

# RIISING FROM THE ASHES: THE CREATION OF A VIABLE CRIMINAL JUSTICE SYSTEM IN EAST TIMOR

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*[Under the trusteeship of the United Nations, East Timor is inching its way towards independence. The challenges faced by the East Timorese and the United Nations Transitional Administration in East Timor cannot be overstated. A nation has had to be built from out of the ruins left after the violence of September 1999 which followed the overwhelming public rejection of autonomy within Indonesia in the historic referendum of August 1999. One of the pillars of a successful democratic state is a properly functioning criminal legal system that is, and is publicly perceived to be, fair and just. This paper examines the establishment of a criminal legal system in East Timor; and its viability, through several key laws and identified themes. In a situation where a people have endured massive violations of human rights in the course of their exercise of the right to self-determination, the process of dealing with those atrocities will have a profound effect on the emerging state and its long-term political and social stability. This examination therefore places particular emphasis on the process that has been chosen by the United Nations Transitional Administration for prosecuting atrocities committed in East Timor through the District Court of Dili. Exciting, ground-breaking work is being done by the United Nations Administration in East Timor; and its efforts to establish a criminal justice system are rich in both achievements and lessons to be learnt.]*

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## I INTRODUCTION

The situation in East Timor is critical. ... The civil administration is no longer functioning. The judiciary and court systems have ceased to exist. ... These are critical issues, which must be addressed even before the full deployment of the United Nations Transitional Administration.

Kofi Annan, Secretary-General of the United Nations.<sup>1</sup>

[T]he very purpose of the UN's trusteeship of East Timor is not to deliver a country and a system to the East Timorese people but to enable them to decide for themselves on the nature of the country they wish to lead to independence.

Amnesty International.<sup>2</sup>

<sup>1</sup> *Report of the Secretary-General on the Situation in East Timor*, UN Doc S/1999/1024 (1999) [22].

<sup>2</sup> Amnesty International, *East Timor: Building a New Country Based on Human Rights* (2000) pt 2.

We are not interested in a legacy of cars and laws, nor are we interested in a legacy of development plans for the future designed by [people] ... other than East Timorese.

Xanana Gusmao, leader of the East Timorese resistance, President of the Council for Timorese National Resistance ('CNRT').<sup>3</sup>

On 25 October 1999, acting under Chapter VII of the *UN Charter*, the Security Council established the UN Transitional Administration in East Timor ('UNTAET').<sup>4</sup> This period of transitional administration is crucial to the future of the independent state that will emerge when the UN departs. In creating UNTAET, the Security Council empowered it to exercise all legislative and executive authority, including the administration of justice and charged it with, inter alia, providing security, maintaining law and order, establishing an effective administration, supporting capacity-building for self-government and assisting in the establishment of conditions for sustainable development.<sup>5</sup>

As the three preceding quotes reveal, implementing the mandate has been no easy task. The transitional period has been fraught with difficulties. Many have noted that UNTAET has had to build a nation from scratch. It became custodian of a traumatised and ravaged land with barely a building left intact from the maelstrom of violence in 1999. People have had to be cared for and housed and infrastructure restored, and sometimes, created. Homes, hospitals, schools and public buildings have had to be rebuilt. The devastated economy has had to be rehabilitated and jobs created. Laws were drafted and the attendant local institutions created from the rubble.

As East Timor's current ruling power, UNTAET has embarked on an ambitious programme of building the foundations of governance and of creating a viable legal system, central financial capacity and public administration in line with the mandate given to it by *Security Council Resolution 1272*. After sustained criticism of its failure to consult and involve the East Timorese in the decision-making process, UNTAET has started the process of relinquishing some of its authority.<sup>6</sup> On 14 July 2000, a National Council, composed of selected representatives of East Timorese civil society, replaced the earlier National Consultative Council, and is intended to enhance further the participation of the East Timorese people in the decision-making process. There is now a joint East Timorese–UNTAET Cabinet in a 'coalition' known as the East Timor Transitional Administration.<sup>7</sup> Four 'ministries' are now headed by East Timorese

<sup>3</sup> Mark Dodd, 'Gusmao Gives UN Team a Serve: We Don't Want a Legacy of Cars', *Sydney Morning Herald* (Sydney), 10 October 2000, 11.

<sup>4</sup> SC Res 1272, 54 UN SCOR (4057<sup>th</sup> mtg), UN Doc S/Res/1272 (1999) ('*Security Council Resolution 1272*').

<sup>5</sup> *Ibid.*

<sup>6</sup> Amnesty International, above n 2, pt 3.2, writes:

Mounting concerns about the lack of direct participation in government by East Timorese people led to the introduction by UNTAET, in July 2000, of a system of co-governance under which four East Timorese appointees serve together with UN officials in a cabinet to provide policy direction to a civil service which will be partially staffed by East Timorese.

