The lack of qualified interpreters is an ongoing problem. Due to a lack of English/ Tetum translators (there is only one), at times a Bahasa Indonesia-Tetum translator has been used for the defendants, or an awkward combination of the judges speaking in English, that being translated by an interpreter from English to Indonesian and then by a second translator from Indonesian to Tetum. In addition to double translations, it is not uncommon for the East Timorese judge to act as a translator when there is no other option, or for an international judge to ask a question first in English and then in Portuguese.

The obvious problems of understanding legal terminology in court proceedings faced by defendants with little or no formal education are compounded by these language difficulties. Defendants in several cases have had obvious problems in understanding the judges' questions. The greatest difficulties appear to be whether the defendants have had access to pre-trial rights and whether they understand the indictments against them.

It is understood that USAID has provided simultaneous translation equipment for the courts, however no one appears to have been trained by the courts to use this technology and to date it has not been installed. We are unaware if the translators required to use this equipment are being hired. In any case, the Dili District Court has an intermittent electricity supply and is not equipped with the generator required to ensure the functioning of the

system. The Court of Appeal is presently being equipped with the latest audio visual technology, but again, we are unaware of any training on the usage of this equipment.

1.3 Research facilities

No provision has been made for the research facilities necessary for the judges and defenders to fulfil their functions. In the present environment, as there is no functioning court library, internet access is a minimum requirement for research. Judges and lawyers need internet access to consult the comparative and international jurisprudence relevant to their decisions. Yet neither the judges nor the public defenders have internet access. In order to research international jurisprudence, such as that from the International Criminal Tribunals for the Former Yugoslavia and Rwanda, they are reduced to using UN Internet cafes.

1.4 Capacity building of East Timorese lawyers

It is widely known that East Timor lacks enough lawyers for the required roles. There has been some training and a mentor system in operation at the court, however, international consultants have been rotating out and the public defenders are so busy that often they have difficulties finding the time for training.

Currently there are only 3 assisting international public defenders, some of whom have never practised in criminal law and procedure, and none of whom speak Indonesian or Tetum. The 9 East Timorese defenders who have been formally appointed to cover the whole country have little if any previous practical legal experience and have not received sufficient training, including in areas such as international human rights law.. Those lawyers working privately and in other local legal organizations face even greater difficulties.

On the other hand, the Serious Crimes prosecutors are mainly international staff with extensive experience.

The problems outlined above have serious implications for the rights of defendants to a fair trial, and by extension to developing public confidence in the new justice system. Areas of concern include:

- Equality before the law without discrimination
 - Access to effective legal representation;
 - The right to a trial within a reasonable time;
 - The right to understand the nature of the charges against you and the conduct of the proceedings;
 - Proper right of appeal given that there is no transcript of proceedings.
- Vulnerable groups within the community, including women, illiterate people and youth are at particular risk. It is therefore essential that far greater priority be given to resourcing and capacity building in the administration of the Special Panel to properly prosecute those defendants that are within the jurisdiction.

1.5 Lack of monitoring and accountability within the justice system

At the moment the only independent reporting of what is occurring at the Special Panel comes from the Judicial System Monitoring Programme, an as yet unfunded project implemented by the East Timorese Jurists' Association (ANMEFTIL) and the East Timorese Institute for Reconstruction Monitoring and Analysis (La'o Hamutuk.). Several organisations have called for independent monitoring of the judicial system, including Amnesty International and the International Commission of Jurists. Monitoring and reporting is absolutely necessary to promote the observance of international human rights standards, and is required to identify where ongoing reform is needed.

2. Recent developments in Indonesia

An Ad Hoc Human Rights Court with the jurisdiction to try human rights violations has after long delays been established. However, it is only empowered to investigate cases of serious human rights violations that occurred in East Timor after the popular consultation on 30 August 1999. Unless the jurisdiction of the Court is widened, it will be unable to hear cases relating to the numerous incidents that occurred as part of the campaign of intimidation that preceded the ballot, as well as the many allegations of human rights violations since 1975.

Even if the jurisdiction is expanded, there are numerous procedural issues in the Indonesian human rights court legislation that may prejudice the right to a fair trial.

The outcomes of the trials of militia leader Eurico Guterres (home detention for unlawful possession of weapons) and the 6 men involved with the UNHCR killings in Atambua (sentences of 10-20 months), do not provide the international and East Timorese communities with confidence that justice will be forthcoming.

Lack of cooperation between Indonesia and UNTAET

Even if the Special Panel were able to effectively determine the serious crimes cases currently pending before it, there remains the problem that much of the necessary evidence and perpetrators of such crimes remains in Indonesia.

The Memorandum of Understanding between the Attorney General of the Republic of Indonesia and the Transitional Authority, signed by the Attorney General of the Republic of Indonesia and Sergio Vieira de Mello on 5 April 2000, states that both parties undertake to "transfer to each other all persons whom the competent authorities of the requesting Party are prosecuting for a criminal offence or whom these parties want for the purposes of serving a sentence" (section 9).

If the Memorandum of Understanding is adhered to all persons indicted for trial by the UNTAET Prosecutor for serious crimes could face trial before the Special Panel of the Dili District Court, unless their case had previously been tried in Indonesia.

