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Part 2: The Mandate of the Commission

Introduction

1. UNTAET Regulation 2001/10 established the Commission as an independent authority, with a requirement that it “not be subject to the control or direction” of any cabinet minister or other government official.* The establishment of the Commission was recognised in the Constitution of the RDTL, Article 162. It was granted an initial operational period of 24 months. Three later amendments by the National Parliament to the Regulation extended this period first to 30 months, then to 39 months, and finally an extension to 31 October 2005, constituting just over 42 months.†

2. Under its mandate the Commission’s tasks included the following.

1. Inquiring into and establishing the truth regarding human rights violations which took place in the context of the political conflicts in Timor-Leste between 25 April 1974 and 25 October 1999.¹ The inquiries were to include:
 - The context, causes, antecedents, motives and perspectives which led to the violations²
 - Whether they were part of a systematic pattern of abuse³
 - The identity of persons, authorities, institutions and organisations involved in them⁴
 - Whether they were the result of deliberate planning, policy or authorisation on the part of the state, political groups, militia groups, liberation movements or other groups or individuals⁵
 - The role of both internal and external factors⁶
 - Accountability, “political or otherwise”, for the violations.⁷
2. Preparing a “comprehensive report which sets out the Commission’s activities and findings, based on factual and objective information and evidence collected or received by it or placed at its disposal”.⁸
3. Formulating recommendations concerning reforms and initiatives designed to prevent the recurrence of human rights violations⁹ and to respond to the needs of victims. The recommendations could also include proposals for legal, administrative and other measures which could contribute the achievement of the objectives of the Commission.¹⁰
4. Recommending prosecutions, where appropriate, to the Office of the General Prosecutor.¹¹
5. Promoting reconciliation.¹²
6. Implementing Community Reconciliation Procedures (CRPs), whose object was to support the reception and reintegration of individuals who had caused harm to their communities through the commission of minor criminal offences and other harmful acts.¹³
7. Assisting in restoring the dignity of victims.¹⁴
8. Promoting human rights.¹⁵

* Regulation 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, Section 2.2.

† Although Section 2.4 of the Regulation allowed for a six-month extension without recourse to parliamentary consideration, both extensions were sanctioned by formal amendments to the Regulation. Democratic Republic of Timor-Leste National Parliament Law No. 7/2003, Section 1 extended the mandate to 30 months. Democratic Republic of Timor-Leste National Parliament Law No. 13/2004, Article 1 extended the mandate to 7 July 2005. Democratic Republic of Timor-Leste National Parliament Law No. 11/2005, Article 1 extended the mandate to 31 October 2005.

3. The Commission was given specific powers relating to its functions of Truth-seeking and Community Reconciliation, which were set out in detail in the Regulation. In addition it was granted the broad power to conduct any activities that were consistent with its mandate.¹⁶ It was thus empowered to implement a variety of programmes designed to promote reconciliation, restore the dignity of victims and promote human rights.

Temporal boundaries

4. The mandate of the Commission, relating both to inquiring into the truth relating to human rights violations, and also to “harmful acts” which might be dealt with by CRP, covered the 25-and-a-half-year period between 25 April 1974 and 25 October 1999. These two dates mark the beginning and end of the most intense period of the political conflict in Timor-Leste. The fall of the Marcelo Caetano regime in Portugal in April 1974 gave the Portuguese colonial territories, including Timor-Leste, the opportunity to exercise their right to self-determination. In Timor-Leste the opening up of politics precipitated a struggle for political power between the main political parties, and led to the Indonesian invasion and occupation. After the descent into violence that followed the Popular Consultation of 30 August 1999, in which the overwhelming majority of East Timorese voted for independence, the UN Security Council passed Resolution 1272, on 25 October 1999, which established UNTAET as the transitional administration with powers to exercise full administrative authority over the territory of Timor-Leste as it prepared it for independence.

Issues of particular relevance

5. The Regulation obliged the Commission to “take into particular consideration” three major aspects of the political conflict in undertaking its truth-seeking functions:

9. The events before, during and after the Popular Consultation of 30 August 1999
10. The events and experiences of all parties immediately preceding, during and after the entry of Indonesia into Timor-Leste on 7 December 1975, and
11. The effect of the policies and practices of Indonesia and its forces present in Timor-Leste between 7 December 1975 and 25 October 1999.¹⁷

The meaning of “related to the political conflict”

6. According to the Regulation, “political conflicts” means “armed and non-armed struggles and discord related to the sovereignty and political status of Timor-Leste, the organisation or governance of Timor-Leste, the illegal Indonesian invasion and occupation of Timor-Leste, or any combination of the foregoing”.¹⁸

Human rights violations

7. National laws are designed to ensure that individual citizens comply with the duties imposed on them by the state. The duties to promote and respect human rights, however, are based on international agreements and obligations, and therefore apply only to sovereign states. Accordingly, individuals may commit crimes against national, and in some cases international criminal law, but the traditional view of human rights violations is that they can be committed only by states and their agents.¹⁹

¹⁶ Security Council Resolution 1272 (1999) established UNTAET on 25 October 1999, granting a mandate to ‘exercise all legislative and executive authority, including the administration of justice’.

8. This traditional definition presents a difficulty in constructing a suitable mandate for the work of truth and reconciliation commissions. Often the context of massive violations, which is the object of a commission's inquiries or investigations, involves not only state actors, such as military and police officers and government officials, but also members of opposition groups, political parties, militias, corporations and other individuals. Any account of "the truth" relating to a conflict will be incomplete if it does not include the actions of all of these parties.

9. One example of the manner in which this problem has been overcome is that of the South African Truth and Reconciliation Commission, which interpreted its empowering legislation as including "modern developments within international human rights law",²⁰ which recognised the equal capacity of state or non-state actors to commit human rights violations.

10. The Regulation which established the Commission contained an unusually broad definition of the term "human rights violations", which included violations of human rights standards, international humanitarian law, and "criminal acts" which violated international or domestic law. The definition covered violations committed by both state and non-state actors.

The Commission's definition of "human rights violations"

11. According to Section 1(c) of the Regulation "human rights violations" means:

12. Violations of international human rights standards
13. Violations of international humanitarian law, and
14. Criminal acts;

committed within the context of the political conflicts in Timor-Leste between 25 April 1974 and 25 October 1999.²¹

12. The use of the term "violations of human rights *standards*" rather than "violations of human rights *law*" and inclusion of two broad categories of laws which are not limited to violations by state actors demonstrates clearly that the Commission's mandate was not intended to be limited to examination of the conduct of state actors alone.

13. The Commission has therefore interpreted its mandate to include any act committed within the context of the political conflicts, whether by individuals, members of a group, institutions or states, which is in violation of at least one of the relevant international human rights standards, a provision of international humanitarian law, or was a crime against domestic or international law.

14. The mandate therefore includes examination of violations committed by representatives and agents of the Indonesian government (including members of its security forces, the Hansip or other civilian defence forces and militia groups), the Portuguese government and its agents, members of Fretilin, Falintil and other pro-independence groups, and members of UDT, Apodeti, KOTA, Trabalhista and other political parties, members of other sovereign states, institutions, groups and individuals who played a role in the context of the political conflicts.

15. According to the definition in the Regulation the Commission must inquire into:

- Violations of a broad range of “human rights standards”. These include, but are not limited to the fundamental rights and freedoms referred to in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (and its Protocols), the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of all forms of Racial Discrimination, the Convention on the Elimination of all forms of Discrimination against Women, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment, and the International Convention on the Rights of the Child.^{*}
- Violations of international humanitarian law, which regulates conduct in situations of armed conflict. According to the Regulation, the standards to be considered in this regard include the major relevant international conventions, including the Geneva Conventions, and “the laws and customs of war”.²²
- Violations of Portuguese or Indonesian criminal law, and international criminal law, such as crimes against humanity, war crimes and genocide.

Priority given to particular categories of violations

16. It was, of course, impossible for the Commission to inquire into and report on all violations of human rights that occurred during the mandate period. The Commission has chosen to examine the most serious violations of fundamental rights relevant to the mandate. In summary form, the categories of human rights standards on which the Commission focused its attention were the following:

1. The right to self determination
2. The right to life (unlawful killings and disappearances)
3. The range of rights relevant to displacement, resettlement and famine (the right to adequate food, freedom from hunger, water and adequate housing, freedom of movement, freedom to choose a residence)
4. The right not to be arbitrarily detained, and to satisfactory conditions of imprisonment
5. The right not to be subjected to torture or cruel, inhuman or degrading treatment
6. The right to a fair trial
7. The right to freedom of opinion, expression and association
8. Rights violated by acts of rape and other forms of sexual assault/harassment (in particular the prohibition on torture and cruel, inhuman or degrading treatment)
9. Rights violated by the practice of sexual slavery (including the prohibition on torture, the right to enter marriage through full and free consent, and the prohibition on slavery)
10. Children’s rights (a range of rights, including entitlement to “special care”)
11. Social and economic rights
12. Reproductive rights (right to found a family and to decide freely on the number and spacing of children).

17. In determining whether particular acts constituted human rights violations, and whether individuals or institutions were responsible and/or accountable for such violations the Commission has used definitions of the relevant violations, which are drawn from international law. Annexe A (Relevant legal principles) at the end of this chapter sets out in detail the definitions.

^{*} Section 1(e) of the Regulation states that “International human rights standards” means the internationally recognised human rights standards outlined under Section 2 of UNTAET Regulation No 1999/1.” The relevant section of UNTAET Regulation 1999/1 refers to these international human rights instruments.

18. The Annexe includes definitions of the human rights standards listed above, and a brief summary of the relevant provisions of international humanitarian law, international criminal law, and Portuguese and Indonesian law.

Inquiry-related powers

19. The Regulation provided the Commission with substantial powers to make inquiries. These included the power to:

- Order individuals to attend hearings and answer questions
- Order the production of specified documents or objects relevant to inquiries
- Request an Investigating Judge of the District court to issue a search warrant which would enable police to search particular premises
- Request information from government authorities both within and outside Timor-Leste
- Gather information and hold meetings in other countries
- Hold public and private hearings and protect the identity of certain witnesses in these hearings.²³

20. The Regulation created criminal offences of knowingly misleading the Commission, failing to comply with an order of the Commission without reasonable excuse, hindering the Commission in its activities, attempting to influence the Commission improperly, threatening or intimidating witnesses, and disclosing confidential information.²⁴

Liability of Commissioners and staff

21. In accordance with principles that generally apply to similar commissions, those working on behalf of the Commission, including the Commissioners, were granted immunity from legal liability “in respect of any finding, point of view or recommendation made in good faith in the course of the Commission’s work or reflected in the Commission’s final report”.²⁵

Confidential information provided to the Commission

22. Information could be provided on a confidential basis if considered necessary.²⁶ The Commission could not be compelled to release information to any body or individual, including government officials, with the sole exception of specific requests made by the Office of the General Prosecutor (OGP).²⁷

23. The right of the OGP to access all information provided to the Commission meant that no guarantee could be given to potential witnesses that their evidence and confessions would not be used against them in future legal proceedings.

24. This provision may have prevented the Commission from gaining some important information that would have assisted its truth-seeking function. However the Commission also recognises that it was established as an institution whose work was in some respects to complement the Serious Crimes process. The provisions of the Regulation reflect a policy decision that the work of the prosecution service should not be compromised by the truth-seeking function of the Commission. This policy is based on recognition of the importance of establishing strong and clear mechanisms to achieve justice and promote respect for the rule of law in the context of a fragile new nation with a history dominated by injustice. The Commission is satisfied that, notwithstanding this limitation, the robust powers it was granted were sufficient to enable it to

compile a Report that contains a strong, objective and comprehensive account of the violations that occurred during the period of the political conflicts.

25. In seeking to achieve its objectives the Commission was given the duty to inquire into “which persons, authorities, institutions and organisations were involved in human rights violations,” whether violations were part of systematic patterns of abuse, issues of accountability arising from the violations, and to prepare a “comprehensive report which sets out its activities and findings, based on factual and objective information and evidence collected or received by it or placed at its disposal.”²⁸

26. The combined effect of these provisions was to establish a duty upon the Commission to publish findings in relation to the identity of persons, authorities and institutions which had been involved in human rights violations, where there was sufficient factual and objective information to support them.

27. The Commission adopted the “civil” standard of “on the balance of probabilities to determine whether the available evidence was sufficient to establish that human rights violations had occurred, and whether particular individuals or institutions were responsible and accountable. This standard, which has also been adopted by a number of other similar commissions, requires a determination that it is more probable than not that the allegations under consideration are true.

The use of specific names in the Report.

28. The CAVR was designed as part of a larger programme aimed to satisfy the needs of both justice in relation to past crimes and reconciliation in Timor-Leste. It was created as a complimentary mechanism to the United Nations sponsored “Serious Crimes” process. Prior to the formation of the Commission, the Serious Crimes Investigations Unit and the Special Panels of the Dili District Court were established, in accordance with UN Security Council Resolution 1272, with a mandate to investigate and prosecute those responsible for serious crimes committed between 1 January and 25 October, 1999. * Because the principle of universal jurisdiction (not limited by time or place) the Serious Crimes Unit was also given the authority to investigate and prosecute those responsible for crimes against humanity, war crimes and genocide throughout the entire period of the Commission’s mandate, from April, 1974 to October 1999.[†]

29. The Commission was therefore created in a strikingly different environment to a number of other “truth and reconciliation commissions” whose mandates recognised the importance of preparing as fully as possible, individual cases, in order to facilitate prosecutions in situations where the will and ability to try those most responsible was lacking. This was not a major issue within Timor-Leste when the Commission was established, because the investigation and prosecution of those most responsible who were inside Timor-Leste was clearly the responsibility of a section of the UNTAET mission, which was provided with significant funding and staffed by international investigators and prosecutors. The United Nations Commission of Inquiry into the violations committed in Timor-Leste had also recommended the establishment of an international tribunal²⁹, and the Indonesian government established the ad hoc tribunal in Jakarta to try those within its jurisdiction who were most responsible.

30. Rather than duplicate the process of the Serious Crimes Investigations Unit, the mandate of the Commission provided it with a duty to focus on the broader patterns of violations which had taken place during the relevant twenty five year period.

^{*} UNTAET Regulation 2000/16 provided that Panels of judges sitting on ‘Serious Crimes’ cases, and on the Appeal Court, would be made up of two internationals and one East Timorese judge

[†] Universal jurisdiction is explicitly granted by UNTAET Regulation 2000/15 Section 2.

31. The mandate specifically included the duty to report on the context, background and historical factors which had led to the violations and whether they were committed as part of a systematic pattern of abuse.³⁰

32. The relevant period included a significant political conflict involving East Timorese factions, a full-scale military invasion, almost twenty-five years of large-scale violations during the military occupation and the explosion into uncontrolled violence and destruction in 1999. It would not have been possible for the Commission to fulfil its mandate of reporting on the patterns of violations over the entire period and whether they were part of a systematic programme of abuse if it had also attempted to conduct comprehensive investigations into a limited number of major incidents, focussing on the liability of particular individuals. The mandate recognised the importance of seeking and reporting on patterns which were evident across many thousands of serious violations, providing an explanation of how and why these violations occurred, who was responsible for them, and what can be done to ensure that they are not repeated.³¹

33. Accordingly, the major focus of the work of the Commission's inquiries has been on establishing which states and institutions were involved in systematic patterns of violations. The Commission has focussed on a goal of understanding and reporting on the totality of what occurred, as far as this could be achieved within the time and resource limits of the Commission's work.