See also Mark Dodd, 'UN Peace Mission at War with Itself', *Sydney Morning Herald* (Sydney), 13 May 2000, 19.

tion.<sup>7</sup> Four ‘ministries’ are now headed by East Timorese (infrastructure, economy, social affairs and internal administration). Elections are projected for mid-2001.

No nation can make a successful transition to independence without a fully and properly functioning legal system and laws that allow for the administration of justice in accordance with international standards, be they in relation to criminal or civil matters. Transparency and consultation with the East Timorese in determining the course and shape of that transition are crucial. Furthermore, in a situation where there has been a culture of impunity for massive violations of human rights, the need to restore public confidence in the rule of law is of paramount importance. In recognition of this, UNTAET has put much effort into drafting laws and into attempting to create a legal regime that is capable of sustaining the needs of the public and of satisfying the responsibilities of an independent democratic state.

The purpose of this article is to examine UNTAET’s efforts to create a viable criminal justice system and what this means for the future of East Timor. In order to appreciate the challenges posed by the current situation in East Timor, the relevant background is briefly discussed in Part II (‘Recent Background’), focusing on the events of 1999. Through the lens of five key regulations, Part III (‘The Legal Regime’) examines the viability of the system. Central to the paper is the regulation enabling the prosecution of atrocities.<sup>8</sup> Particular scrutiny of this regulation is entered into because of the crucial role that dealing with massive violations of human rights plays in determining the future social and political stability of a nation in transition. The emphasis on *Regulation 2000/15* is also warranted in view of the unusual and little-examined vehicle of justice which has been chosen and its potential to impact significantly upon the enforcement of international criminal law in national courts. Three key themes will be traced through this paper: the degree of consultation with the East Timorese in the decision-making process; the ability of the existing and incoming system to cope with the legal regime that has been created; and the investment in human skills that is being undertaken to empower the East Timorese to manage their own country after independence. Finally, the concluding part draws together the discussions and the key themes, and offers some thoughts on the way forward for UNTAET and East Timor.

<sup>7</sup> UNTAET, *Regulation No 2000/24 on the Establishment of a National Council*, UNTAET/REG/2000/24 (entered into force 14 July 2000), *Official Gazette of East Timor*, UNTAET/GAZ/2000/Add.4, 151.

<sup>8</sup> UNTAET, *Regulation No 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, UNTAET/REG/2000/15 (entered into force 6 June 2000), *Official Gazette of East Timor*, UNTAET/GAZ/2000/Add.3, 99 (‘*Regulation 2000/15*’).

## II RECENT BACKGROUND

A *The Invasion and Occupation of East Timor*

The armed forces of the Republic of Indonesia invaded the Portuguese administered 'non-self-governing territory' of East Timor on 7 December 1975.<sup>9</sup> This followed several months of engineered civil disorder, which saw both unilateral declarations of independence and calls for integration with Indonesia from the East Timorese. Prior to this, Portugal had commenced steps in preparation for the decolonisation of East Timor and its people's exercise of their right to self-determination. Despite international outcry, Indonesia declared East Timor as its 27<sup>th</sup> province on 17 July 1976.<sup>10</sup> Its laws became applicable and were enforced by Indonesian judges in district courts located in the key towns. Much international hand-wringing continued and cautiously worded resolutions were passed by the UN in subsequent years,<sup>11</sup> but these were never matched with any action

<sup>9</sup> There is a substantial amount of literature concerning East Timor and dealing with the invasion, of which the following are some of the best sources: Catholic Institute for International Relations and the International Platform of Jurists for East Timor, *International Law and the Question of East Timor* (1995); James Dunn, *Timor: A People Betrayed* (1983); John Taylor, *Indonesia's Forgotten War: The Hidden History of East Timor* (1991); John Taylor, *East Timor: The Price of Freedom* (1999). The various resolutions passed and the continued discussion by some of the UN organs make it clear that the UN continued to consider East Timor a non-self-governing territory under the administration of Portugal. The General Assembly had declared a non-self-governing territory by Transmission of Information under Article 73c of the Charter, GA Res 1542 (XV), 15 UN GAOR (948<sup>th</sup> plen mtg), UN Doc A/Res/1542 (1960). Although it is obiter dicta in view of its refusal to accept jurisdiction over the merits of the case, it is interesting to note that the International Court of Justice recognised East Timor's status as a non-self-governing territory despite the Indonesian presence in *Case Concerning East Timor (Portugal v Australia)* [1995] ICJ Rep 90, 103. See also below n 11.