So far, UNTAET has provided much material to the Indonesian authorities, but it appears that the Indonesian government has been reluctant to hand over evidence, witnesses or suspects to UNTAET, notwithstanding its undertaking to cooperate.

There are at present a number of cases pending before the Special Panel for Serious Crimes in East Timor. The vast majority of these stem from indictments of individuals presently in East Timor. Unless the MOU is adhered to the judges of the Special Panel may have no further cases to hear in a few months time.

3. International Tribunal

Given Indonesia's failure so far to prosecute those responsible for organising the violence and their reluctance to comply with the Memorandum of Understanding, calls are growing amongst the NGO community for the establishment of an International Tribunal to fulfil this role.

At the same time, it seems, international attention and commitment is declining, and the Security Council has as yet taken no action.

The people of East Timor are increasingly troubled and angered by the lack of action against those responsible for the most serious crimes. Families are waiting to have some finality to their grief. Over the past eighteen months, evidence is being misplaced, witnesses move, the perpetrators remain free to dispose of the evidence, and victims have to tell and retell their stories to each new police officer or investigator.

4. The Reception, Truth and Reconciliation Commission

The draft regulation to establish a Reception, Truth and Reconciliation Commission is presently under review by a Standing Committee within the National Council.

It is intended that the Commission operate for 2 years and deal with "criminal or non-criminal acts committed within the context of the political conflicts in East Timor between 25 April 1974 and 25 October 1999" (Part IV, Section 22.1). "Serious crimes" will continue to be dealt with in the courts. All other crimes will be addressed through community based mediated agreements with any perpetrators who voluntarily come forward to the Commission.

In part, the proposed Commission arises from an assessment by the UN that the formal justice system in East Timor will not be able to cope with the number of criminal matters that occurred during 'Indonesian time' and post ballot violence, such as every instance of looting or property damage.

Yet the NGO Forum has often been told by members of the East Timorese community that without justice, there can be no reconciliation. The new Commission should not be seen as a substitute for bringing those responsible for the violence to justice.

5. CONCLUSION

The NGO Forum is concerned about the slow progress of prosecutions in relation to internationally recognised crimes committed in East Timor, particularly the fact that none of the high level militia leaders or TNI officers have yet been tried

The Special Panel of the Dili District Court, as the domestic mechanism created to try serious crimes, is lacking the necessary resources and the administration and planning required to effectively deal with matters in a timely and procedurally fair manner.

It is clear that the government of Indonesia does not have the political will to:

- prosecute those responsible for the human rights violations in East Timor who are presently within their jurisdiction, nor to
- cooperate in any meaningful way with the Transitional Administration pursuant to the Memorandum of Understanding so that the Serious Crimes Unit may prosecute these people.

The people of East Timor have waited long enough. Over the past eighteen months, evidence is being misplaced, witnesses move, the perpetrators remain free to dispose of the evidence, and victims have to tell and retell their stories to each new police officer or investigator.

The political will and structures necessary in Indonesia are lacking, both in regards to their own jurisdiction and the necessary cooperation with UNTAET. The only remaining option for the prosecution of those responsible for human rights violations in East Timor currently residing Indonesia is to establish an International Ad Hoc Criminal Tribunal.

The tribunal should be established on recommendations from, and according to terms negotiated by the East Timorese people. We recognise that this issue is a complex one and that to date there has not been sufficiently informed debate on the topic. The conference should analyse the need for a tribunal and evaluate different models preferable for East Timor. Issues covered should include gender issues, jurisdiction of the tribunal, location, resources available, the role of the national justice system, participation of East Timorese judges in the trial chambers and the possible community impacts within both Indonesia and East Timor.

Therefore, the NGO Forum proposes that:

1. International donors financially support an international conference on an International Ad Hoc Tribunal to be held in Dili as soon as is practical

- *That the conference be organised by the NGO Forum*
- *That international speakers be invited to share their experiences of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda, some of whom are already working in East Timor*

· That the conference seek to reach a common position regarding the need or otherwise for an international tribunal

2. That the creation of a functioning court administration be a priority for the international donor community, which requires:

· The funding and appointment of experienced administrative court staff who understand the role of court administration in a functioning judicial system.

· The appointment of at least seven additional interpreters able to speak the working languages used by the Special Panel (English, Bahasa Indonesia and Tetum).

· That bilateral donors second experienced public criminal defenders, preferably with Bahasa Indonesia skills, to the Public Defenders office to support the existing mentoring program.

· The funding of the basic facilities necessary for the administration of justice, such as generators, photocopiers, tape recorders, filing facilities, internet access etc

3. The NGO Forum proposes that international donors fund the Judicial System Monitoring Programme and other such initiatives, involving Timorese participation, to monitor judicial proceedings in East Timor, in the Special Panel and other district court matters.

Acknowledgements

*Executive Summary Report on the Investigation of human Rights Violations In East Timor, January 31, 2000

Report to the International Commission of Inquiry on East Timor To Secretary General, January 2000

Crimes Against Humanity in East Timor, January to October 1999, James Dunn

UNTAET slow to investigate crimes against humanity, TAPOL Bulletin No.161

March/April 2001

** Judicial System Monitoring programme Project Proposal Dili April 2000

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