34. The statements and interviews provided to the Commission included the names of thousands of individuals identified as perpetrators of violations. In making a decision whether to include these names in its Final Report the Commission discussed at length, over many months, the competing factors involved in the decision. Although there were many complex discussions held, they focussed on a number of key issues, including the following:

- There has been only a limited degree of justice achieved in relation to the mass violations committed in Timor-Leste. The public shaming of individuals could make a contribution in this regard.
- Individuals who have committed serious violations should be named, as a contribution to the fight against impunity. This is particularly important where the perpetrator is in a position to commit further violations against future victims.
- The Commission does not have the authority to affect the freedom of individuals as does a court with criminal jurisdiction, or the authority to provide a remedy which affects their assets, as does a court with civil jurisdiction. However, the public naming of an individual as a perpetrator of a serious human rights violation has the potential to destroy their reputation, career and family life. It may also have serious consequences on the lives of spouses and children of those named. Naming must therefore be based on strong, reliable evidence which leaves relatively little room for error.
- It is a fundamental right of all persons accused of serious allegations that they be given an opportunity to respond to those allegations. This opportunity will fulfil the requirement of natural justice and ensure that the accuser's explanation in relation to the accusation is considered before a decision on his liability is reached. For example the accused may be able to explain that he was not in the same region at the time the violation was committed, that his accuser was motivated by personal reasons, and so on.
- The context of the Commission's work involved the challenge of investigating thousands of violations committed by citizens of a neighbouring country, Indonesia, in particular members of that country's military forces. The need to find and contact Indonesian military officers in order to provide them with an opportunity to respond to allegations, particularly when the allegations relate to events which took place up to 25 years ago presented a major logistical challenge for the Commission.
- Contacting alleged perpetrators inside Timor-Leste was also extremely problematic. Timor-Leste does not have a functioning postal system throughout the territory, nor landline telephones. Transport to many areas is impossible in the wet season and difficult in the dry. All public records were destroyed during the violence of 1999. There are therefore no records which could assist in identifying where alleged perpetrators might live, or even might have lived at the time of the alleged violation.
- In Timor-Leste there is an extraordinary amount of common naming. Thus, for example, there are thousands of individuals who share common names such as João, Tomás, José and surnames, such as Guterres and Alves. The potential for misidentification of an alleged perpetrator based only on the name is therefore extremely high. This was greatly increased again because in many cases the perpetrator was only known and identified by a single first name (for example, João, Tomás or Jacinto.)
- The fact that victims usually did not personally know the names of Indonesian military officers who committed violations, but more often did know the identity of East Timorese who were involved resulted in a much greater percentage of East Timorese perpetrators being named, even though the witnesses reported many more violations committed by members of the Indonesian security forces. Witnesses were often able to identify the command level of the perpetrator, the battalion or unit to which they belonged but did not know their individual names.
- The unfortunate fact that at the fragile transitional stage of governance currently experienced by Timor-Leste it is unrealistic to believe that the safety of witnesses who have identified perpetrators can be guaranteed. In fact the Commission has experienced one situation in which a victim who named perpetrators in a public hearing held at the sub-district level suffered threats and violent attacks from the alleged perpetrator and his family, which resulted in the wounding of the victim's husband and their forced evacuation from their home. The potential that naming perpetrators would produce significant problems for victims could not simply be ignored in the East Timorese context.

- The mandate of the Commission specifically includes the power to provide names to the Prosecutor General of Timor-Leste, with a recommendation for prosecution where appropriate.³²

35. In reaching its decision on which names are included in this Report the Commission has sought to balance all of these competing factors. The decision is based on a strong belief in the importance of naming those perpetrators who are most responsible, balanced against the fundamental requirement that the Commission, as an organisation mandated to recommend ways to ensure further human rights violations are not committed, should not in any way be involved itself in the violation of individual's fundamental rights.

36. In Part 8 of this Report, Responsibility and Accountability, the Commission provides the following:

1. Findings in relation to the responsibility and accountability of the major institutions involved in human rights violations within the boundaries of the mandate - the Indonesian security forces, and the Fretilin and UDT and Apodeti political parties, as well as those States which the Commission finds most seriously violated their obligations to recognise and assist the rights of the East Timorese people to determine their own political, social and economic reality.
2. The names of those it considers to be most responsible for the most serious patterns of violations committed during the period of the mandate. These individuals were senior commanders in the Indonesian security forces and senior officials in the Indonesian government during the period of mass violations
3. An analysis of the responsibility of various "micro-institutions" most often identified as affiliated with perpetrators of human rights violations. This includes the offices of government officials most often identified as perpetrators, particular battalions and auxiliary groups of the Indonesian security forces. Following a brief summary of the patterns of violations reported a list of those persons who served in senior positions in these "micro-institutions" during the relevant periods has been provided.
4. A list of all those persons who the Prosecutor General of Timor-Leste has indicted for crimes against humanity in relation to the mass violations committed during 1999. The list also identifies whether an indictee has already been tried and convicted by the Special Panels. It also identifies those suspects those who are believed to be outside Timor-Leste, within the jurisdiction of the Indonesian authorities. The Commission hopes the list will help to redress the problem of a lack of available information on the progress of legal proceedings which was a common complaint received from community members during the field operations of the Commission.

37. The Commission has also compiled a list of individual perpetrators who were identified by witnesses and victims as being involved in multiple serious human rights violations. As the Commission did not have sufficient time and resources to complete in-depth investigations into each of these matters, nor to provide notice to each of the individuals concerned, it has not included the list in this Report. However, it has, in accordance with its powers under Section 3(1)(e) of Regulation 2001/10^{*}, provided the entire list to the Prosecutor General of Timor-Leste, with a recommendation that each individual named should be further investigated and, if warranted prosecuted. The list has also been forwarded to the Office of the President of the Republic with a recommendation that all of those persons named should be prohibited from holding public office.

^{*} Regulation 2001/10 Section 3.1 "The objectives of the *Commission* shall include...(e) the referral of *human rights violations* to the *Office of the General Prosecutor* with recommendations for the prosecution of offences where appropriate;"

38. The thousands of names of perpetrators which were identified to the Commission by victims and witnesses have been replaced in the text of the Report by a code which does not bear any relationship to the identified name of the perpetrator.

39. The Commission's decision to provide the list to the Prosecutor General and President and to replace names in the text is based on the existence of a well-funded and relatively effective system of prosecution of individuals in Timor-Leste, the impossibility of contacting each of the persons identified in order to provide their right of reply, the very common duplication of names in Timor-Leste and the potential this provides for erroneous identification of individuals, the inability of the Commission to guarantee the safety of victims who identified perpetrators, and the fact that because of the scale of its inquiries and the long period of its mandate the Commission was not able to conduct in-depth investigations into each case. In addition, for protection of the victims the Commission has not included the names of victims of sexual violations which were reported to the Commission.

Standards used in determining issues of responsibility and accountability

40. Although it is clearly not a court and is not competent to make findings at law, the Commission is required to make findings on responsibility and accountability for human rights violations. In fulfilling these duties the Commission accepts that there are many levels of responsibility relevant to the violations that were committed. These include political, historical, moral and legal responsibility.

41. In relation to its obligation to make findings on issues of accountability, the Commission has, as far as possible, assessed the conduct of individuals, states and institutions against rules of domestic and international law that were in existence and binding at the time of the conduct in question.

The Indonesian invasion of Timor-Leste

42. As already noted, the mandate of the Commission imposed on it a specific duty to examine the events and experiences of all parties around the time that Indonesia security forces entered Timor-Leste on 7 December 1975. The use of force to enter into another state's territory is governed by the obligations and duties of member states of the United Nations and the fundamental rules of international law.

43. Indonesia became a member of the United Nations on 28 September 1950.^{*} Portugal became a member state on 14 December 1955. All member states of the United Nations are bound by the UN Charter and the following obligations:

1. They must comply with decisions of the UN Security Council.

Under the UN Charter all member states agree to accept and carry out decisions of the Security Council.³³ On two occasions the Security Council adopted resolutions calling on Indonesia to withdraw its forces from the territory of Timor-Leste.³⁴

2. They must not use force against any other state.

The prohibition on the use of force is the most fundamental rule of the UN Charter.³⁵ It is also one of the most important rules of customary international law.³⁶ Force may only be used in self-defence or where authorised by the Security Council.³⁷ Using force to intervene in a civil war that is occurring in another state's territory is also prohibited, even if it is said to be at the invitation of one of the armed groups involved in the conflict.³⁸

^{*} Indonesia purported to withdraw its membership of the UN on 20 January 1965 but rejoined in September 1966.

44. The United Nations Charter also imposes obligations on states that administer non-self governing territories.³⁹ Under the UN system Portugal was the state responsible for the administration of the territory of Timor-Leste. Administering states have obligations to promote the well-being of the inhabitants of the non-self-governing territories they administer, including by ensuring their just treatment and their protection against abuses.⁴⁰

Justice of war and justice in war

45. The mandate of the Commission spans a number of different periods of political conflict. It includes the low-level violence leading to the full-scale conflict known as “the civil war” between East Timorese factions, which was followed soon after by the Indonesian invasion and occupation of the territory, the resistance to this occupation, and the widespread destruction and violence surrounding the Popular Consultation in 1999. Annexe at the end of this chapter sets out in detail the legal principles, in particular those drawn from international humanitarian law, which the Commission used in its consideration of violations committed during each of these periods.

46. The material before the Commission includes the claim made by various parties to the conflict that they were justified in deciding to wage war. This argument relies on a mistaken belief that if a party has a justified reason for waging war, it may use any means necessary to fight that war.

47. A related argument, which is also not supported by international law, is that because the invasion and subsequent occupation were illegal, all subsequent actions of the Indonesian government and its agents in the territory were also illegal, and that human rights violations committed while resisting this illegal situation were justified.

48. The principles of international humanitarian law have guided the Commission in its examination of these issues.^{*} According to this body of law even those who are fighting a just war may only use just means to achieve their aims. The same set of rules on how war may be waged applies equally to all parties to a conflict. Combatants who decide to take up arms to wage war become legitimate targets in that war. All non-combatants, including civilians and prisoners of war, are entitled to be protected. Although combatants from all sides may, for example, be killed legitimately in combat, they may not be killed if they are no longer taking an active part in the conflict, and may never be tortured or treated in an inhuman manner.[†]

49. Although a large, well-armed and professional force, fighting to extend its territorial boundaries illegally cannot be seen to hold the same degree of moral legitimacy as those forced to take up arms to defend their homes and families from invaders, the rules governing conduct during hostilities apply equally to both. The political goal, no matter how just, does not justify the means. The methods of warfare employed by all parties who have taken up arms in a conflict must comply with the provisions of international humanitarian law. The Commission has applied the relevant standards objectively and equally to all parties in determining whether human rights violations were committed, and in making findings on issues of responsibility and accountability.

Community Reconciliation Procedures

50. Part IV of the Regulation provided the Commission with a mandate to implement Community Reconciliation Procedures (CRPs). Part 9 of this Report details the Commission’s CRP programme.

51. The broad objective of the CRPs was:

^{*} Annexe A to this chapter has a more thorough analysis of international humanitarian law.

[†] Annexe A explains the rules governing conduct in armed conflicts.

“to assist the reception and reintegration of persons into their communities...in relation to criminal or non-criminal acts committed within the context of the political conflicts in Timor-Leste between 25 April 1974 and 25 October 1999.”⁴¹

52. The Regulation set out in broad terms the procedures for CRPs, but it also allowed for some flexibility according to local conditions. The basic procedure was as follows.

53. Any person who has committed a “less serious” act or crime that harmed their community and was related to the political conflict could provide the Commission with a statement which set out the details of their actions.⁴² The statement was then considered by a Committee within the Commission before being forwarded to the Office of the General Prosecutor (OGP) with an accompanying recommendation as to whether it was a suitable matter to be dealt with by CRP. Within two weeks the OGP had to provide written notification of whether it intended to exercise its exclusive jurisdiction over “serious criminal offences” in relation to the matter. If the OGP decided not to exercise jurisdiction, the case would be returned to the Commission to be processed.⁴³

54. Authority over the case was then delegated to a Regional Commissioner, who had to form a panel of between three to five local leaders from the community in which the relevant acts took place. The Regional Commissioner acted as chair of the panel. A hearing was arranged at which the deponent gave evidence and was questioned by the panel. Victims and community members were given an opportunity to speak at the hearing.⁴⁴

55. At the completion of the hearing the panel deliberated and decided on “acts of reconciliation”, such as community service, public apology or reparations, which the deemed appropriate for the deponent to complete in order to be accepted back into the community.⁴⁵ If the deponent agreed to undertake these acts, the panel would draft a Community Reconciliation Agreement that was signed by the Deponent and the Panel.⁴⁶ The agreement was then registered as an order of the appropriate District Court.⁴⁷ On completion of the required “Acts of Reconciliation” the deponent received immunity from future criminal prosecution or civil liability arising from the actions disclosed.⁴⁸

56. The Regulation provided examples of cases which could appropriately be dealt with by CRP, among them theft, minor assault, arson and the killing of livestock or destruction of crops.⁴⁹ Authority to conduct Community Reconciliation Procedures did not extend to any action which would affect the exclusive authority of the Office of the General Prosecutor and the Special Panels of the Dili District Court over the “serious criminal offences” of murder, sexual offences, torture, crimes against humanity, genocide and war crimes.⁵⁰

The community-based approach of the Commission

57. Most other truth commissions have been mandated to focus primarily on the task of establishing and reporting the truth in relation to human rights violations. A notable exception was the South African Truth and Reconciliation Commission, whose programme included amnesty hearings. In addition to the collection, evaluation and reporting of information, a number of more recent commissions have also held public hearings on themes relevant to their work.

58. In addition to seeking and reporting on historical violations and holding major thematic public hearings, the Commission also implemented a range of grassroots, community-based programmes whose objectives were reconciliation, restoration of the dignity of victims and the promotion of human rights.

59. These programmes included Community Reconciliation Procedures (CRPs), local public hearings for victims, participatory workshops on the history of human rights violations in

communities, victims' healing workshops, a special reparations scheme for victims with urgent needs, radio programmes focusing on local reconciliation issues, and information programmes aimed at East Timorese people in West Timor.

60. The Commission attributes much of the widespread support and recognition it has received from the population of Timor-Leste to the community-based approach it followed in implementing its mandate. Formulating, organising and completing such a range of programmes were extremely demanding of staff and resources. However, it provided incalculable benefits by encouraging small communities across the territory to enter into partnerships with the Commission in the quest for local solutions to the challenge of reconciliation and of healing the wounds caused by historical violations.

Annexe A: Relevant Legal Principles

Introduction - International law relevant to the mandate

61. Two types of law need to be considered in establishing the meaning of "human rights violations", according to the definition in the mandate. One is the domestic law that was applied in Timor-Leste at a particular time, whether Portuguese or Indonesian. The other is international law, which contains principles relating to human rights and the conduct of armed conflicts.

62. The two main sources of international law are treaties and "customary law".^{*} Treaties bind only those states that are parties to them.

63. Customary international law is a more general body of law, made up of rules that have been accepted and practiced by a significant portion of the international community. Rules of customary international law are generally binding on all states.[†]

64. Resolutions of UN bodies are also relevant to international law. Members of the UN (including Indonesia and Portugal) are bound to accept and carry out decisions of the Security Council.⁵¹ Although resolutions of the UN General Assembly are not binding on states, they are relevant to the creation of customary international law,⁵² and they represent the views of the UN community, of which Indonesia is a member.

65. In considering which parts of international law are relevant to its mandate, the Commission has sometimes needed to consider the status of the territory of Timor-Leste during the mandate period. For this purpose, the Commission has adopted the view maintained by the United Nations⁵³ that Timor-Leste remained a non-self-governing territory under the administration of Portugal throughout that period. It is clear that Indonesia did not acquire sovereignty over the territory. Under international law territory cannot be acquired by the unlawful use of force.⁵⁴ The purported integration by Indonesia did not meet any of the requirements laid down by the General Assembly for the voluntary integration of a non-self-governing territory into another state.[‡]

^{*} See Article 38(1) Statute of the International Court of Justice. Other sources include general principles that are recognised in the legal systems of many nations; the writings of respected legal writers, and the decisions of international tribunals.

[†] The only exception is where a state persistently objects to a non-fundamental customary rule: *Fisheries Case (United Kingdom v Norway)* (1951) ICJ Reports 116 at p131.

[‡] General Assembly Resolution 1541 (XV), 15 December 1960 recognizes that this can happen when: 1) the integrating territory has attained an advanced stage of self-government with free political institutions, so that its peoples would have the capacity to make a responsible choice through informed and democratic processes; and 2) the integration is the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage.

1 International human rights standards

66. The Commission is mandated to consider violations of “international human rights standards”.⁵⁵ These are defined as “the internationally recognised human rights standards outlined under Section 2 of UNTAET Regulation No 1999/1”.⁵⁶ That section refers to “internationally recognised human rights standards, as reflected, in particular, in:

- The Universal Declaration on Human Rights of 10 December 1948
- The International Covenant on Civil and Political Rights of 16 December 1966 and its Protocols
- The International Covenant on Economic, Social and Cultural Rights of 16 December 1966
- The Convention on the Elimination of All Forms of Racial Discrimination of 12 December 1965
- The Convention on the Elimination of All Forms of Discrimination Against Women of 17 December 1979
- The Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment of 17 December 1984
- The International Convention on the Rights of the Child of 20 November 1989.