<sup>10</sup> Carmel Budiardjo and Liem Soei Liong, *The War against East Timor* (1984) 96, write:  
East Timor was formally incorporated as Indonesia's '27<sup>th</sup> province' on 17 July 1976 when President Suharto signed the Bill of Integration which had been unanimously adopted two days earlier by the Indonesian Parliament. This was based on the fiction that an act of self-determination had taken place through the unanimous decision of a People's Assembly which represented no one. This Assembly was a creation of the puppet Provisional Government of East Timor established immediately after Indonesian troops took control of Dili in December 1975.

<sup>11</sup> For more detailed analysis of how the UN has dealt with the East Timor situation, see Roger Clark, 'The Decolonisation of East Timor and the United Nations Norms on Self-Determination and Aggression' in Catholic Institute for International Relations and the International Platform of Jurists for East Timor, *International Law and the Question of East Timor* (1995) 65. As Professor Clark notes, the Security Council passed two resolutions: SC Res 384, 30 UN SCOR (1869<sup>th</sup> mtg), UN Doc S/Res/384 (1975), calling for Indonesian withdrawal from Portuguese Timor and calling upon all states to respect the territorial integrity of East Timor as well as the inalienable right of its people to self-determination; and SC Res 389, 31 UN SCOR (1914<sup>th</sup> mtg), UN Doc S/Res/389 (1976) condemning the Indonesian invasion. The General Assembly was somewhat more faithful to the issue: Question of East Timor, GA Res 3485, 30 UN GAOR (2439<sup>th</sup> plen mtg), UN Doc A/Res/3485 (1975); Question of East Timor, GA Res 31/53, 31 UN GAOR (85<sup>th</sup> plen mtg), UN Doc A/Res/31/53 (1976); Question of East Timor, GA Res 32/34, 32 UN GAOR (83<sup>rd</sup> plen mtg), UN Doc A/Res/32/34 (1977); Question of East Timor, GA Res 33/39, 33 UN GAOR (81<sup>st</sup> plen mtg), UN Doc A/Res/33/39 (1978); Question of East Timor, GA Res 34/40, 34 UN GAOR (75<sup>th</sup> plen mtg), UN Doc A/Res/34/40 (1979); GA Res 35/27, 35 UN GAOR (57<sup>th</sup> plen mtg), UN Doc A/Res/35/27 (1980); GA Res 36/50, 36 UN GAOR (70<sup>th</sup> plen mtg), UN Doc A/Res/36/50 (1981); Question of East Timor, GA Res 37/30, 37 UN GAOR (77<sup>th</sup> plen mtg), UN Doc A/Res/37/30 (1982). The question of East Timor continued to be discussed at sessions of the Commission on Human Rights, remained on the agenda of the General Assembly and the UN List of Non-Self-Governing Territories within the meaning of ch XI of the

or punishment due to Indonesia's perceived importance as a strategic bulwark against communism in the region and as an important trading partner for leading nations such as the United States, Australia and the United Kingdom. Over the years, the non-governmental organisation ('NGO') community and the international media persistently brought to the fore the repression and many atrocities committed by Indonesian forces in East Timor, only for the issue to fade away again. The only state 'action' taken against Indonesia was indirect and demonstrated the weakness of the international order. In 1991, the International Court of Justice was seised with a case brought by Portugal against Australia in relation to the *Timor Gap Treaty*<sup>12</sup> between Australia and Indonesia to exploit the oil-rich continental shelf around East Timor. Because the matter was predicated on Indonesia's controversial role vis-à-vis East Timor, and Indonesia was not a party to the proceedings, the majority of the International Court of Justice declined to exercise its jurisdiction over the dispute.<sup>13</sup> The torpor of the international community in relation to East Timor stands in stark contrast to its reaction to other situations of blatant aggression, such as the invasion of Kuwait by Iraq in 1990.

### B *President Suharto and His Fall from Power*

General Suharto came to power after a bloody military coup in 1965 and formally replaced President Sukarno as Head of State in March 1967. The reign of Suharto saw Indonesia's rise to the ranks of an 'Asian Tiger', whilst hundreds of thousands were butchered in the course of an anti-communist pogrom, with brutal military expansion in Aceh, Irian Jaya and East Timor. Suharto's regime is generally viewed as one of extensive repression, corruption and nepotism. Many condemnations from human rights NGOs have marked Suharto's Indonesia as one of the world's most repressive nations.

Ironically, or perhaps predictably, it turned out to be money that was the catalyst for the changes in Indonesia leading to the fall of President Suharto, and eventually paving the way for the freedom of East Timor. Discontent with President Suharto and his regime had been building up within Indonesia over the years. In 1998, Indonesia went into financial crisis following the Asia-wide currency crash. The value of the rupiah plummeted, with bank insolvency and corporate debt rocketing. Economic downturn soon became a meltdown. There was massive unemployment, corruption increased, prices rose and there were serious food shortages across the archipelago. The situation led to public unrest and widespread civil disorder, fuelled by pressure from the International Monetary Fund. *Reformasi*, or reform, came to be a rallying cry, with the public increasingly demanding political changes, including the resignation of President

*UN Charter* and was monitored by the Special Committee on the Situation with Regard to the Implementation of the Declaration of the Granting of Independence to Colonial Countries and Peoples. Consultations were held between the Secretary-General and Indonesia and Portugal with a view to finding an amicable solution to the East Timor question.