67. Regulation 1999/1 refers to internationally recognised standards “as reflected in particular in” the above international instruments. As this reference is inclusive of, but not limited to, these instruments, the Commission’s mandate includes other “internationally recognised standards” in international instruments that are not included in the above list.

68. During the mandate period Indonesia had ratified the following instruments:

- The Convention on the Elimination of All Forms of Discrimination Against Women (on 13 September 1984)
- The Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (on 28 October 1998)
- The Convention on the Rights of the Child (on 5 September 1990) (However, the ratification of this treaty was qualified by a reservation to the effect that it would apply to Indonesia only to the extent consistent with the Indonesian Constitution and that it would not grant rights not granted under the Constitution.)

69. During the mandate period Portugal had ratified or acceded to the following instruments:

- International Covenant on Civil and Political Rights (on 15 June 1978)
- Second Optional Protocol to the International Covenant on Civil and Political Rights aimed at the abolition of the death penalty (on 17 October 1990)
- International Covenant on Economic, Social and Cultural Rights (on 31 July 1978)
- International Convention on the Elimination of all forms of Racial Discrimination (on 24 August 1982)
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (on 9 February 1989)
- Convention on the Elimination of all forms of Discrimination Against Women (on 30 July 1980)
- Convention on the Rights of the Child (on 21 September 1990)

70. It is important to note also that international human rights standards continue to be relevant even during an armed conflict. These standards run concurrently with international humanitarian law.⁵⁷ In addition, a state's human rights responsibilities apply to its conduct outside its own territory, including in any foreign territories it occupies.⁵⁸

The right to self-determination

71. It is beyond doubt that a right of peoples to self-determination exists in international law. The right is guaranteed by Article 1 common to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and has been reaffirmed by the UN General Assembly.⁵⁹ It has been recognised repeatedly by the International Court of Justice as existing under customary law.* The obligation of states to respect this right is of such importance that it is said to be owed to the international community as a whole, or to all states (it is owed *erga omnes*).⁶⁰ The Human Rights Committee has said that:

The right of self-determination is of particular importance because its realisation is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.⁶¹

72. The right is said to be held by "all peoples". It applies not only to the inhabitants of non-self-governing territories (that is, peoples under colonial rule) but also to those living under alien occupation.⁶² The East Timorese are, and were throughout the mandate period, a people with a right to self-determination. Between December 1975 and 1982 the General Assembly passed eight resolutions,⁶³ and the Security Council a further two,⁶⁴ recognising the right of the East Timorese people to self-determination.

* See, mostly recently, *Advisory Opinion on the legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) ICJ where 14 of 15 judges referred to the right to self-determination: see judgment of the court at paras 88 and 155-156; separate opinion of Judge Koroma at para 5; separate opinion of Judge Higgins at paras 18 and 28-31; separate opinion of Judge Kooijmans at paras 6 and 31-33; separate opinion of Judge Al-Khasawneh at para 9; separate opinion of Judge Buergenthal at para 4; and the separate opinion of Judge Elaraby at para 3.4; also in *Case Concerning East Timor (Portugal v Australia)* (1995) ICJ Reports 90 at 102, para 29; and *Advisory Opinion of 16 October 1975 ("Western Sahara")* (1975) ICJ Reports 12 at paras 55-59; see also *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (1971) I.C.J. Reports 16, at paras. 52-53.

73. The essence of the right is the entitlement of a people to freely express its will. This involves, at a minimum, two central entitlements as set out in Article 1 common to the ICCPR and ICESCR. These are:

1. the right of a people to participate freely in a process whereby it is possible freely to determine its political status; and
2. the right of a people to partake in the pursuit of economic, social and cultural development and deal with its own natural wealth and resources.

74. Common Article 1(2) of the ICCPR and ICESCR provides:

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

75. States are required to respect and promote the right of peoples to self-determination⁶⁵ and to take positive action to facilitate its realisation.⁶⁶ The Human Rights Committee has said:

[I]n particular, States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination.⁶⁷

76. Although there may be difficulties in some cases in determining whether a specific act impeding self-determination breaches that obligation,⁶⁸ there is no doubt that a breach occurs in the case of a military invasion and occupation. That position has been made clear by the International Court of Justice, which, citing a General Assembly resolution, observed that:

Every State has the duty to refrain from any forcible action which deprives peoples...of their right to self-determination.⁶⁹

77. Where a denial of the right to self-determination occurs, all other states in the international community are obliged to recognise the illegality of that situation (or obliged not to recognise it as lawful) and must not take any action that aids or assists in its maintenance.⁷⁰

Unlawful killings

78. The right to life is protected under Article 3 of the Universal Declaration of Human Rights (UDHR) and Article 6 of the International Covenant on Civil and Political Rights (ICCPR). It is binding on all states as a rule of customary international law.⁷¹ Even where an emergency threatens the life of a nation, obligations in respect of the right to life may not be limited in any way ("derogated from").⁷²

79. Article 6(1) of the ICCPR provides that:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

80. State authorities are permitted to take a life only in states where the death penalty is in force, where it has been imposed after a fair trial by a competent court according to law,⁷³ and where it is carried out in such a way as to minimise physical and mental suffering.

81. Extrajudicial killings are clear a clear breach of the right to life. The Human Rights Committee, which oversees the implementation of the ICCPR, has commented:

The protection against arbitrary deprivation of life which is explicitly required by the third sentence of Article 6 (1) is of paramount importance. The Committee considers that State parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.⁷⁴

82. One circumstance in which a death will not violate the right to life is where it occurs in an armed conflict and in accordance with international humanitarian law. However this exception extends only to the killing of combatants and incidental deaths of civilians that result from proportionate and necessary military action. The intentional killing of civilians or prisoners remains a violation of international law. Furthermore, the Human Rights Committee has indicated in the context of the right to life that states have a “supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life”.⁷⁵

Disappearances

83. Causing the disappearance of individuals is a violation of a number of basic human rights. The Human Rights Committee has stated that states are required to take specific and effective measures to prevent the disappearance of individuals and should establish procedures to investigate cases of disappeared persons.⁷⁶ It has said that:

Any act of such disappearance constitutes a violation of many of the rights enshrined in the Covenant, including the right to liberty and security of person (Article 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Article 7), and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (Article 10). It also violates or constitutes a grave threat to the right to life (Article 6).⁷⁷

84. Other rights, such as the right to recognition as a person before the law (Article 16 ICCPR), may also be violated.⁷⁸ In addition to violating the human rights of the victim, disappearances may cause mental anguish in the victim's relatives sufficient to amount to a violation of the prohibition on torture and cruel, inhuman or degrading treatment or punishment.⁷⁹ From the perspective of surviving relatives, a disappearance also constitutes a violation of the right to a family life, and where a family was dependant economically on a disappeared person may also violate various economic and social rights such as the right to an adequate standard of living (Article 11 ICESCR) and the right to education (Article 13 ICESCR).⁸⁰

⁷³ Death sentences may otherwise infringe the prohibition on torture and cruel, inhuman or degrading treatment or punishment: see for example Human Rights Committee, General Comment 20, para.61; *Ng v Canada* (1994) HRC Comm No 469/1991, at para 16.2.

Displacement, resettlement and famine

85. Under the UDHR and ICCPR all persons have the right to liberty of movement and freedom to choose his or her residence.⁸¹ Restrictions on these rights are only permitted when it is necessary in a democratic country to protect national security, public order, public health or morals, or the rights of others, and any restrictions must be provided by law and not inconsistent with other human rights.⁸²

86. Everyone has the right to adequate food⁸³ and to be free from hunger.⁸⁴ This right means that there should be food available of sufficient quality and quantity to satisfy the dietary needs of individuals.⁸⁵ States are obliged not only to take steps to achieve the full realisation of this right,⁸⁶ but also to ensure that everyone under its control has access to the minimum essential food to ensure their freedom from hunger.⁸⁷ States may violate this obligation either directly or indirectly, for example by pursuing policies that are manifestly incompatible with the right of people to food.⁸⁸

87. All persons also have a right to water⁸⁹ and to adequate housing.⁹⁰ Most importantly, all persons have a right to life.⁹¹ The Human Rights Committee has indicated that this right should not be interpreted narrowly, and that it involves an obligation on states to take measures, for example, to reduce malnutrition.⁹²

88. In addition to these principles of human rights law, international humanitarian law also includes important provisions relating to displacement and famine (see below).

Arbitrary detention

89. The right to liberty of the person is protected under Article 3 of the UDHR and Article 9(1) of the ICCPR. That right is intended to ensure that a person's physical liberty is not restricted arbitrarily.⁹³ Article 9 of the UDHR and Article 9 of the ICCPR, more specifically, prohibit arbitrary arrest and detention. That prohibition is also contained in customary international law,⁹⁴ and is therefore binding on all states.

90. Article 9 of the ICCPR contains the following specific rights which apply to all deprivations of liberty:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that a court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

91. Detention will be arbitrary, and therefore in breach of human rights standards, in a number of circumstances. The clearest case is where the detention is not in conformity with national law. In addition, the UN Working Group on Arbitrary Detention has indicated that detention which violates other human rights standards is also arbitrary. It treats a detention as arbitrary:

1. Where there is no legal basis justifying the detention
2. Where the detention arises from the legitimate exercise of fundamental rights (for example, freedom of expression or opinion)
3. When the situation involves human rights violations of such severity that the detention may be regarded as arbitrary (for example, where due process or a fair trial is lacking).⁹⁵

92. More generally still, the Human Rights Committee has indicated that an otherwise lawful detention may still be arbitrary and in breach of Article 9 of the ICCPR if it is not reasonable or necessary in all the circumstances.⁹⁶ Detention might also become arbitrary, if it continues past the point at which it is reasonable or necessary in the circumstances.⁹⁷

93. In cases where a person is arrested or detained on a criminal charge that person must be brought promptly (within a few days)⁹⁸ before a judge, and must either be tried within a reasonable time or released.⁹⁹

94. Pre-trial detention should be an exception and as short as possible.¹⁰⁰ Importantly, the Human Rights Committee also stressed that

[I]f so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (Para 1), information of the reasons must be given (Para 2) and court control of the detention must be available (Para 4) as well as compensation in the case of a breach (Para 5). And if, in addition, criminal charges are brought in such cases, the full protection of Article 9 (2) and (3), as well as Article 14 [which covers the right to a fair trial], must also be granted.¹⁰¹

Conditions of imprisonment

95. Article 10(1) of the ICCPR provides that:

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.¹⁰²

96. The Human Rights Committee has said that this provision reflects “a norm of general international law”¹⁰³ and that it is “not subject to derogation”.¹⁰⁴ It has interpreted the provision as meaning, among other things, that persons in detention must not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and must be allowed to enjoy all human rights subject to the restrictions that are unavoidable in a closed environment.¹⁰⁵

97. Where treatment in detention fails to meet minimum standards, it may also amount to cruel, inhuman or degrading treatment or punishment.* In particular, prolonged periods of solitary

* In violation of Article 5 UDHR; Article 7 ICCPR, Article 16 CAT.

confinement or incommunicado detention may violate these standards.¹⁰⁶ The Human Rights Committee has also observed that:

[C]ertain minimum standards regarding the conditions of detention must be observed regardless of a State party's level of development. These include, in accordance with Rules 10, 12, 17, 19 and 20 of the U.N. Standard Minimum Rules for the Treatment of Prisoners, minimum floor space and cubic content of air for each prisoner, adequate sanitary facilities, clothing which shall be in no manner degrading or humiliating, provision of a separate bed, and provision of food of nutritional value adequate for health and strength. It should be noted that these are minimum requirements which the Committee considers should always be observed, even if economic or budgetary considerations may make compliance with these obligations difficult.¹⁰⁷

Torture and other cruel, inhuman or degrading treatment

98. Article 5 of the UDHR and Article 7 of the ICCPR provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Torture is also prohibited under customary international law, which binds all states.¹⁰⁸ The prohibition is so significant that it “enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules” (that is, it is a “norm of *jus cogens*”) and may not be circumvented (“derogated from”) under any circumstances.¹⁰⁹

99. The Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT) (ratified by Indonesia on 28 October 1998) sets out a more detailed regime for the prevention and punishment of torture and cruel, inhuman or degrading treatment or punishment, including the following:

- States must take measures to prevent torture in any territory under their jurisdiction.¹¹⁰
- States must also prevent cruel, inhuman or degrading treatment or punishment from being carried out with the involvement or acquiescence of officials.¹¹¹
- No circumstances, such as a war or public emergency, are a justification for torture.¹¹²
- States must make torture an offence under their criminal laws.¹¹³
- Cases of alleged torture or cruel, inhuman or degrading treatment or punishment must be promptly and impartially investigated.¹¹⁴
- States must educate all civil and military law enforcement personnel and public officials about the prohibition on torture, and must systematically review rules and practices relating to the interrogation and custody of prisoners in order to prevent torture and cruel, inhuman and degrading treatment or punishment.¹¹⁵
- Statements made as a result of torture must not be used as evidence.¹¹⁶

100. The CAT defines torture as occurring where each of the following elements is present:

- An act is committed which, intentionally, inflicts severe pain or suffering
- The act is committed for the purpose of punishment, intimidation, coercion, or of obtaining information or a confession or on any discriminatory basis
- The act is committed by or at the instigation of a public official, or with the consent or acquiescence of a public official.

101. This definition does not treat an act as torture if it is carried out by a non-governmental actor, such as a member of an opposition party or militia, unless it is done with the consent or acquiescence of the government.¹¹⁷ However in cases where a country has no functioning government, factions or organisations that in fact exercise government-like functions may be treated as public officials.¹¹⁸ (This exception may allow the definition to apply to acts committed by Fretilin/Falintil at least in areas and at times where they exercised governmental functions in the absence of other authorities). The CAT definition has been said to reflect customary international law.¹¹⁹

102. The definition of torture is similar under other human rights instruments. The Human Rights Committee has said that whether conduct amounts to torture depends on “the nature, purpose and severity of the treatment applied”.¹²⁰ However, one distinction is that the concept of torture under the ICCPR does not require the involvement or acquiescence of a public official. According to the Human Rights Committee:

It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.¹²¹

103. Although no treaty defines cruel, inhuman or degrading treatment or punishment, it is understood to include acts which fall short of torture because they are not carried out for a particular purpose or are not severe enough. It includes, for example, solitary confinement,¹²² sleep deprivation,¹²³ restraining a person in painful positions,¹²⁴ keeping a person’s head hooded,¹²⁵ and subjecting a person to death threats.¹²⁶

104. Under the CAT states are required to take steps to prevent cruel, inhuman or degrading treatment or punishment only where it involves or is acquiesced to by a public official.¹²⁷ Obligations under the ICCPR are wider, requiring states to take steps against such treatment even when carried out by non-government groups or private individuals.¹²⁸

Unfair trials

105. Rights to due process and a fair trial under international human rights law are guaranteed by Articles 10 and 11 of the UDHR and Articles 14 and 15 of the ICCPR.

106. Some provisions are also relevant to pre-trial procedures. A person who is arrested on a criminal charge must be informed promptly, in a language that he or she understands, of the criminal charges being brought,¹²⁹ and must as soon as possible be given access to a lawyer of his or her

^{*} Article 1(1) CAT provides that torture means “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.” The definition is without prejudice to any definition in international instruments or national legislation that is of wider application: Article 1(2) CAT.

choosing.* He or she must be brought, within a few days,[†] before a judge, and must be either tried within a reasonable time or released.¹³⁰ Adequate time and facilities must be provided to the accused person for the preparation of his or her defence before the trial.¹³¹ This includes allowing access by the accused person to the documents and other evidence which are needed for the preparation of his or her case, as well as opportunities to communicate with his or her lawyer.¹³²

107. The accused person must be tried without undue delay.¹³³ The trial must be before a “competent, independent and impartial tribunal established by law”.[‡] The hearing must be fair.¹³⁴ According to the Human Rights Committee, “an indispensable aspect of the fair trial principle is the equality of arms between the prosecution and the defence”.¹³⁵ This means that the defence must be allowed as many resources as the prosecution, and an equal opportunity to present its case. This principle will be violated, for example, where the prosecution detains witnesses without special circumstances justifying such action.¹³⁶ Prosecutors should also not be permitted to rely on evidence obtained through torture or cruel, inhuman or degrading treatment.¹³⁷

108. The hearing must be public, except in very special circumstances.¹³⁸ The right to a public hearing may be violated even when a hearing is technically “public”, if it is not in practice accessible to the public.¹³⁹ This may extend to situations where the public is effectively scared away from attendance at a hearing.

109. An accused person also has the following specific rights at trial:

- to be presumed innocent until proved guilty according to law¹⁴⁰
- to defend him or herself in person or through legal assistance of his or her choosing¹⁴¹
- to examine (him or herself or through a lawyer) the prosecution witnesses and to call witnesses for him or her self¹⁴²
- to have assistance from an interpreter if he or she cannot understand or speak the language used in the court¹⁴³
- not to be compelled to testify against him- or herself or to confess guilt.¹⁴⁴ The Human Rights Committee has said that compliance with this right involves:

the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused with a view to obtaining a confession of guilt. *A fortiori*, it is unacceptable to treat an accused person in a manner contrary to Article 7 of the Covenant in order to extract a confession.¹⁴⁵

110. If found guilty, a person has the right to appeal his or her conviction and sentence to a higher court.¹⁴⁶ Written reasons for decisions must be provided within a reasonable time by appeal courts in order to facilitate further appeals.¹⁴⁷

111. No person may be found guilty of a crime in relation to acts which were not illegal at the time they were committed.¹⁴⁸

* Article 14(3)(b) ICCPR; see eg *Kelly v Jamaica* (1996) HRC Comm No 537/1993, at para 9.2, where a 5 day delay in receiving access to a lawyer after being taken into custody was held to have breached Article 14(3)(b).

† Human Rights Committee General Comment 8 para 2; See also *Jijon v Ecuador* (1992) HRC Comm. No. 227/88 where a delay of five days in bringing a prisoner before a judge was held to have breached Article 9(3).

‡ Article 14(1) ICCPR; see also *Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985; see also *Guidelines on the Role of Prosecutors*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

Rights to freedom of opinion, expression, assembly and association

112. In addition to these procedural rights, political trials often violate other human rights. These include, for example:

1. The right to freedom of opinion and expression¹⁴⁹
2. The right to peaceful assembly and association.¹⁵⁰

113. No restrictions on or exceptions to the right to freedom of opinion are permitted.¹⁵¹ Restrictions on the rights to freedom of expression, peaceful assembly and association are permitted only in narrowly defined circumstances. These are:

- The restriction must be provided by law
- The restriction must be for a permissible purpose (to uphold the rights of others, or to protect national security, public order, public health or public morals)
- The restriction must be necessary in order to achieve the permissible purpose (and in the case of freedom of assembly and association, the measures are only permissible if they are necessary to achieve the purpose “in a democratic society”).¹⁵²

114. A mere assertion that measures are necessary for national security is insufficient unless it is shown why that is the case.¹⁵³ These requirements must be strictly complied with. For example the Human Rights Committee has said that:

[Freedom of expression] is of paramount importance in any democratic society, and any restrictions to the exercise thereof must meet a strict test of justification.”¹⁵⁴

Rape and other forms of sexual assault/harassment

115. Although there is no human rights instrument that refers specifically to rape and sexual assault, these abuses amount to violations of a number of human rights standards. Most significantly, cases of rape or sexual assault will usually amount to torture or cruel, inhuman or degrading treatment.¹⁵⁵ The ICTY Appeals Chamber has stated that:

Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture.¹⁵⁶

116. In all cases rape violates the right to physical integrity, which is protected under customary international law.¹⁵⁷

117. In addition, rape and sexual assaults violate the right to privacy.¹⁵⁸ When carried out against women, they violate the rights of women to be free from and protected against gender-based discrimination,¹⁵⁹ of which sexual crimes against women are one form. The Human Rights Committee has said that “women are particularly vulnerable in times of internal or international armed conflicts” and that states should take steps “to protect women from rape, abduction and other forms of gender-based violence”.¹⁶⁰

118. Many of these rights are protected under the Convention on the Elimination of all forms of Discrimination against Women, which Indonesia became a party to on 13 September 1984.

Sexual slavery

119. Incidents of sexual slavery are repetitive violations of all of the rights discussed above.

120. The UDHR and ICCPR both prohibit all forms of slavery,¹⁶¹ reflecting a fundamental rule of customary international law.¹⁶² The Human Rights Committee has discussed questions of sexual slavery in the context of that prohibition.¹⁶³ In the context of international humanitarian law, the crime against humanity of enslavement has been said to consist of the exercise of any or all of the powers attaching to the right of ownership over a person,¹⁶⁴ and this can include cases where women are detained for long periods of time and repeatedly sexually assaulted.*

121. In addition, under the Convention on the Elimination of All Forms of Discrimination against Women, states are obliged to take measures to suppress all forms of traffic in women.¹⁶⁵

Children's rights

122. As well as being protected by general human rights standards such as those relating to the rights to life, food, freedom from torture and arbitrary detention, and social and economic rights, children are protected by specific additional rules of international human rights law which reflect the requirement in Article 25 of the UDHR that childhood is "entitled to special care".¹⁶⁶ Most of these are contained in the Convention on the Rights of the Child (CRC), although some are also found in other international instruments. Indonesia ratified the CRC on 5 September 1990.[†]

123. An overarching obligation is to treat the best interests of the child as a primary consideration when taking any action concerning children.¹⁶⁷

124. The CRC provides that children are entitled to many of the rights granted more generally under other instruments, including the right to life,¹⁶⁸ the right to be free from torture,¹⁶⁹ the right to be free from arbitrary detention,¹⁷⁰ and the right to enjoy the highest attainable standard of health and to have access to medical facilities.¹⁷¹

125. More specifically, the CRC requires states to protect children from all forms of physical or mental harm,¹⁷² all forms of sexual exploitation and abuse,¹⁷³ and all other forms of exploitation.¹⁷⁴ It also provides that children have a right to a standard of living adequate for their physical, mental, spiritual and social development.¹⁷⁵ Capital punishment may not be imposed for offences committed by a person under the age of 18.¹⁷⁶

126. In respect of the recruitment of children into military or paramilitary organisations the following standards are relevant:

* In *Prosecutor v Kunarac* women were detained and were repeatedly raped and sexually assaulted and were forced to carry out work around the accused's home. This was held to constitute the crime against humanity of enslavement.

† Indonesia entered a reservation in respect of the CRC that it would implement the Convention in conformity with its constitution and did not accept obligations going beyond those imposed by its Constitution.

- States must refrain from recruiting children under the age of 15 into their armed forces, and must take measures to prevent children under the age of 15 from directly participating in hostilities.¹⁷⁷
- If recruiting children between the ages of 15 and 18 into their armed forces states must give priority to older children.¹⁷⁸
- Children have a right to protection from economic exploitation and from performing work that is likely to be harmful or dangerous to the child.¹⁷⁹

127. A number of further standards contained in the CRC are specifically relevant to the transfer of East Timorese children to Indonesia. For example:

- A child must not be separated from his or her parents against his or her will except where proper procedures establish that it is in the best interests of the child.¹⁸⁰
- States are required to combat the illicit transfer of children abroad, and the abduction, sale or traffic of children.¹⁸¹
- States must regulate adoption processes and ensure that adoption is undertaken by competent authorities according to the law.¹⁸²
- Where a child is separated from his or her family the state must provide special protection, the nature of which shall be determined with due regard to the desirability of continuity in a child's upbringing, and the child's ethnic, religious, cultural and linguistic background.¹⁸³
- A child has the right to preserve his or her identity, including nationality, name and family relations.¹⁸⁴

Social and economic rights

128. Economic, social and cultural rights are set out in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Some are also contained in the UDHR.

129. The most relevant of these to the Commission's mandate are the following rights granted to all individuals:

- The right to undertake work freely chosen¹⁸⁵ and to just and favourable conditions of work,¹⁸⁶ including a fair wage and safe and healthy working conditions.¹⁸⁷
- The right to an adequate standard of living for every person and his or her family, including adequate food, clothing and housing, and the continuous improvement of living conditions.¹⁸⁸
- The right to the enjoyment of the highest attainable standard of physical and mental health.¹⁸⁹
- The right to an education, including free and compulsory primary education.¹⁹⁰

130. It is recognised that economic, social and cultural rights are different from political and cultural rights because their attainment is more dependent on the resources available to a state. For this reason states' obligations in respect of the rights listed above are not obligations to guarantee those rights absolutely, but rather to take steps towards the maximisation of resources so as to achieve the rights set out.¹⁹¹ However this should not be interpreted by states as an excuse for non-compliance with their obligations. The Committee on Economic, Social and Cultural Rights (CESC) has emphasised that the ICESCR does impose two specific obligations on states. These are:

1. The requirement that social and economic rights be exercised without discrimination (as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status)
2. The duty to take “deliberate, concrete and targeted” steps towards realising the rights in the Covenant.¹⁹²

131. The Committee has also indicated that the Covenant imposes “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights”,¹⁹³ including for example the provision of “essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education”.¹⁹⁴

132. It is also important to recognise the link between economic and social rights and the right of a people to self-determination. Both the ICESCR and the ICCPR, in setting out the right to self-determination, provide that a people has the right to freely dispose of its natural wealth and resources for its own ends, and that “in no case may a people be deprived of its own means of subsistence”.¹⁹⁵

Reproductive rights

133. Several human rights provisions may be relevant to the Indonesian control of fertility and incidents of coerced birth control. The ICCPR guarantees the rights of men and women to found a family.¹⁹⁶ In respect of that right the Human Rights Committee has indicated that:

When State parties adopt family planning policies, they should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or compulsory.¹⁹⁷

134. CEDAW grants women the same rights as men in deciding freely on the number and spacing of their children.¹⁹⁸ This is said to involve a prohibition on compulsory sterilisation or abortion, and requires states to take measures to prevent the coercion of women in respect of their fertility.¹⁹⁹

Human rights during national emergencies

135. Some international human rights instruments allow states to suspend or temporarily limit (“derogate from”) their human rights obligations when a national emergency occurs.²⁰⁰ However this may only occur in the most severe emergencies, and there are restrictions on the extent to which states may take measures in derogation.

136. Most significantly, some human rights may never be derogated from, even in the most serious emergency. These include:

- The right to life²⁰¹
- The right to freedom from torture and cruel, inhuman and degrading treatment and punishment²⁰²
- The right to freedom from slavery and servitude²⁰³
- The right of those in detention to be treated with humanity²⁰⁴
- Rights to a fair trial²⁰⁵
- The right to bring legal proceedings to challenge the lawfulness of any detention.²⁰⁶

137. Even in areas where derogation is permitted, this should only happen temporarily and the special measures taken must be strictly necessary in the circumstances.²⁰⁷

2. International humanitarian law

Introduction

138. Under the Commission mandate, “human rights violations” are defined as including “violations of international humanitarian law”.²⁰⁸ International humanitarian law is the body of law setting out the rules applicable during an armed conflict. These rules apply to states, to armed groups,²⁰⁹ and also to individuals.

139. International humanitarian law applies only where there is an “armed conflict”. In addition, the rules that apply will differ depending on whether the conflict is “international” or “internal” in nature.

The existence of an armed conflict

Conclusion:

140. The Commission considers that there was an armed conflict in existence in Timor-Leste from 11 August 1975 until at least the end of the mandate on 25 October 1999. International humanitarian law therefore applied throughout this period.

Reasoning:

141. The existence of an armed conflict does not require a declaration of war or even recognition by parties themselves formally that a state of armed conflict exists. The test is whether there are actual hostilities on a level that goes beyond a mere “internal disturbance”.²¹⁰ An armed conflict exists:

Whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.²¹¹

142. Between April 1974 and August 1975 the sporadic, low level violence in Timor-Leste was not of sufficient intensity to trigger the application of international law. During August-September 1975 the hostility between Fretilin and UDT went beyond minor disturbances and tensions, and was more organised than riots or sporadic acts of violence. The Commission is satisfied that from 11 August, when UDT launched its attempted coup, the two parties and the armed forces under their control engaged in open armed confrontations. During September-November 1975 groups of armed combatants under the control of the Indonesian security forces entered the territory of Timor-Leste and engaged the armed forces under the control of Fretilin almost up until the full-scale invasion on 7 December 1975. The situation of international armed conflict which began when these armed groups crossed the border and continued at least until the end of the Commission’s mandate on 25 October 1999. Although the main body of Indonesian security forces and militias had left the territory by this date there was continued armed conflict between

Indonesian-controlled militia groups and international peacekeepers after UNTAET's administration of the territory commenced on 25 October 1999.²¹²

Status of the conflict in Timor-Leste: international or internal armed conflict?

Conclusions:

1. During the period from approximately 11 August 1975 until approximately 1 October 1975 the laws relating to internal armed conflicts were applicable in Timor-Leste.
2. The laws relating to international armed conflicts applied from approximately 1 October 1975 until 25 October 1999.

Reasoning:

143. An internal or non-international armed conflict occurs where an armed conflict takes place in the territory of one state, without the involvement of any other state.²¹³

144. An international armed conflict occurs where:

- A conflict takes place between two or more states or
- An internal armed conflict exists in one state and a second state intervenes in that conflict with its troops or
- An internal armed conflict exists in one state and some of the participants in that conflict, such as militia groups, in fact act on behalf of a second state.²¹⁴

145. According to the theory of international humanitarian law, whenever an armed conflict exists it is either an international armed conflict or a non-international (internal) armed conflict. There is no third category. In practice however, it is sometimes more difficult to categorise a conflict.

146. In the case of Timor-Leste the "civil war" between Fretilin and UDT amounted to an internal armed conflict, which took place in the territory of one state (Portugal). Although Indonesia began interfering in the affairs of Timor-Leste while it was still under Portuguese control, by supporting members of Apodeti, and even providing military training and weaponry to its members²¹⁵ this could not "internationalise" the conflict unless Indonesia exercised "effective control" of Apodeti's actions, or had at least "overall control" of Apodeti.[†] The Commission is therefore of the view that the "civil war" had the status of an internal armed conflict.

147. However, from mid-September 1975 and possibly earlier, cross-border attacks were carried out by Indonesian forces, who were in command (and therefore held effective and overall control) of East Timorese groups known as Partisans. These cross-border attacks roughly overlapped with the end of the most intense period of the "civil war". The initial attacks were followed by the full-scale invasion by Indonesia on 7 December 1975.

148. The nature of the conflict in Timor-Leste is different from most international armed conflicts in which the armed forces of at least two states are clearly involved. The forces that resisted the Indonesian attack were not under the command and control of the Portuguese army

^{*} *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (1986) ICJ Reports 4 at p.65. The ICJ indicated that the supply of weaponry and training was insufficient without more for effective control by the state to be demonstrated: see at 64.

[†] *Prosecutor v Dusko Tadic*, ICTY Case Number IT-94-1, Appeals Chamber Judgment, 15 July 1999 at para 120. The ICTY in this decision rejected the "effective control" test that the ICJ had adopted in the *Nicaragua* case. Disagreement continues as to which is the appropriate test.

(it had withdrawn to Ataúro). They included local Portuguese soldiers and reservists (Segunda Linha) acting independently, members organised resistance to occupation.

149. The Commission considers of Falintil and Fretilin-organised militias Throughout the occupation the Indonesian forces fought not against Portuguese troops but against the armed forces of Falintil and the that the conflict in Timor-Leste had the status of an international armed conflict from October 1975 for the following reasons:

1. There was an armed conflict sufficient to trigger the application of international humanitarian law. This conflict was clearly not internal, as it did not take place in the territory of one state without the involvement of any other state. Although different to the more common situations involving the armed forces of two sovereign states, the armed forces of one such state (Indonesia) were fighting in the territory of another (Portugal).
2. Indonesia's invasion constituted foreign interference in an existing internal armed conflict, which had the effect of "internationalising" that conflict.²¹⁶
3. The Geneva Conventions of 1949 (which, aside from Common Article 3, deal with international armed conflicts) apply to "all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."²¹⁷ Since Portugal was a party to the Geneva Conventions, they applied, on this basis, to any part of Timor-Leste that was occupied by Indonesia (see sections of this Annex dealing with the law of belligerent occupation).