<sup>12</sup> *Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia*, 11 December 1989, [1991] ATS No 3, 29 ILM 469 (entered into force 9 February 1991).

<sup>13</sup> *Case Concerning East Timor (Portugal v Australia)* [1995] ICJ Rep 90.

Suharto and his entourage of family and friends. Finally, on 21 May 1998, following the worst mob violence seen in recent years and after 32 years in power, Suharto resigned as President of the Republic of Indonesia.<sup>14</sup> The Vice-President, B J Habibie, became President.

### C *President Habibie and the Pre-Referendum Period*

President Habibie, struggling to regain control of the situation, recognised that the costs of keeping the armed forces and police in trouble spots such as Aceh, East Timor and Irian Jaya were immense and a substantial drain on the resources of a nation in economic crisis.<sup>15</sup> He was also alive to the damage that the activities of Indonesian forces in these areas were causing to Indonesia's international reputation, and aware that an Indonesia in need of friends was no longer in a position to ignore the concerns of the international community. The Suharto regime's intractability on East Timor gave way to what seemed to be a more accommodating position, as indicated by moves to give the territory 'special status'.<sup>16</sup> From June 1998, Habibie began to raise the issue of autonomy for East Timor. Encouraged by the debate, in October 1999 the UN submitted a proposal for permanent or transitional autonomy for East Timor.<sup>17</sup> On 27 January 1999, President Habibie announced that the people of East Timor would be permitted to choose between autonomy within Indonesia and independence.<sup>18</sup> Xanana Gusmao, the imprisoned East Timorese leader, was moved from Cipinang prison to house arrest.

On 5 May 1999, Indonesia, Portugal and the UN agreed on a consultation process whereby the people of East Timor were empowered to accept or reject the Indonesian offer of autonomy through a direct ballot.<sup>19</sup> The agreement confirmed Indonesia's responsibility 'for maintaining peace and security in East Timor in order to ensure that the popular consultation [was] carried out in a fair

<sup>14</sup> For more details on the situation leading to the fall of Suharto, see Carmel Budiardjo, 'The Legacy of the Suharto Dictatorship' in Paul Hainsworth and Stephen McCloskey (eds), *The East Timor Question* (2000) 51. See also the detailed reports of Human Rights Watch, Amnesty International and TAPOL.

<sup>15</sup> Budiardjo, above n 14, 65:

At the end of 1998, experts were predicting that 140 million Indonesians would be destitute by the millennium. The Indonesian economy contracted by 15 percent during 1998 and by a further 5 percent in 1999 ... [Indonesia ranked as] the world's most indebted country ... Inflation reached a crippling 80 percent by the end of 1998.

<sup>16</sup> See Paul Hainsworth, 'East Timor after Suharto — A New Horizon' in Paul Hainsworth and Stephen McCloskey (eds), *The East Timor Question* (2000) 193, 197.

<sup>17</sup> See UNTAET, *United Nations Transitional Administration in East Timor (UNTAET): A Chronology* (2000) <<http://www.un.org/peace/etimor/Untaetchron.html>> at 10 March 2001 (copy on file with author).

<sup>18</sup> See Haris Syaman, 'Indonesia Might Discuss Possible Independence for East Timor', *Associated Press Newswire* (Jakarta, Indonesia), 27 January 1999.

<sup>19</sup> See *Agreement between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor*, 5 May 1999, UN Doc S/1999/513, annex I; *Agreement Regarding the Modalities of the Popular Consultation of the East Timorese through a Direct Ballot*, 5 May 1999, UN Doc S/1999/513, annex II; *East Timor Popular Consultation* (5 May 1999), UN Doc S/1999/513, annex III.

and peaceful way in an atmosphere free of intimidation, violence or interference from any side.<sup>20</sup>

In order to organise and conduct the popular consultation, scheduled for 8 August 1999, the Security Council established the UN Mission to East Timor ('UNAMET') on 11 June 1999.<sup>21</sup> Despite the unstable and violent environment, no international security force was dispatched to protect UNAMET or its staff due to Indonesia's refusal to allow foreign forces to enforce security in the run-up to the referendum. The Security Council was clear that Indonesia continued to be responsible for law and order:

[The Security Council] *stresses once again* the responsibility of the Government of Indonesia to maintain peace and security in East Timor, in particular in the present security situation ... in order to ensure that the popular consultation is carried out in a fair and peaceful way and in an atmosphere free of intimidation, violence or interference from any side and to ensure the safety and security of United Nations and other international staff and observers in East Timor ...<sup>22</sup>

#### D *The Referendum and Its Aftermath*

##### 1 *August to September 1999*

On 30 August 1999, after having been postponed twice for security and technical reasons, the UN-administered referendum was held. The results were announced on 4 September 1999: 78.5% of voters rejected the autonomy option. Immediately thereafter, civilians across East Timor were subjected to a campaign of intensified and orchestrated violence by the Indonesian and militia forces. This planned violence, worse than any that had taken place before, took the form of widespread, systematic attacks on the civilian population and settlements. There were disappearances of persons, murders, assaults, rapes and torture, along with widespread arson, looting and plunder. Notable features of the violence were the deportation or forcible transfer of hundreds of thousands of civilians across the border to Indonesian West Timor, the 'scorched earth' policy and the astonishing speed and organisation with which the pro-Jakarta forces were able to decimate East Timor.<sup>23</sup>

<sup>20</sup> *Agreement between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor*, above n 19, art 3.

<sup>21</sup> SC Res 1246, 54 UN SCOR (4013<sup>th</sup> mtg), UN Doc S/Res/1246 (1999), 38 ILM 1459 ('*Security Council Resolution 1246*').

<sup>22</sup> *Ibid* [9] (emphasis in original).

<sup>23</sup> See *Report of the International Commission of Inquiry on East Timor to the Secretary-General*, UN Doc A/54/726, S/2000/59 (2000). This report was transmitted by way of identical letters dated 31 January 2000 from the Secretary-General addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights. See also *Situation of Human Rights in East Timor*, UN Doc A/54/660 (1999); KPP-HAM, *Report on the Investigation of Human Rights Violations in East Timor* (2000). An Executive Summary of this *Report* has been made publicly available: see Embassy of Indonesia, Ottawa, Canada, Doc No BB-451/DEP/030300, <<http://www.indonesia-ottawa.org/news/Issue/HumanRights/ham-kpp-timtim-01312000.htm>> at 10 March 2001 (copy on file with author).



## 2 Security Council Resolution 1264 of 15 September 1999

Immense international pressure was put on Indonesia in reaction to the unfolding scenes of mayhem and butchery in East Timor that emerged on television screens across the world and through the testimony of the evacuated UN staff and East Timorese civilians. The Security Council met numerous times and repeatedly condemned the violence.<sup>24</sup> The International Monetary Fund and World Bank threatened to delay loan disbursements (which they eventually suspended on 30 September 1999).<sup>25</sup> On 9 September 1999, the United States suspended military sales to Indonesia.<sup>26</sup> Australia offered to send in its forces to restore law and order subject to Indonesian consent; none of the leading nations were prepared to contemplate confronting the immensely resourced Indonesian armed forces, which had generally been equipped by many of those very same nations. Finally, on 12 September 1999, President Habibie, faced with a US threat of loss of billions of US dollars in loans and aid, consented to the sending of an emergency international force to restore law and order to East Timor.<sup>27</sup>

On 15 September 1999, deeming the situation in East Timor to be a threat to international peace and security, and acting under Chapter VII of the *UN Charter*, the Security Council authorised the creation of a multinational force under a unified command structure, to be known as INTERFET.<sup>28</sup> The troops comprising INTERFET were led by Australia; their mandate was ‘to restore peace and security in East Timor, to protect and support UNAMET in carrying out its tasks and, within force capabilities, to facilitate humanitarian assistance operations’.<sup>29</sup> States participating in the multinational force were authorised to ‘take all necessary measures to fulfil this mandate’.<sup>30</sup> Thus, despite the continuing Indonesian responsibility for law and order (*Security Council Resolution 1264* underlined Indonesia’s continuing responsibility to maintain peace and security in East Timor), INTERFET forces could kill if necessary. This was a ‘peace-enforcement’ mission, there being no peace to keep, but rather a mandate directed towards the restoration of peace and security in East Timor. The Rules of Engagement provided to troops have not been examined, but from the robust

<sup>24</sup> See, eg, UN, ‘Security Council Welcomes Successful Popular Consultation in East Timor, Condemns Violence before and after Ballot’ (Press Release) UN Doc SC 6723 (3 September 1999).

<sup>25</sup> See International Monetary Fund, *The Situation in Indonesia and the IMF, A Comment by William Murray, An IMF Spokesman* (1999) <<http://www.imf.org/external/np/vc/1999/091699.htm>> at 10 March 2001 (copy on file with author).