Relevant treaties

150. International humanitarian law, like other areas of international law, is made up primarily of treaties and rules of customary international law. Customary law that applies to situations of armed conflict is referred to as "the laws and customs of war". While treaties bind only those states that are party to them, customary law binds all states.

151. The Commission's mandate defined "international humanitarian law" as including:

- The four Geneva Conventions of 12 August 1949
- The two Protocols Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International and non-International Armed Conflict of 8 June 1977
- The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects of 10 October 1980 and
- The laws and customs of war.²¹⁸

152. The provisions included in these sources are relevant to the Commission's mandate to examine violations of the standards recognised by the international community that relate to the conduct of warfare, irrespective of whether they may have been legally binding on particular parties at the time of their actions.

153. However, it is also useful to consider which provisions were legally binding on parties to the conflict. These include the treaty obligations of each party and the provisions of customary international law know as the "laws and customs of war".

²¹⁶ Which includes, amongst other things, the content of the Hague Regulations of 1907: see *Advisory Opinion on the Treat or Use of Nuclear Weapons* (1996) ICJ Reports 226 at pp257-258 (citing the judgement of the Nuremberg IMT); *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territories* (2004) ICJ at para 89.

Indonesia's treaty obligations

154. From the beginning of the mandate period, Indonesia was a party to the following humanitarian law treaties:

- The Geneva Conventions of 12 August 1949 (which Indonesia became a party to on 30 September 1958)
- The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954 (which Indonesia became a party to on 10 January 1967)
- The First Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954 (which Indonesia became a party to on 26 July 1967) and
- The Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and Warfare of 17 June 1925 (which Indonesia became a party to on 21 January 1971).

155. Indonesia also became a party to the following conventions during the mandate period:

- The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction of 10 April 1972 (which Indonesia became a party to on 19 February 1992) and
- The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects of 10 October 1980 (which Indonesia became a party to on 12 November 1998).

Portugal's treaty obligations:

156. At the beginning of the mandate period Portugal was a party to the following relevant treaties:

- The Geneva Conventions of 12 August 1949 (which Portugal became a party to on 14 March 1961) and
- The Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and Warfare of 17 June 1925 (which Portugal became a party to on 1 July 1930).

157. During the mandate period Portugal became a party to a number of further humanitarian law treaties, including:

- The First Additional Protocol to the Geneva Conventions of 8 June 1977 (which Portugal became a party to on 27 May 1992)
- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction of 10 April 1972 (which Portugal became a party to on 15 May 1975)
- Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious (CCW) of 10 October 1980 (which Portugal became a party to on 4 April 1997)
- Protocol I to the CCW on Non-Detectable Fragments (which Portugal became a party to on 4 April 1997)
- Protocol II to the CCW on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and other Devices (which Portugal became a party to on 4 April 1997)
- Protocol III to the CCW on Prohibitions or Restrictions on the Use of Incendiary Weapons (which Portugal became a party to on 4 April 1997)
- Convention on the Prohibitions of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction of 13 January 1993 (which Portugal became a party to on 10 September 1996)
- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction of 18 September 1997 (which Portugal became a party to on 19 February 1999)
- Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (which Portugal became a party to on 9 February 1999)

158. However, as Portugal was not a party to the conflict for most, if not all, of its duration, and as Indonesia was not also a party to most of these conventions, they are of only minimal relevance to the conflict.

Obligations on states and armed groups

International armed conflict: the Indonesian invasion and occupation

159. The Geneva Conventions of 1949 apply to “all cases of total or partial occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance”.

160. The Conventions therefore applied to the international armed conflict involving Indonesian forces in the legal territory of Portugal, from the beginning of the international armed conflict and throughout the Indonesian occupation.

161. In addition, the full range of the laws and customs of war applied to the conflict.

162. Some of the main principles contained in these sources are as follows:

1. Attacks on civilians and civilian objects are prohibited

163. One of the fundamental rules of international armed conflict is the principle of distinction. This states that a distinction must be drawn between civilians and civilian objects on the one hand, and combatants and military objectives on the other. Parties to the conflict must only attack

⁷ Article 2 common to the Geneva Conventions states that the conventions apply to “all cases of total or partial occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.” Portugal, which was the administering power for Timor-Leste, was a party to the Geneva Conventions throughout the mandate period.

other combatants and military objectives. The International Court of Justice has called this a cardinal principle of international humanitarian law.²¹⁹

164. This principle involves a number of more specific rules:

165. Attacks must not be made directly on civilians, civilian objects or undefended towns or buildings.²²⁰ It is not permitted to carry out acts for the purpose of intimidating or terrorising the civilian population, or to take civilian hostages.²²¹ Attacks on cultural objects, places of worship or objects necessary for the survival of the civilian population (such as those used in food production) are prohibited.²²² Even if one party to a conflict breaches these rules, the other side may not respond by targeting civilians.²²³ The collective punishment of civilians is prohibited, meaning that where a person is suspected of criminal acts or of fighting for the opposing side in a conflict, it is not permitted to punish that person's friends, family or community.²²⁴

166. Using the starvation of civilians as a means of warfare is prohibited, as is the destruction or removal of objects necessary for the survival of the civilian population, such as food, crops, livestock, drinking water installations, or means of producing food.²²⁵ Parties to a conflict must allow the free passage of aid, including medical supplies and food and clothing for children and expectant mothers.²²⁶

167. Attacks must not be carried out using methods or weapons that make it impossible to distinguish between civilian and military targets.²²⁷

168. Civilian casualties and damage to civilian objects resulting from an attack on a military objective are permissible only so long as they are not excessive in relation to the military necessity of the attack.²²⁸ Attacks should be carried out in such a way as to minimise civilian casualties and damage to civilian objects.²²⁹ Wherever possible, advance warning should be given to civilians of attacks that may harm the civilian population.²³⁰

169. Customary law also prohibits "perfidy". This means that combatants are prohibited from feigning civilian status (or the status of other protected persons, such as wounded combatants) in order to carry out attacks.²³¹

170. Geneva Protocol I defines civilians and civilian objects as follows:^{*}

171. A civilian includes all persons in the relevant area except members of:

- The armed forces, including militias and volunteer units forming part of the armed forces
- Militias or resistance movements and
- The inhabitants of a territory who spontaneously take up arms to resist an invasion.²³²

172. Where it is not clear whether a person is a civilian, he or she must be treated as a civilian.²³³ The presence within a civilian population of some individuals who are not civilians does not change the civilian nature of that population.²³⁴ This means that even if a town contains some enemy combatants, it should not become a military target.

173. All objects and buildings except "military objectives" are classed as civilian and therefore protected.²³⁵ Military objectives are objects which make an effective contribution to military action and the destruction or capture of which provides a military advantage.²³⁶

^{*} Although this treaty did not itself apply to the conflict in Timor-Leste as Indonesia was not a party to it, the provisions dealing with the principle of distinction have been said to reflect customary law: see for example Christopher Greenwood, "The Customary Law Status of the 1977 Geneva Protocols" in Astrid J.M. Delissen and Gerrard J. Tanja (eds) *Humanitarian Law of Armed Conflict: Challenges Ahead* Dordrecht, Martinus Nijhoff Publishers, 1991 at p.109.

174. Where guerrilla fighters take part in a conflict, they must distinguish themselves from civilians. Under the laws and customs of war and the Third Geneva Convention of 1949, the requirements are that such fighters must:

- Be part of an organisation commanded by a person responsible for his subordinates
- Wear a fixed distinctive sign recognisable at a distance or otherwise distinguish themselves clearly from civilians
- Carry weapons openly and
- Generally conduct their operations in accordance with the laws and customs of war.[†]

175. A more relaxed standard applies to persons who take up arms spontaneously against an invading army without sufficient time to organise into formal organised units. They are required only to carry arms openly and comply generally with the laws and customs of war.²³⁷

176. Those who do not comply with these requirements while participating in fighting are not entitled Prisoner of War status if captured,²³⁸ and also forfeit their civilian status as a result of their participation, becoming a legitimate target. They are sometimes referred to as “unlawful” or “unprivileged combatants”. They may be tried and punished for their participation in the fighting. However, importantly, although civilians are not permitted to join in the fighting without complying with these requirements, they are always permitted to act in self-defence.

177. The Commission has taken the view that, in general, the members of Falintil sufficiently complied with the above requirements. Falintil had relatively strict and enforced command structures and discipline, carried arms openly and generally conducted their operations in accordance with the laws and customs of war. From the commencement of the conflict members of Falintil wore the uniforms of the Portuguese army. By 1980 many of these uniforms had become worn and were at various times replaced with other military fatigues. However the combination of the available uniforms and insignia’s and other very distinctive features, such as Falintil members adopting an exclusive and uniform policy of wearing extremely long hair made them easily distinguishable from a distance.²³⁹

2. The mistreatment of enemy combatants is prohibited

178. Under the laws of war special rules apply to combatants who have fallen into enemy hands.

179. Most combatants in enemy hands are entitled to Prisoner of War (POW) status. These include:

^{*} The purpose of the requirement in Article 1 of the Hague Regulations and Article 4A(2) of Geneva Convention III that combatants wear a fixed distinctive sign recognisable at a distance is to enable the enemy to distinguish members of the group (who are legitimate military targets) from civilians (who are not legitimate targets). For this reason it seems likely that under customary law it has been subsumed by the more liberal requirement under Article 43(3) First Additional Protocol to the Geneva Conventions 1977 that members of the group must distinguish themselves from civilians in some way. It seems likely that this broader requirement either reflected pre-existing custom in 1977 or became customary soon thereafter: see Christopher Greenwood, “Customary Law Status of the 1977 Geneva Protocols”, in Astrid J.M. Delissen and Gerard J. Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead*, Dordrecht, Martinus Nijhoff, 1991, at p.107.

[†] Article 1 Hague Regulations 1907 and Article 4A(2) Geneva Convention III. Although less onerous requirements are set down in Article 44(3) of the First Additional Protocol to the Geneva Conventions, that treaty was not applicable to the conflict in Timor-Leste, and in this respect does not reflect customary law.

- Members of the armed forces, including militias forming part of the armed forces
- People who accompany the armed forces in support or logistical roles
- Members of militias or resistance movements who have complied with the requirement to distinguish themselves from civilians (including by wearing a distinctive uniform and carrying weapons openly) and
- Inhabitants of a territory who spontaneously take up arms to resist an invasion, without having had time to organise themselves into a military structure, but who carry arms openly and obey the laws and customs of war.*

180. Where it is unclear whether a person is entitled to POW status, he must be treated as a POW until a competent tribunal determines his status.²⁴⁰ Prisoners of war must be treated humanely.²⁴¹ They must not be tortured, killed or subjected to intimidation or insults.²⁴² They must be provided with food and water and any necessary medical treatment.²⁴³ They must be held away from areas in danger of attack during military activities.²⁴⁴

181. Combatants who fall into enemy hands but are not entitled to POW status, such as resistance fighters who have not complied with the requirement to distinguish themselves from civilians, are still entitled to certain standards of treatment. Under Geneva Convention IV, persons in occupied territories who are suspected of acts hostile to the occupying power must be treated with humanity and are entitled to a fair trial.²⁴⁵ In all cases unlawful combatants are entitled to humane treatment under general international law,[†] and the protection of human rights law which forbids extra-judicial killing, torture and arbitrary detention, and which guarantees rights to a fair trial (see sections of this Annex on Unlawful Killings, Disappearance, Arbitrary detention, Torture and other cruel and inhumane or degrading treatment, and Unfair trials, above).

3. Unlawful means of warfare

182. Under the laws of armed conflict, the weapons and techniques (“means of warfare”) that may be used to cause harm to opposing forces are limited.²⁴⁶ Two general principles apply:

1. It is forbidden to use means of warfare which cause superfluous injury or unnecessary suffering²⁴⁷
2. It is forbidden to use means of warfare that do not allow the attacker to distinguish between military targets and civilians (“indiscriminate means”).²⁴⁸ This prohibition covers tactics such as poisoning of water supplies, and attempts to starve a population.²⁴⁹

4. Forced recruitment into military activities

183. Under the laws and customs of war it is prohibited to compel enemy nationals to take part in operations of war that are directed at their own country.²⁵⁰ Geneva Convention IV also prohibits an occupying power from compelling civilians to serve in its armed or auxiliary forces.²⁵¹ This prohibition also covers pressure or propaganda directed at encouraging enlistment.²⁵²

5. Duties of an occupying power

184. It is important to note that an occupying power does not acquire sovereignty over the occupied area. Rather, occupation should be a temporary state, during which the occupying

* Article 4 Geneva Convention III; Article 44(1), (3) and (4) Geneva Protocol I. (This includes combatants who are sick or wounded: Article 14 Geneva Convention I.)

† More specifically, by application of the Martens Clause (set out in the Hague Convention IV of 1907 and a number of other conventions), include “principles of humanity”: see Report of the International Law Commission on the Work of its Forty-sixth Session, 2 May -22 July 1994, GAOR A/49/10, at p.317; *Advisory Opinion on the Threat or Use of Nuclear Weapons* (1996) ICJ Reports 226 at pp257 and 259 and the Dissenting Opinion of Judge Shahabuddeen at pp.406-408.

power has certain obligations towards the local population. These obligations are in addition to those set out above in respect of hostilities. Some of the most important and relevant rules are:

- Civilians are entitled to respect for their person, honour, family rights, religious convictions, customs and property, and to humane treatment generally²⁵³
- The occupying power must not cause physical suffering to civilians²⁵⁴
- The occupying power must ensure that the population receives adequate food, water and medical treatment, including by importing resources or accepting aid if local supplies are inadequate²⁵⁵
- The occupying power must protect children by ensuring that institutions for their care and education are functioning; and by refraining from enlisting them in its services.²⁵⁶

185. Although the occupying power is permitted,²⁵⁷ and in fact obliged,²⁵⁸ to restore public order, the means by which they may do this are not unlimited. It may not:

- Require inhabitants in the occupied areas to swear allegiance to it²⁵⁹
- Deprive people of any rights to a fair trial²⁶⁰
- Carry out individual or mass forcible transfers or deportations of the local population, or transfer its own citizens into the occupied territory²⁶¹ or
- Override the existing laws and legal institutions of the occupied territory, except as necessary to maintain government and security,²⁶² or carry out criminal trials outside the occupied territory.²⁶³

186. The occupying power may compel civilians to work (for a fair wage), but only where it is necessary for the needs of the occupying army, or to ensure the functioning of for public utilities or the provision of food, shelter and medical services.²⁶⁴ However the occupying power may not:

- Compel civilians to serve in the armed or auxiliary forces of the occupying power or subject them to pressure or propaganda encouraging enlistment²⁶⁵
- Compel children under the age of 18 years to do work²⁶⁶ or
- Force civilians to provide information about the resistance forces or its means of defence.²⁶⁷

187. The occupying power may use the resources of the occupied territory, but only to the extent necessary to cover the cost of the occupation. It may not use local resources to enrich its own population or support its general military operations.²⁶⁸

188. The occupying power is prohibited from confiscating private property,^{*} except for the needs of the occupying army where the requisitions are in proportion to the resources of the country, and in return for compensation.²⁶⁹

* Article 46 Hague Regulations; contrast the public property of the state, which may be used by the occupying army.

Was Timor-Leste an occupied territory?

Territory is considered occupied when it comes under the actual authority of the invading army.²⁷⁰
This may be seen to occur where:

- The occupying power is in a position to substitute its own authority for that of the occupied authorities who have become incapable of functioning properly
- The enemy forces have been defeated or have withdrawn, although sporadic local resistance may continue
- The occupying power has a sufficient force present to make its authority felt
- A temporary administration has been established over the territory
- The occupying power has issued and enforced directions to the civilian population.²⁷¹

Indonesia's control over the territory of Timor-Leste increased gradually after the invasion in 1975. The Commission considers that from approximately December 1978 until September 1999 the above indicia were present in Timor-Leste and that Indonesia was in sufficient actual control of the territory to be considered an occupying power. Although resistance continued, it was not sufficient to nullify the state of occupation.

Internal armed conflicts: the civil war of August-September 1975

189. The main sources of humanitarian law applicable during an internal armed conflict are:

- Common Article 3 of the Geneva Conventions of 1949 and
- Parts of the laws and customs of war.