<sup>26</sup> See US Department of State, *Suspension of Military Sales to Indonesia*, Press Release (10 September 1999) <<http://www.secretary.state.gov/www/briefings/statements/1999/ps990910a.html>> at 10 March 2001 (copy on file with author); see also Elizabeth Becker and Philip Shenon, ‘With Other Goals in Indonesia, US Moves Gently in East Timor’, *New York Times* (New York, USA), 9 September 1999, 1.

<sup>27</sup> See Seth Mydon, ‘Indonesia Invites a UN Force to East Timor’, *New York Times* (New York, USA), 13 September 1999, 1; B J Habibie, ‘Speech Accepting International Peacekeeping Troops for East Timor’ (Speech delivered in Jakarta, 12 September 1999) <[http://www.news.bbc.co.uk/hi/english/world/asia-pacific/newsid\\_445000/445240.stm](http://www.news.bbc.co.uk/hi/english/world/asia-pacific/newsid_445000/445240.stm)>.

<sup>28</sup> SC Res 1264, 54 UN SCOR (4045<sup>th</sup> mtg), UN Doc S/Res/1264 (1999) (*‘Security Council Resolution 1264’*).

<sup>29</sup> *Ibid* [3].

<sup>30</sup> *Ibid*.

positions taken, it is clear they instructed troops to take a 'no nonsense' approach.

### 3 INTERFET

Upon landing in East Timor on 20 September 1999, the Australian-led INTERFET forces found a blazing, devastated land, emptied of a large part of its population, with thousands of terrified survivors hiding in the hills above the towns from the marauding Indonesian forces that still remained. What rule of law there had been in East Timor went up in flames with the rest of the country and there was no functioning law and order system. Sporadic atrocities continued to occur after the arrival of INTERFET, such as the murder of a group of clergy in Los Palos on 25 September 1999, as well as in the remote western enclave of Oecussi-Ambeno, which the retreating militia swept through in their journey to West Timor. Nevertheless, through September and October of 1999, INTERFET was gradually able to gain control of the situation on the ground. By the end of October 1999, the last remaining Indonesian forces had left East Timor.

INTERFET was dispatched to East Timor on the understanding that the government of Indonesia would continue to have responsibility for law and order in East Timor until the transfer of authority to the UN as the first step in implementing the results of the referendum. The situation on the ground was different. INTERFET arrested numerous people in order to restore peace and security, and handed them to the few remaining civilian authorities, who promptly released them. The civilian legal and administrative order in East Timor had totally collapsed. Thus INTERFET found it necessary, using its powers under *Security Council Resolution 1264*, to establish basic, short-term legal and practical provisions for preventive detention.<sup>31</sup> These ad hoc procedures continued until 21 October 1999, when the Detainee Management Unit ('DMU') was established by the Force Commander, Major-General Peter Cosgrove, as an interim judicial system pending the re-establishment of the civil authorities.<sup>32</sup> This was very much based on the framework for administering occupied territories set out in the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*,<sup>33</sup> which did not apply de jure to the situation, as the Indonesian government had consented to the entry of INTERFET into territory it considered its own.

Through the DMU, INTERFET applied Indonesian law, which is still heavily based on the European civil law model through the system introduced during Dutch colonisation. INTERFET's choice had been between the law of East Timor's 500 year-long colonial master and that of the nation that had illegally occupied and brutalised East Timor for the last 25 years. Portuguese law could have been applied, given that, under article 64 of the *Fourth Geneva Convention*, the existing penal laws of the occupied territory remain in force during the

<sup>31</sup> See *Report of the Secretary-General on the Situation in East Timor*, above n 1, [13].

<sup>32</sup> See Lt Col Michael Kelly, 'INTERFET Detainee Management Unit in East Timor' (Paper presented at the Swiss Seminar on the Law of Armed Conflict, Chavannes-de-Bogis, Geneva, 27 October 2000) <<http://www.vbs.admin.ch/internet/gst/kvr/e/SLAC2000-exp-Timor.htm>> at 10 March 2001 (copy on file with author).

<sup>33</sup> Opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('*Fourth Geneva Convention*').

period of the occupation unless they constitute a threat to the occupying power's security or an obstacle to the application of the Convention.<sup>34</sup> However, in the tragic circumstances of the newly emerging state, no matter what the de jure situation was, Indonesian law applied de facto in East Timor and a pragmatic decision had to be made in an extreme situation. The decision, later adopted by UNTAET in *Regulation 1999/1*,<sup>35</sup> was to apply Indonesian law. Nevertheless, the DMU suspended all provisions of Indonesian law that were incompatible with its own provisions on arrest and detention.<sup>36</sup> INTERFET's pragmatic decision must be seen as a correct and responsible one; for them to have done otherwise would have prolonged the period of absolute anarchy and delayed the restoration of law and order.