190. Common Article 3 requires parties to the conflict to provide humane treatment to persons who are taking no active part in the hostilities, including members of armed forces who have laid down their arms or are *hors de combat* due to sickness, wounds, detention or other cause. In respect of those persons it is prohibited to carry out the following acts:

- Violence, especially murder, mutilation, cruel treatment and torture
- The taking of hostages
- Outrages upon personal dignity, in particular humiliating and degrading treatment
- The passing of sentences or the carrying out of executions without a fair trial.

191. Further general principles have become part of the laws and customs of war and are applicable during an internal armed conflict. Many of these rules are directed at the protection of civilians:

^{*} See UN General Assembly Resolution 2444 (XXIII), 19 December 1968 and UN General Assembly Resolution 2675 (XXV), 9 December 1970, both recognised as declaratory of customary law by the ICTY in *Prosecutor v Tadic* Appeals Chamber decision on Jurisdiction, paras 110-112; and see more generally *Prosecutor v Tadic* Appeals Chamber decision on Jurisdiction, paras 100-119.

- Attacks must never be launched at civilians as such²⁷²
- In conducting military operations, all possible precautions must be taken to protect civilians²⁷³
- It is prohibited to attack civilian dwellings or other buildings, or to attack places or areas for the protection of civilians such as hospitals²⁷⁴
- It is prohibited to make civilians the target of forcible transfers or of reprisals (acts of retribution for violations of humanitarian law carried out by opposing forces)²⁷⁵
- A distinction must always be maintained between civilians and those taking part in the conflict (“combatants”).²⁷⁶ This means that combatants must distinguish themselves visually from civilians, in order to make it possible for enemy combatants to restrict their attacks to combatants and military targets. “Perfidy” is also prohibited.*

192. The other fundamental rules of the laws and customs of war applicable during an internal armed conflict are those that limit the methods and weapons that it is permissible to use.²⁷⁷ The basic rules governing permissible means of warfare are the same as those that apply to international armed conflicts.²⁷⁸ These principles prohibit methods and weapons which:

- Cause superfluous injury or unnecessary suffering²⁷⁹ or
- By their nature are incapable of distinguishing between civilian and military targets (“indiscriminate means”).²⁸⁰

Obligations on individuals (individual criminal responsibility)

193. The mandate of the Commission specifically includes “criminal acts” committed in Timor-Leste during the relevant period.

194. Customary international law prohibits individuals from committing the following crimes:

Genocide

195. Genocide occurs where a person commits any of the following prohibited acts against a national, ethnic, racial or religious group with the specific intention of destroying the group in whole or in part:

1. Killing members of the group
1. Causing serious bodily or mental harm to members of the group
2. Inflicting certain conditions of life upon the group which are intended to bring about the destruction of the group in whole or in part
3. Inflicting measures to prevent births
4. Forcibly transferring children from one group to another.²⁸¹

Crimes against humanity

196. A crime against humanity occurs where any of the following prohibited acts are committed as part of a widespread or systematic attack against a civilian population:

1. Murder
2. Extermination (including by deprivation of food)²⁸²

* *Prosecutor v Dusko Tadic*, ICTY Case Number IT-94-1, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 125. See section on International law: obligations on states and armed groups, above.

3. Enslavement
4. Deportation or forcible transfer of population
5. Forced labour
6. Imprisonment
7. Torture
8. Rape
9. Persecutions on political, racial, or religious grounds
10. Other inhumane acts.²⁸³

Aggression

197. The crime of aggression was originally said to occur where a person plans, prepares, initiates or wages a war of aggression, or a war in violation of international treaties, agreements or assurances, or participates in a common plan for the accomplishment of those acts.²⁸⁴

198. However, recently the international community has been unable to agree on a current definition for this crime.²⁸⁵

War crimes

199. Two categories of war crimes exist in the context of an international armed conflict. The first are referred to as “grave breaches” of the Geneva Conventions. A “grave breaches” occurs where any of the following acts is committed against vulnerable persons, namely those who are shipwrecked, sick or wounded, prisoners of war, and civilians:

1. Wilful killing
2. Torture or inhuman treatment, including biological experiments
3. Wilfully causing great suffering or serious injury to body or health
4. Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly
5. Compelling a prisoner of war or a civilian to serve in the forces of a hostile power
6. Wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial
7. Unlawful deportation or transfer or unlawful confinement of a civilian
8. Taking civilians as hostages.²⁸⁶

200. The second category consists of serious breaches of the laws and customs of war including, among others, the following:

1. Murder, ill-treatment or deportation of the civilian population of an occupied territory
2. Murder or ill-treatment of prisoners of war
3. Plunder of public or private property
4. Wanton destruction of towns or villages or devastation not justified by military necessity²⁸⁷
5. Employment of poisonous weapons or weapons calculated to cause unnecessary suffering
6. Attack, or bombardment of undefended towns, villages, dwellings, or buildings
7. Seizure, destruction or damage of institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science²⁸⁸
8. Intentionally directing attacks against the civilians or civilian objects²⁸⁹
9. Taking hostages²⁹⁰

10. Rape²⁹¹
11. Torture (whether involving a public official or purely private individuals)²⁹²
12. Killing or wounding a combatant who has surrendered
13. Transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of the population of the occupied territory
14. Compelling nationals of the hostile party to take part in operations of war directed against their own country
15. Using the presence of civilians or other protected persons to render areas immune from military operations
16. Employing weapons, or methods of warfare which cause superfluous injury or unnecessary suffering or which are inherently indiscriminate
17. Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies.*

201. In an internal armed conflict, war crimes consist only of the most serious violations of Common Article 3 of the Geneva Conventions or the laws and customs of war.²⁹³ Serious violations of Common Article 3 include the following acts when committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms or who are sick, wounded or in detention:

1. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture
2. Committing outrages upon personal dignity, in particular humiliating and degrading treatment
3. Taking of hostages and
4. The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable.²⁹⁴

202. Other violations of the laws and customs of war amounting to war crimes in internal armed conflict include:

1. Launching attacks on the civilian populations;
2. Committing rape or other sexual violations; †

Command responsibility

203. Under international law it is not only the person who directly carries out a crime that is responsible, but also that person's superiors, especially in the military or government. A superior will be directly responsible where a crime is committed by a subordinate that was ordered by the superior. In addition, a person who is in the position of a superior (either in law or in fact) and who has effective control over his or her subordinates²⁹⁵ will have command responsibility where a crime is committed by a subordinate and the superior knew or should have known of crime but did nothing to prevent or punish it.²⁹⁶

* Paragraphs (12) to (17) are examples from Article 8 of the ICC Statute which the Commission considers to reflect war crimes under customary law.

† See for example Article 8(2)(e)(i) and (vi) which the Commission considers to reflect customary international law.

3. “Criminal acts”: domestic law of Portugal and Indonesia

Introduction

204. The Commission’s mandate includes reference to “criminal acts” which occurred in Timor-Leste during the relevant period. That term is not defined in the UNTAET regulations establishing the Commission. The Commission considers that it is intended to cover violations of domestic and international criminal laws that were applicable to the territory of Timor-Leste at the relevant times.

Which laws applied in Timor-Leste?

There is no doubt that at the beginning of the Commission’s mandate period the law in force in Timor-Leste was Portuguese law. This law remained in force at least until the Indonesian invasion.

It is more difficult to say which law applied during the Indonesian occupation. Although Indonesia may have been prohibited under international law from applying its laws in occupied Timor-Leste, it is clear that as a matter of fact it was Indonesian law that was applied and enforced.

The East Timorese Court of Appeal has held that because the Indonesian annexation was in violation of international law, Indonesian law was never in force in Timor-Leste and Portuguese law continued to apply.²⁹⁷

Conversely, the Special Panel for Serious Crimes has since held that the Court of Appeal was wrong to apply Portuguese law and that Indonesian law in fact applied.²⁹⁸ The East Timorese Parliament has also legislated to indicate its understanding that the law that was in force before 25 October 1999, and which has been continued by legislation since then, is Indonesian law.²⁹⁹

An occupying power must leave in place all penal laws in existence in the occupied territory, the only exception being for those that constitute a threat to the security of the occupying power or an obstacle to the application of the Geneva Conventions.³⁰⁰ The wholesale importation of the occupying power’s own domestic law and legal system is therefore prohibited.³⁰¹ Where this does occur the occupying power is in breach of its obligations under humanitarian law. However it is unclear whether the new or imported laws are invalid within the occupied territory.

It may therefore be that under international law Portuguese law remained applicable as a question of law. However Indonesian law was certainly applied in fact. For this reason the Commission considers that both bodies of law are relevant to its mandate in respect of the period of the Indonesian occupation.

Portuguese law

205. On 25 April 1974, at the beginning of the Commission mandate period, Portuguese law was the applicable domestic law in Timor-Leste. It is Portuguese law that governed the actions of those who participated in acts of violence leading up to and during the civil war of 1975.

206. The Portuguese Criminal Code as it existed in 1975 included prohibitions on the following conduct:

207. Crimes against personal liberty, including:

- Detaining a free person³⁰²
- Using physical violence to compel another person to do something³⁰³
- Illegally detaining, arresting, imprisoning or restraining a person,³⁰⁴ especially where violence or threats of death, torture or assault are used,³⁰⁵ or where a person is held hostage³⁰⁶
- Using violence against a person who is lawfully detained.³⁰⁷

208. Crimes against the person, including:

- Murder and attempted murder, especially where the acts are premeditated or are accompanied by torture or acts of cruelty;³⁰⁸
- Assault, especially where it results in illness, injury, psychological harm or death;³⁰⁹
- Using or threatening to use a firearm or projectile weapons;³¹⁰

209. In cases involving provocation or self-defence, defences could reduce or excuse responsibility for these crimes.³¹¹

210. Crimes involving damage to property, including:

- Housebreaking³¹²
- Arson³¹³
- Destroying part of or all of a building that belongs to another person or the state;³¹⁴
- Damaging or destroying a public utility;³¹⁵
- Damaging crops or livestock;³¹⁶
- Damaging property by rioting;³¹⁷

Indonesian law

211. Indonesian law was applied in Timor-Leste after it was annexed as Indonesia's 27th province pursuant to Indonesian Law 7/76 of 17 July 1976.³¹⁸ Although the Indonesian annexation of Timor-Leste was in breach of international law, the Commission considers that Indonesian law is relevant in any event because it regulated the actions of Indonesians in Timor-Leste, who in many cases violated not only international law, but Indonesian law as well. In addition, whether validly or not, Indonesian law was in fact used to regulate the actions of East Timorese people.

212. The Commission has not included in its inquiries acts that were technically violations of Indonesian laws where the laws themselves constituted violations of human rights standards, such as the right to freedom of expression and opinion, and the right to self-determination. Indonesian law contained extensive provisions prohibiting political activities which were perceived to threaten the authority of the state. These were contained for example in the 1963 Law on Eradication of Subversive Activities,³¹⁹ the Law on Political Activity,³²⁰ as well as some of the provisions of the Indonesian criminal code.

213. Indonesia's Criminal Code (Kitab Undang-Undang Hukum Pidana, KUHP) governs criminal acts committed by civilians and officials, including the armed forces. The following types of conduct constitute crimes under the KUHP:

214. Crimes against the general security of persons, including:

- Deliberately setting a fire, causing an explosion, damaging electrical works, or damaging or destroying buildings, especially if it endangers property or life or results in death³²¹
 - Poisoning public water sources.³²²
215. Sexual and related crimes, including:
- Rape^{*}
 - Carnal knowledge of a girl under 15 years of age³²³
 - Using force or the threat of force to compel someone to commit or tolerate an obscene act, or committing an obscene act with someone who is unconscious or helpless or a girl under 15 years of age³²⁴
 - Trading in women or boys.³²⁵
216. Crimes against personal liberty, including:
- Participating in slavery³²⁶
 - Kidnapping³²⁷
 - Abducting a minor, especially if done with tricks, force or the threat of force³²⁸
 - Depriving a person of his or her liberty, especially if serious physical injury or death results.³²⁹
217. Crimes against life and the person, including:
- Manslaughter³³⁰
 - Murder³³¹
 - Maltreatment, especially if it causes serious physical injury or death or if done with premeditation³³²
 - Deliberately causing serious physical injury to another person (“serious maltreatment”), especially if done with premeditation.³³³
218. Crimes against property, including:
- Theft, especially if carried out during a fire, explosion, or distress caused by war or if accompanied by force or the threat of force³³⁴
 - Deliberately destroying or damaging property belonging to another, electricity or water works, or buildings³³⁵
219. Crimes against public order and similar crimes, including:

^{*} Article 285 KUHP (Rape is defined so as to only include sexual intercourse with a woman out of marriage by using force or the threat of force. Under Article 286 KUHP having carnal knowledge of a woman out of marriage who is unconscious or helpless is also prohibited)

- Hindering a person from freely voting in an election by violence or the threat of violence³³⁶
- Hindering a lawful public meeting by violence or the threat of violence³³⁷
- Hindering a lawful public religious meeting or funeral ceremony by violence or the threat of violence³³⁸
- Burying or hiding a dead body with intent to conceal the death.³³⁹

220. The KUHP provides that where an official (including a member of the armed forces³⁴⁰) commits a crime by employing the power, opportunity or means conferred on him by his office, the punishment for that offence is to be increased by a third.³⁴¹ In addition, certain specific crimes by officials are prohibited, including:

- The misuse of power by an official to force someone to do, not to do, or to tolerate something³⁴²
- The use of coercion by an official to procure a confession or statement in a criminal case.³⁴³

Indonesian military law

221. In addition to the general criminal provisions of the KUHP, Indonesian military personnel are regulated by the Indonesian Military Criminal Code (Kitab Undang-undang Hukum Pidana Militer, KUHPM) and other legislation specific to the military.³⁴⁴

222. Although Indonesia is a party to the Geneva Conventions of 1949, it has not incorporated the substance of those conventions into its military law. This means that the war crimes set out in the Geneva Conventions do not constitute crimes under Indonesian law. Similarly, during the CAVR's mandate period Indonesian law did not recognise the crimes of genocide, crimes against humanity, war crimes or torture (although it has since done so).