#### 4 Security Council Resolution 1272 of 25 October 1999

On 25 October 1999, the Indonesian People's Consultative Assembly voted to ratify the referendum result. Responsibility for East Timor was formally handed over to the UN, although it can be argued that Indonesia, as the illegal occupying power of a non-self-governing territory, had no legal standing to transfer sovereignty, which still vested de jure in the administering power, Portugal.<sup>37</sup>

Determining that the situation in East Timor constituted a continuing threat to international peace and security, and acting under Chapter VII of the *UN Charter*, the Security Council established UNTAET on the same day, 25 October 1999.<sup>38</sup> This was to be an integrated, multi-dimensional peacekeeping operation responsible for taking East Timor through a transitional period to independence. It would be headed by a Special Representative of the Secretary-General

<sup>34</sup> Indonesia ratified the *Fourth Geneva Convention* on 30 September 1958 and Portugal ratified it on 14 March 1961. The prevailing view is that, under international law, Portugal continued to be the administering power over the non-self-governing territory of East Timor; the invasion, occupation and annexation of East Timor by Indonesia had never been recognised by the UN or the vast majority of the world's nations, Australia being the exception. See below n 159 and accompanying text.

<sup>35</sup> UNTAET, *Regulation No 1999/1 on the Authority of the Transitional Administration in East Timor* UNTAET/REG/1999/1 (deemed to have entered into force 25 October 1999) *Official Gazette of East Timor*, UNTAET/GAZ/2000/1, 1.

<sup>36</sup> Under Indonesia's *Kitab Undang-Undang Hukum Acara Pidana* ('*Indonesian Code of Criminal Procedure*') of 1981, as amended, sole responsibility for arrest, initial detention of up to 20 days and investigation in criminal cases rests with the investigators. The *Indonesian Code of Criminal Procedure* can be found in its original language at <<http://www.asiamaya.com/hukum/kuhap/index.htm>> at 10 March 2001 (copy on file with author). The DMU allowed for detention up to 96 hours at the discretion of the Force Commander, after which the detainee had to be brought before a reviewing authority who could, given the exigencies of the situation and pending the re-establishment of civilian authority, extend detention indefinitely. For more insight into the workings of the DMU, see Kelly, above n 32.

<sup>37</sup> Jarat Chopra, *Introductory Note to UNTAET Regulation 13* (2000) 39 ILM 936, 937 has written: On 20 October 1999, Lisbon's representative in New York, Ambassador Antonio Monteiro, expressed to UN officials that Portugal would relinquish its legal ties to East Timor and consider UNTAET its successor with the passage of the Security Council mandate. No other written expression on the part of Portugal was required. Resolution 1272 was the instrument for bestowing sovereignty over East Timor to the UN. When a delegation of Indonesian representatives met later that day with the same officials to deliver their acceptance of the election results, [Jamshed Marker, Personal Envoy of the Secretary-General] informed them that no such formality was required since the UN had never recognized the legitimacy of their occupation.

<sup>38</sup> *Security Council Resolution 1272*, above n 4.

(‘SRSG’) who, as the Transitional Administrator, would be responsible for all aspects of the UN’s work in East Timor, with the power to enact new laws and regulations and to amend, suspend or repeal existing ones.<sup>39</sup> Its first mission members were in the main taken from UNAMET, which had re-established a presence in East Timor by the end of September 1999. In November 1999, the UN civilian police (‘CIVPOL’), took over the investigations of all crimes in East Timor. Nevertheless, INTERFET’s military police continued to play an important role and detainees were still to be kept in the Force Detention Centre. Following the appointment of the civilian judiciary and prosecution, the DMU was disbanded on 11 January 2000. INTERFET handed over command of military operations to UNTAET on 28 February 2000. A regular UN peacekeeping force is now in place.

### III THE LEGAL REGIME

#### *A Overview*

Five UNTAET regulations crucial to the establishment of the criminal justice system are examined in this section.<sup>40</sup> The regulations are linked to one another, drawing their legitimacy ultimately from the authority granted to UNTAET by *Security Council Resolution 1272*, which in turn is rooted in Chapter VII of the *UN Charter*. It will be seen that the Indonesian legal regime has been evolved by UNTAET into a complex hybrid system that has resulted in many legal and practical difficulties in application.

Before commencing, however, it is important to examine the position of the East Timorese judges, prosecutors and public defenders. They will remain after UNTAET leaves. There were no East Timorese judges or prosecutors before the first appointments by UNTAET in January 2000. Thus INTERFET and later UNTAET faced the daunting task of rebuilding a destroyed nation with no remaining infrastructure, and few suitably skilled and trained East Timorese able to be brought into critical leadership roles with immediate effect. From the start, it was clear that the need to equip the East Timorese with appropriate skills would be one of the major needs of East Timor, along with reconstruction, development and the establishment of the rule of law.