¹ Regulation 2001/10 Section 3.1(b)

² Regulation 2001/10 Section 13.1(a)(ii)

³ Regulation 2001/10 Section 13.1(a)(i)

⁴ Regulation 2001/10 Section 13.1(a)(iii)

⁵ Regulation 2001/10 Section 13.1(a)(iv)

⁶ Regulation 2001/10 Section 13.1(a)(v)

⁷ Regulation 2001/10 Section 13.1(a)(vi)

⁸ Regulation 2001/10 Section 13.1(c)

⁹ Regulation 2001/10 Section 13.1(d)

¹⁰ Regulation 2001/10 Section 21

¹¹ Regulation 2001/10 Section 3.1(e)

¹² Regulation 2001/10 Section 3.1(g)

¹³ Regulation 2001/10 Section 3.1(h)

^{*} As part of Law 26/2000 on the *Ad Hoc* Human Rights Courts

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- ¹⁴ Regulation 2001/10 Section 3.1(f)
- ¹⁵ Regulation 2001/10 Section 3.1(i)
- ¹⁶ Regulation 2001/10 Section 3.3
- ¹⁷ Regulation 2001/10 Section 13.2
- ¹⁸ Regulation 2001/10 Section 1(j)
- ¹⁹ Report of the Meeting of Special Rapporteurs/Representatives Experts and Chairpersons of Working Groups of the Special Procedures of the Commission on Human Rights and the Advisory Services Programme, UN Commission on Human Rights, E/CN.4/1997/3, 30 September 1996, para 46; Analytical report of the Secretary-General on Minimum Humanitarian Standards submitted pursuant to Commission on Human Rights Resolution 1997/21, E/CN.4/1998/87, 5 January 1998, paras 59-61.
- ²⁰ Truth and Reconciliation Commission of South Africa Report, Vol 1, Ch 4 paras 77-81.
- ²¹ Regulation 2001/10 Section 1(c)
- ²² Regulation 2001/10 Section 1(d)
- ²³ Regulation 2001/10 Section 14
- ²⁴ Regulation 2001/10 Sections 20.1 and 39
- ²⁵ Regulation 2001/10 Section 45
- ²⁶ Regulation 2001/10 Section 44.2
- ²⁷ Regulation 2001/10 Section 44.2
- ²⁸ Regulation 2001/10 Sections 13.1(a)(i), (iii) and (iv) and 13.1(c).
- ²⁹ *International Commission of Inquiry on East Timor to the Secretary-General*, UN Document A/54/726 – S/2000/59, 31 January 20
- ³⁰ Regulation 2001/10 Sections 3 (c), 13 (1)
- ³¹ Regulation 2001/10 Section 3(1)(d)
- ³² Regulation 2001/10 Section 3(1)(e)
- ³³ Article 25 UN Charter.
- ³⁴ Security Council Resolution 384 (1975) of 22 December 1975, para 2; SC Resolution 389 (1976) of 22 April 1976, para 2.
- ³⁵ Article 2(4) UN Charter.
- ³⁶ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (1986) ICJ Reports 4 at p100.
- ³⁷ Articles 51, 42 UN Charter.
- ³⁸ Christine Gray, *International Law and the Use of Force*, Oxford, Oxford University Press, 2000, at p.52.
- ³⁹ Article 73 UN Charter.
- ⁴⁰ Article 73(a) UN Charter.
- ⁴¹ Regulation 2001/10 Section 22.1
- ⁴² Regulation 2001/10 Section 23
- ⁴³ Regulation 2001/10 Section 24
- ⁴⁴ Regulation 2001/10 Sections 25, 26 and 27

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- ⁴⁵ Regulation 2001/10 Sub-section 27.7
- ⁴⁶ Regulation 2001/10 Sub-section 27.8
- ⁴⁷ Regulation 2001/10 Section 28
- ⁴⁸ Regulation 2001/10 Section 32
- ⁴⁹ Regulation 2001/10 Schedule 1, para 1
- ⁵⁰ Regulation 2001/10 Sub-section 22.2
- ⁵¹ Article 25 UN Charter.
- ⁵² *Advisory Opinion on the Threat or Use of Nuclear Weapons* (1996) ICJ Reports 226 at pp. 254-255.
- ⁵³ Security Council Resolution 384, 22 December 1975; Security Council Resolution 389, 22 April 1976; General Assembly Resolution 3485 (XXX), 12 December 1975; General Assembly Resolution 36/50, 24 November 1981; General Assembly Resolution 37/30, 23 November 1982.
- ⁵⁴ *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ at para 87.
- ⁵⁵ Regulation 2001/10 Sections 3 and 1(c).
- ⁵⁶ Regulation 2001/10 Section 1(e).
- ⁵⁷ *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ at para 102-106; see also Concluding Observations of the Human Rights Committee on Israel, of 18 August 1998 (CCPR/C/79/Add.93 at para 10), and of 21 August (2003CCPR/CO/78/ISR at para 11); and Concluding Observations of the Committee on Economic, Social and Cultural Rights on Israel, of 23 May 2003, (E/C.12/1/Add.90 at paras 15 and 31).
- ⁵⁸ *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ at para 107-113.
- ⁵⁹ Most importantly in the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV) 14 December 1960; the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, GA Res 2625 (XXV) 24 October 1970; and the *Definition of Aggression*, GA Res 3314 (XXIX) 14 December 1974.
- ⁶⁰ *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) ICJ at para 88 and 155-156; *Case Concerning East Timor (Portugal v Australia)* (1995) ICJ Reports 90 at para 29.
- ⁶¹ Human Rights Committee General Comment 12, para 1.
- ⁶² Antonio Cassese, *Self-Determination of Peoples*, Cambridge, Cambridge University Press, 1995, p90; *Yearbook of the International Law Commission* (1988) Vol II, pt.2, at p.64; see also *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ, Separate opinion of Judge Higgins at paras 29-30.
- ⁶³ GA Res 3485 (XXX) 12 December 1975; GA Res 31/53, 1 December 1976; GA Res 32/34, 28 November 1977; GA Res 33/39, 13 December 1978; GA Res 34/40, 21 November 1979; GA Res 35/27, 11 November 1980; GA Res 36/50, 24 November 1981; GA Res 37/30, 23 November 1982.
- ⁶⁴ SC Res 384, 22 December 1975; SC Res 389, 22 April 1976.
- ⁶⁵ Article 1(3) ICCPR and art 1(3) ICESCR.
- ⁶⁶ Human Rights Committee General Comment 12, para 6.
- ⁶⁷ Human Rights Committee General Comment 12, para 6.

⁶⁸ See for example the separate opinions of Judge Higgins (at para 30) and Judge Kooijmans (at para 32) in the *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) ICJ Reports.

⁶⁹ *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ Reports at para 88.

⁷⁰ *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)* (1971) ICJ Reports 16 at para 119; Separate opinion of Judge Weeramantry in the *Case Concerning East Timor (Portugal v Australia)* (1995) ICJ Reports 90, especially at 204; Article 41(2), ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, International Law Commission, Commentaries on the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, at pp.287-291 especially p.290.

⁷¹ Human Rights Committee General Comment 24, para 8.

⁷² Article.4(2) of the ICCPR; Human Rights Committee, General Comment 6, para.1.

⁷³ Human Rights Committee, General Comment 6, para 7.

⁷⁴ Human Rights Committee, General Comment 6, para 3

⁷⁵ Human Rights Committee, General Comment 6, para 2; Human Rights Committee, General Comment 14, para 2.

⁷⁶ Human Rights Committee, General Comment 6, para.4.

⁷⁷ *Jegatheeswara Sarma v Sri Lanka* (2003) HRC Communication No. 950/2000 at para 9.3.

⁷⁸ See Article 1(2), Declaration on the Protection of All Persons from Enforced Disappearances, General Assembly Resolution 47/133 of 18 December 1992.

⁷⁹ *Quinteros v. Uruguay* (1983) HRC Comm. No. 107/1981 at para 14; *Jegatheeswara Sarma v Sri Lanka* (2003) HRC Communication No. 950/2000 at para 9.5.

⁸⁰ UN Working Group on Enforced or Involuntary Disappearances, Fact Sheet No. 6 (Rev.2).

⁸¹ Article 13(1) UDHR and Article 12(1) ICCPR.

⁸² Article 12(3) ICCPR; HRC General Comment 27, para 11

⁸³ Article 25(1) UDHR and Article 11(1) ICESCR.

⁸⁴ Article 11(2) ICESCR.

⁸⁵ CESCR General Comment 12 para 8.

⁸⁶ Article 2 ICESCR, CESCR General Comment No 12, para 14.

⁸⁷ Committee on Economic Social and Cultural Rights, General Comment 12, para 14.

⁸⁸ Committee on Economic Social and Cultural Rights, General Comment 12, para 19.

⁸⁹ Committee on Economic Social and Cultural Rights, General Comment 15, para 3; Article 11(1) ICESCR.

⁹⁰ Article 25(1) UDHR; Article 11(1) ICESCR; CESCR General Comment 4.

⁹¹ Article 3 UDHR, Article 6 ICCPR.

⁹² Human Rights Committee General Comment 6, para 5.

⁹³ See the decision of the European Court of Human Rights in *Engel v The Netherlands* (ECHR 1976 Applic No 5100/71) at para 58.

⁹⁴ Human Rights Committee General Comment 24, para 8.

⁹⁵ See UN High Commissioner for Human Rights Fact Sheet No 26 on the Working Group on Arbitrary Detention; see also for example the 2003 Opinions adopted by the Working Group on Arbitrary Detention, E/CN.4/2004/3/Add.1.

⁹⁶ *Van Alphen v The Netherlands* (HRC Comm. No. 305/1998, 23 July 1990).

⁹⁷ See for example the decision of the European Court of Human Rights in *Quinn v France* (1995) ECHR Applic No. 18580/91.

⁹⁸ Human Rights Committee, General Comment 8 para 2; See also *Jijon v Ecuador* (1992) HRC Comm. No. 227/88 where a delay of five days in bringing a prisoner before a judge was held to breach Article 9(3).

⁹⁹ Article 9(3) ICCPR.

¹⁰⁰ Human Rights Committee General Comment 8 para 3.

¹⁰¹ Human Rights Committee General Comment 8 para 4.

¹⁰² See also the Standard Minimum Rules for the Treatment of Prisoners; the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the Basic Principles for the Treatment of Prisoners.

¹⁰³ Human Rights Committee, General Comment 29, para 13(a).

¹⁰⁴ Human Rights Committee, General Comment 29, para 13(a).

¹⁰⁵ Human Rights Committee, General Comment 21, para. 3.

¹⁰⁶ Human Rights Committee, General Comment 20, para. 6; Human Rights Committee, General Comment 7, para 2, *El-Megreisi v Libyan Arab Jamahiriya* (1990) HRC Comm. No. 440/90, para 5.4; *Mukong v Cameroon* (1994) HRC Comm. No. 458/91 at para 9.3-9.4.

¹⁰⁷ *Mukong v Cameroon* (1994) HRC Comm. No. 458/91 at para 9.3-9.4.

¹⁰⁸ HRC in General Comment 24, para 8; *Prosecutor v Anto Furundzija* (1998) ICTY Case No IT-95-17/1, Trial Chamber Judgment, 10 December 1998, at paras 144-155.

¹⁰⁹ *Prosecutor v Anto Furundzija* (1998) ICTY Case No IT-95-17/1, Trial Chamber Judgment, 10 December 1998, at paras 153-155; Human Rights Committee in General Comment 24, para 10.

¹¹⁰ Article 2(1) CAT.

¹¹¹ Article 16 CAT.

¹¹² Article 2(2) CAT.

¹¹³ Article 4 CAT.

¹¹⁴ Articles 12 and 13 CAT; Article 16 CAT.

¹¹⁵ Article 10 CAT; Article 11 CAT; Article 16 CAT.

¹¹⁶ Article 15 CAT.

¹¹⁷ *GRB v Sweden* (1998) CAT Comm No. 83/1997, para6.5.

¹¹⁸ *Elmi v Australia* (1999) HRC Communication No 120/1998, at para 6.5.

¹¹⁹ *Prosecutor v Kunarac* (2002) ICTY Appeals Chamber, at paras 146-147.

¹²⁰ Human Rights Committee General Comment 20, para 4.

¹²¹ Human Rights Committee General Comment 20, para 2.

¹²² *Mukong v Cameroon* (1994) HRC Comm. No. 458/91 at para 9.4.

¹²³ Concluding observations of the Committee against Torture on Israel, A/52/44, 9/5/97 at para 257; see also *Ireland v UK* (1978) ECHR Applic No 5310/71, at paras 96 and 167.

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- ¹²⁴ Concluding observations of the Committee against Torture on Israel, A/52/44, 9/5/97 at para 257.
- ¹²⁵ Concluding observations of the Committee against Torture on Israel, A/52/44, 9/5/97 at para 257; see also *Ireland v UK* (1978) ECHR Applic No 5310/71, at paras 96 and 167.
- ¹²⁶ Concluding observations of the Committee against Torture on Israel, A/52/44, 9/5/97 at para 257.
- ¹²⁷ Article 16 CAT.
- ¹²⁸ Human Rights Committee, General Comment 20, para 2.
- ¹²⁹ Article 9(2) and 14(3)(a) ICCPR.
- ¹³⁰ Article 9(3) ICCPR.
- ¹³¹ Article 14(3)(b) ICCPR.
- ¹³² Human Rights Committee General Comment 13, para 9.
- ¹³³ Article 14(3)(c) ICCPR.
- ¹³⁴ Article 14(1) ICCPR.
- ¹³⁵ *Campbell v Jamaica* (1993) HRC Communication No. 307/1988, para 6.4.
- ¹³⁶ *Campbell v Jamaica* (1993) HRC Communication No. 307/1988, para 6.4.
- ¹³⁷ HRC General Comment No 20, para 12; Article 15 CAT.
- ¹³⁸ Article 14(1) ICCPR.
- ¹³⁹ *Van Meurs v The Netherlands* (1990) Comm No 215/1986, at para 6.2; see *Riepan v Austria* (2000) ECHR, Application no. 35115/97, at paras 28-31.
- ¹⁴⁰ Article 14(2) ICCPR.
- ¹⁴¹ Article 14(3)(d) ICCPR.
- ¹⁴² Article 14(3)(e) ICCPR.
- ¹⁴³ Article 14(3)(f) ICCPR.
- ¹⁴⁴ Article 14(3)(g) ICCPR.
- ¹⁴⁵ *Berry v Jamaica* (1994) HRC Communication No. 330/1988, para 11.7.
- ¹⁴⁶ Article 14(5) ICCPR.
- ¹⁴⁷ *Henry v Jamaica* (1991) HRC Communication No. 230/1987, para 8.4; *Little v Jamaica* (1991) HRC Communication No. 283/1988, para 8.5.
- ¹⁴⁸ Article 15 ICCPR.
- ¹⁴⁹ Article 19 UDHR; Article 19 ICCPR.
- ¹⁵⁰ Article 20 UDHR; Articles 21 and 22 ICCPR.
- ¹⁵¹ Human Rights Committee, General Comment 10, para 1.
- ¹⁵² Article 19(3) ICCPR; Article 21 ICCPR; Article 22(2) ICCPR; Human Rights Committee, General Comment 10, para 4; *Kim v Republic of Korea*, (1999) HRC Communication No 574/1994, para 12.2;
- ¹⁵³ *Kim v Republic of Korea*, (1999) HRC Communication No 574/1994, para 12.5; *Park v Korea* (1998) HRC Communication No 628/1995, para 10.3.
- ¹⁵⁴ *Park v Korea* (1998) HRC Communication No 628/1995, para 10.3.
- ¹⁵⁵ *Prosecutor v Anto Furundzija*, ICTY Case No IT-95-17/1, Trial Chamber Judgment, 10 December 1998, at para 170-171; 1995 Report of the UN Special Rapporteur on Torture, E/CN.4/1995/34 Para 15-24; *Mejia*

v. *Peru* (1996) Inter-American Commission on Human Rights, Report No. 5/96; *Aydin v. Turkey* (1997) ECHR Applic No 23178/94 at paras. 83 and 86.

¹⁵⁶ *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, ICTY Case No IT-96-23 and IT-96-23/1, Appeals Chamber Judgment, 12 June 2002, para 150.

¹⁵⁷ *Prosecutor v Anto Furundzija*, ICTY Case No IT-95-17/1, Trial Chamber Judgment, 10 December 1998, at para 170.

¹⁵⁸ Article 12 UDHR and article 17 ICCPR; see for example *Mejia v. Peru* (1996) Inter-American Commission on HR, Report No. 5/96.

¹⁵⁹ Under Article 2 CEDAW; Article 2(1) ICCPR, Article 2(2) ICESCR; See for example CEDAW General Recommendations 12 and 19.

¹⁶⁰ Human Rights Committee, General Comment 28, para 8.

¹⁶¹ Article 4 UDHR, Article 8 ICCPR.

¹⁶² *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)* (1970) ICJ Reports 4 at p32.

¹⁶³ See *Summary record of the 1359th meeting*: Nepal, 21/10/94, CCPR/C/SR.1359 at para 41.

¹⁶⁴ *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, ICTY Case No IT-96-23 and IT-96-23/1, Trial Chamber Judgment, 22 February 2001, at para 539; *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, ICTY Case No IT-96-23 and IT-96-23/1, Appeals Chamber Judgment, 12 June 2002, at para 124.

¹⁶⁵ Article 6 CEDAW.

¹⁶⁶ See also Article 24 ICCPR

¹⁶⁷ Article 3(1) CRC.

¹⁶⁸ Article 6 CRC.

¹⁶⁹ Article 37(a) CRC.

¹⁷⁰ Article 37(b) CRC.

¹⁷¹ Article 24 CRC; see also ICESCR Article 12(2)(a).

¹⁷² Article 19 CRC.

¹⁷³ Article 34 CRC.

¹⁷⁴ Article 36 CRC.

¹⁷⁵ Article 27 CRC.

¹⁷⁶ Article 37 CRC; see also ICCPR Article 6.

¹⁷⁷ Articles 38(2)-(3) CRC.

¹⁷⁸ Article 38(3) CRC.

¹⁷⁹ Article 32; See also Article 10(3) ICESCR

¹⁸⁰ Article 9 CRC.

¹⁸¹ Articles 11 and 35 CRC.

¹⁸² Article 21 CRC.

¹⁸³ Article 20 CRC.

¹⁸⁴ Article 8 CRC.

¹⁸⁵ Article 6 ICESCR and Article 23 UDHR, See also the prohibitions on forced labour in Article 8(3) of the ICCPR.

¹⁸⁶ Article 7 ICESCR and Article 23 UDHR.

¹⁸⁷ Article 7 ICESCR.

¹⁸⁸ Article 11 ICESCR and Article 25(1) UDHR.

¹⁸⁹ Article 12 ICESCR.

¹⁹⁰ Article 13 ICESCR, Article 26 UDHR, Article 28 CRC. See also Article 29 CRC.

¹⁹¹ Article 2(1) ICESCR.

¹⁹² Committee on Economic, Social and Cultural Rights, General Comment 3, paras 1-2.

¹⁹³ Committee on Economic, Social and Cultural Rights, General Comment 3 para 10.

¹⁹⁴ Committee on Economic, Social and Cultural Rights, General Comment 3, para 10.

¹⁹⁵ Article 1(2) ICESCR, Article 1(2) ICCPR.

¹⁹⁶ Article 23 ICCPR.

¹⁹⁷ Human Rights Committee, General Comment No 19, para 5.

¹⁹⁸ Article 16(e) CEDAW.

¹⁹⁹ Committee on the Elimination of Discrimination Against Women, General Comment 19, paras 22 and 24(m); see also Committee on the Elimination of Discrimination Against Women, General Recommendation 21, para 22.

²⁰⁰ For example Article 4 ICCPR.

²⁰¹ Article 4(2) ICCPR.

²⁰² Article 4(2) ICCPR.

²⁰³ Article 4(2) ICCPR.

²⁰⁴ Human Rights Committee, General Comment 29, para 15(a),

²⁰⁵ Human Rights Committee, General Comment 29, para 16.

²⁰⁶ Human Rights Committee, General Comment 29, para 16.

²⁰⁷ Human Rights Committee, General Comment 29, paras 4-5.

²⁰⁸ Regulation 2001/10 Section 1(c.)

²⁰⁹ See Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, 2002, at pp. 9-38.

²¹⁰ *Prosecutor v Akayesu*, ICTR Trial Chamber, Case number ICTR-96-4-T, decision of 2 September 1998, para 601.

²¹¹ *Prosecutor v Dusko Tadic*, ICTY Case Number IT-94-1, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 70.

²¹² See for example, references to continued fighting between militia groups and Interfet in *Report of the Secretary-General on the United Nations Transitional Administration in East Timor*, S/2000/53, 26 January 2000, para 18; *Report of the Security Council Mission to East Timor and Indonesia (9-17 November 2000)*, S/2000/1105, 21 November 2000, para 9.

²¹³ See for example Article 1(1) Second Protocol to the Geneva Conventions 1977.

²¹⁴ *Prosecutor v Dusko Tadic*, ICTY Case Number IT-94-1, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 84

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- ²¹⁵ Tomás Gonçalves, SCU Interview, 8 August 2000.
- ²¹⁶ *Prosecutor v Dusko Tadic*, ICTY Case Number IT-94-1, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 84.
- ²¹⁷ Common Article 2, Geneva Conventions 1949.
- ²¹⁸ Regulation 2001/10 Section 1(d).
- ²¹⁹ *Advisory Opinion on the Threat or Use of Nuclear Weapons* (1996) ICJ Reports 226 at p257.
- ²²⁰ Article 25 Hague Regs; Article 27 Geneva Convention IV; Articles 51(2) and 57(1) and (2)(a) Geneva Protocol I; Article 52(1) Geneva Protocol I.
- ²²¹ Articles 33-34 Geneva Convention IV; Article 51(2) Geneva Protocol I.
- ²²² Articles 53 and 54(2) Geneva Protocol I.
- ²²³ Article 33 Geneva Convention IV; Articles 51(6) and 52(1) Geneva Protocol I.
- ²²⁴ Article 33 Geneva Convention IV;
- ²²⁵ Article 54 First Additional Protocol to the Geneva Conventions, which reflects customary international law.
- ²²⁶ Article 23 Geneva Convention IV.
- ²²⁷ Article 51(4) and (5) Geneva Protocol I; *Advisory Opinion on the Threat or Use of Nuclear Weapons* (1996) ICJ Reports 226 at p257.
- ²²⁸ Articles 51(5)(b) and Article 57(2)(a)(iii) and (b) Geneva Protocol I.
- ²²⁹ Article 57(3) Geneva Protocol I.
- ²³⁰ Article 26 Hague Regulations; Article 57(2)(c) Geneva Protocol I.
- ²³¹ *Prosecutor v Tadic*, Appeals Chamber decision on Jurisdiction, para 125.
- ²³² Article 50(1) and 43 Geneva Protocol I and Article 4A Geneva Convention III.
- ²³³ Article 50(1) Geneva Protocol I.
- ²³⁴ Article 50(3) Geneva Protocol I.
- ²³⁵ Article 52(1) Geneva Protocol I.
- ²³⁶ Article 52(2) Geneva Protocol I.
- ²³⁷ Article 4A(6) Geneva Convention III.
- ²³⁸ Article 4A Geneva Convention III.
- ²³⁹ CAVR Interview with Jacinto Alves, former assistant to the Falintil Chief of Staff, Dili, 3 May 2005.
- ²⁴⁰ Article 5 Geneva Convention III; Article 45(1) Geneva Protocol I.
- ²⁴¹ Article 4, Hague Regulations, Article 13 Geneva Convention III.
- ²⁴² Articles 13 and 17 Geneva Convention III;
- ²⁴³ Articles 15, 26, 30 Geneva Convention III;
- ²⁴⁴ Articles 19 and 23 Geneva Convention III;
- ²⁴⁵ Article 5 Geneva Convention IV.
- ²⁴⁶ Article.22 Hague Regulations; Article.35(1) Geneva Protocol I; *Advisory Opinion on the Threat or Use of Nuclear Weapons* (1996) ICJ Reports 226 at p.256.

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- ²⁴⁷ St Petersburg Declaration 1868; Article 23 Hague Regulations; art 35(2) Geneva Protocol I; *Advisory Opinion on the Threat or Use of Nuclear Weapons* (1996) ICJ Reports 226 at p.257.
- ²⁴⁸ Article 51(4) Geneva Protocol I; *Advisory Opinion on the Threat or Use of Nuclear Weapons* (1996) ICJ Reports 226 at p257.
- ²⁴⁹ See also Article 54(1)-(2) Geneva Protocol I.
- ²⁵⁰ Article 23 Hague Regulations.
- ²⁵¹ Article 51 Geneva Convention IV.
- ²⁵² Article 51 Geneva Convention IV.
- ²⁵³ Article 46 Hague Regulations, Article 27(1) and 53 of Geneva Convention IV.
- ²⁵⁴ Article 32, Geneva Convention IV.
- ²⁵⁵ Article 55, Geneva Convention IV; see also Article 56 Geneva Convention IV re medical treatment and Articles 59-62 re accepting aid.
- ²⁵⁶ Article 50 Geneva Convention IV.
- ²⁵⁷ Article 27 Geneva Convention IV.
- ²⁵⁸ Article 43 Hague Regulations.
- ²⁵⁹ Article 45 Hague Regulations.
- ²⁶⁰ Articles 65-75 Geneva Convention IV; see also Article 23(h) Hague Regulations.
- ²⁶¹ Article 49 Geneva Convention IV.
- ²⁶² Article 43 Hague Regulations and Article 64 Geneva Convention IV.
- ²⁶³ Article 66 Geneva Convention IV.
- ²⁶⁴ Article 51 Geneva Convention IV.
- ²⁶⁵ Article 51 Geneva Convention IV; see also generally Article 23 Hague Regulations.
- ²⁶⁶ Article 51 Geneva Convention IV
- ²⁶⁷ Article 44 Hague Regulations.
- ²⁶⁸ *In re Krupp and Others* (1948) 15 Annual Digest 620 at pp.622-623, *NV De Bataafsche Petroleum Maatschappij and others v The War Damage Commission* (1956) 23 ILR 810 at p.822.
- ²⁶⁹ Article 52 Hague Regulations; see also Article 55 Geneva Convention IV.
- ²⁷⁰ Article 42 Hague Regulations 1907; *Prosecutor v Naletilic and Martinovic* Trial Chamber Judgment, 31 March 2003, at para 216.
- ²⁷¹ *Prosecutor v Naletilic and Martinovic*, Trial Chamber Judgement, 31 March 2003, at para 217.
- ²⁷² UN General Assembly Resolution 2444 (XXIII), 19 December 1968, para 1(b) and UN General Assembly Resolution 2675 (XXV), 9 December 1970, para 4.
- ²⁷³ UN General Assembly Resolution 2675 (XXV), 9 December 1970, para 3.
- ²⁷⁴ UN General Assembly Resolution 2675 (XXV), 9 December 1970, paras 5 and 6.
- ²⁷⁵ UN General Assembly Resolution 2675 (XXV), 9 December 1970, para 7.
- ²⁷⁶ UN General Assembly Resolution 2444 (XXIII), 19 December 1968, para 1(c) and UN General Assembly Resolution 2675 (XXV), 9 December 1970, para 4.
- ²⁷⁷ UN General Assembly Resolution 2444 (XXIII), 19 December 1968, para 1(a); *Prosecutor v Tadic*, Appeals Chamber decision on Jurisdiction, para 119.

²⁷⁸ *Prosecutor v Dusko Tadic*, ICTY Case Number IT-94-1, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 119.

²⁷⁹ See for example Article 23 Hague Regulations 1907; *Advisory Opinion on the Threat or Use of Nuclear Weapons* (1996) ICJ Reports 226 at p.257.

²⁸⁰ See for example *Advisory Opinion on the Threat or Use of Nuclear Weapons* (1996) ICJ Reports 226 at p.257.

²⁸¹ Convention on the Prevention and Punishment of the Crime of Genocide 1948, Article 2.

²⁸² See Article 7(2)(b) Rome Statute of the ICC.

²⁸³ Article 6(c) London Charter for the International Military Tribunal at Nuremberg, Article 5 Statute of the ICTY, Article 3 Statute of the ICTR, Article 7(1) Rome Statute of the ICC.

²⁸⁴ London Charter for the Nuremberg IMT.

²⁸⁵ Giorgio Gaja, "The Long Journey towards Repressing Aggression" in Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, at pp.435-438; Yoram Dinstein, *War, Aggression and Self-Defence* (Third edition), Cambridge, Cambridge University Press, 2001 at pp.114-116.

²⁸⁶ See Article 50 Geneva Convention I; Article 51 Geneva Convention II; Article 130 Geneva Convention III; and Article 147 Geneva Convention IV.

²⁸⁷ Paras (1)-(4) were contained in the London Charter for the Nuremberg IMT, Article 6(b).

²⁸⁸ Paras (5)-(7) are contained in the Statute of the ICTY, Article 3.

²⁸⁹ *Prosecutor v Tihomir Blaskic*, ICTY Case No IT-95-14-T, Trial Chamber Judgment, 3 March 2000, paras 170, 180.

²⁹⁰ *Prosecutor v Tihomir Blaskic*, ICTY Case No IT-95-14-T, Trial Chamber Judgment, 3 March 2000, para 187.

²⁹¹ *Prosecutor v Anto Furundzija*, ICTY Case No IT-95-17/1-T, Trial Chamber Judgment, 10 December 1998, para 168.

²⁹² *Prosecutor v Dragoljub Kunurac and others*, ICTY Case No IT-96-23&23/1, Appeals Chamber Judgement, 12 June 2002, para 148.

²⁹³ *Prosecutor v Dusko Tadic*, ICTY Case Number IT-94-1, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 134.

²⁹⁴ Common Article 3, Geneva Conventions 1949.

²⁹⁵ See *Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*, ICTY Case No IT-96-21, Appeals Chamber Judgment, 20 February 2001, paras 196-198.

²⁹⁶ See for example Article 7(3) Statute of the ICTY; Article 6(3) Statute of the ICTR; and Article 28 Rome Statute for the International Criminal Court 1998.

²⁹⁷ *Armando dos Santos v The Prosecutor General*, Case no 16/2001, 15 July 2003; *Agustinho da Costa v The Prosecutor General*, Case no 07/2000, 18 July 2003

²⁹⁸ *The Public Prosecutor v Joao Sarmiento and Domingos Mendonca*, Case No 18a/2001, pp.10-13.

²⁹⁹ Article 1 Law 10/2003, 10 December 2003.

³⁰⁰ Article 64 Geneva Convention IV.

³⁰¹ Myres S. McDougal and Florentino P. Feliciano, *The International Law of War*, New Haven, New Haven Press, 1994, at p.760.

³⁰² Article 328 Portuguese Criminal Code ("Detainment")

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- ³⁰³ Article 329 Portuguese Criminal Code (“Physical Coercion”)
- ³⁰⁴ Article 330 Portuguese Criminal Code (“Private Detention”)
- ³⁰⁵ Article 331 Portuguese Criminal Code (“Special enhancement in crimes of Private Detention”)
- ³⁰⁶ Article 332 Portuguese Criminal Code
- ³⁰⁷ Article 335 Portuguese Criminal Code (“Violence of persons against detainees”)
- ³⁰⁸ Article 349 (“Simple wilful murder”), Article 350 (“Attempted murder and failed murder”) and Article 351 (“Qualified murder”).
- ³⁰⁹ Portuguese Criminal Code Article 359 (“Simple wilful corporal offences”), Article 360 (“Wilful corporal offences which result in illness or incapacity to work”), Article 361 (“Wilful corporal offences which result in loss of mental sanity, permanent incapacity to work or death”) and Article 362 (“Corporal offences that result in death due to accidental circumstances”).
- ³¹⁰ Article 363 Portuguese Criminal Code (“Use and threats with firearms or projectile weapons”)
- ³¹¹ Articles 370-375, 377, 378 Portuguese Criminal Code.
- ³¹² Article 380 Portuguese Criminal Code (“Intrusion into an alien house”)
- ³¹³ Articles 463-470 Portuguese Criminal Code
- ³¹⁴ Articles 472-473 Portuguese Criminal Code
- ³¹⁵ Articles 474 Portuguese Criminal Code
- ³¹⁶ Articles 477, 479 and 480 Portuguese Criminal Code.
- ³¹⁷ Article 478 Portuguese Criminal Code
- ³¹⁸ Regulation No 7 1976 on Ratification of East Timor's Unification into the Republic of Indonesia and the Formation of the Province Regional Level 1, of East Timor 9LN No.35/1976); PP No 19 of 1976 on Legalisation on the Unification of East Timor into the Republic of Indonesia (LN No. 39/1976), supplemented in 1978 with TAP MPR-RI No. VI/MPR/1978. (UU No.7 tahun 1976 Tentang Pengesahan Penyatuan Timor Timur kedalam Negara Kesatuan Republic Indonesia dan Pembentukan Propinsi Daerah Tingkat I Timor Timur (LN No.35/1976); PP No. 19 of 1976 Tentang Pengukuhan Penyatuan wilayah Timor Timur ke dalam negara Kesatuan Republik Indonesia (LN No. 39/1976), supplemented in 1978 with TAP MPR-RI No. VI/MPR/1978).
- ³¹⁹ Presidential Decree No 11/PNPS/1963, incorporated in 1969 as Law No 5/1969.
- ³²⁰ Law No 5/1963, incorporated into Law No 5/1969.
- ³²¹ Articles 187, 191 bis, 191 ter, 200 KUHP.
- ³²² Article 202 KUHP.
- ³²³ Article 187 KUHP.
- ³²⁴ Article 289 and Article 290 KUHP.
- ³²⁵ Article 297 KUHP.
- ³²⁶ Article 324 KUHP.
- ³²⁷ Article 328 KUHP.
- ³²⁸ Article 330 KUHP.
- ³²⁹ Article 333 KUHP.
- ³³⁰ Article 338 and Article 339 KUHP.

³³¹ Article 340 KUHP.

³³² Articles 351-353 KUHP.

³³³ Articles 354 and 355 KUHP;

³³⁴ Articles 362, 363 and 365 KUHP.

³³⁵ Articles 406, 407, 408 and 409 KUHP.

³³⁶ Article 148 KUHP.

³³⁷ Article 173 KUHP.

³³⁸ Article 175 KUHP.

³³⁹ Article 181 KUHP.

³⁴⁰ Article 92(3) KUHP.

³⁴¹ Article 52 KUHP.

³⁴² Article 421 KUHP.

³⁴³ Article 422 KUHP.

³⁴⁴ For example Law no 40/1947 on Military Discipline Law; and Law No 6/1950 on Criminal Procedure for the Military Judicial System and later Law No 1/Drt/1958.