On 7 January 2000, the first judges, prosecutors and public defenders of the District Court of Dili were appointed by the SRSG on recommendation of the Transitional Judicial Service Commission<sup>41</sup> for a probationary period of two years, but with full authority to act and exercise their responsibilities from the

<sup>39</sup> *Ibid* [6].

<sup>40</sup> It should be noted that UNTAET’s development of civil laws has continued apace, but the developments in this area are outside the scope of this paper.

<sup>41</sup> The Transitional Judicial Service Commission was established by UNTAET, *Regulation No 1999/3 on the Establishment of a Transitional Judicial Service Commission*, UNTAET/REG/1999/3 (entered into force 3 December 1999), *Official Gazette of East Timor*, UNTAET/GAZ/2000/1, 5 and inter alia recommends under s 1 candidates for provisional judicial or prosecutorial office to the Transitional Administrator.

moment of appointment.<sup>42</sup> This decision to appoint the best of the few available East Timorese jurists to be judges, prosecutors and public defenders, with authority to act on appointment, was taken in full knowledge that, whilst potentially competent, none of those selected had any prior experience of working in the judicial or prosecutorial services. It may well be that a political need to create the appearance of a legal system staffed with local judges, prosecutors and public defenders drove UNTAET to give complete novices unfettered authority to carry out their tasks. They received no training beyond a week that was spent in Darwin with members of the Judicial Affairs Department (now the Ministry of Judicial Affairs). It was also highly unfair to place such heavy responsibilities upon these 'lucky few' who, unlike the majority of their countrymen, had found themselves jobs. The task of institution-building would undoubtedly have been better served by having international expertise brought in for the transitional period, with East Timorese counterparts appointed as deputies on probation in order to receive the appropriate training on the job. At the end of the transitional period, their training would have empowered them to assume full responsibility as judges, prosecutors and public defenders.

It is interesting to note that the District Court of Dili was itself only created on 6 March 2000 by UNTAET *Regulation 1999/1*, some three months after the appointment of its first judges and prosecutors. International standards, as exemplified by article 9 of the *International Covenant on Civil and Political Rights*,<sup>43</sup> require that a person may not be subjected to arbitrary arrest or detention, and may not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law. Could those appointed to a court that did not yet exist (even the court building remained in ruins until repaired by the Portuguese government in March 2000) have exercised any legal authority on behalf of a non-existent entity? Could they have validly arrested and detained people? Probably not, but even if the arrests and detentions were invalid, this would have been 'remedied' by the controversial article 12a.10 of UNTAET *Regulation 2000/14*,<sup>44</sup> under which all arrests and detentions ordered by the investigating judge and prosecutors before 10 May 2000 were retroactively validated.

Almost immediately after their appointment, the novice judges and prosecutors were bequeathed the detainee caseload acquired by INTERFET, comprising numerous persons in detention in relation to both referendum-related and current crime. Coupled with that were the ongoing criminal investigations that were brought to them by CIVPOL investigators, who were equally confused about what to do in East Timor; the investigators tended to fall back on their national systems. Due to a serious shortage of translators, the international investigators and the East Timorese often could not communicate with each other, which made

<sup>42</sup> See *Notification on the Appointment of Judges and Prosecutors* (effective 7 January 2000), *Official Gazette of East Timor*, UNTAET/GAZ/2000/1, 25.

<sup>43</sup> Opened for signature 19 December 1966, 999 UNTS 171, 6 ILM 368 (entered into force 23 March 1976) ('ICCPR').

<sup>44</sup> UNTAET, *Regulation No 2000/14 Amending Regulation No 2000/11*, UNTAET/REG/2000/14 (entered into force 10 May 2000), *Official Gazette of East Timor*, UNTAET/GAZ/2000/Add.2, 77. See discussion in below Part III(D).

co-ordination and co-operation virtually impossible. The material and logistical support provided to the Timorese jurists was virtually non-existent.<sup>45</sup> They received little or no training from UNTAET for the first few months, although CIVPOL seconded several police prosecutors to assist at the District Court of Dili. The role of these police prosecutors was essentially to ‘mentor’ the local prosecutors by guiding them and showing them how to deal with their cases as competent professionals. Their advice could be, and often was, ignored. At a later stage, through the Judicial Affairs Department of UNTAET, a separate comprehensive mentoring programme was designed by an expert sent by the International Foundation for Electoral Systems. However, this was never implemented in the form designed, partly due to East Timorese hostility towards the Judicial Affairs Department and the perception that the mentors were sent by that department to control their activities, restrict their professional independence and report on them. The Judicial Affairs Department’s training programmes continue to this day, with an extensive programme, conducted by the International Development Law Institute, and training abroad in countries such as Indonesia and Portugal.

## B UNTAET Regulation No 1999/1 on the Authority of the Transitional Administration in East Timor

### 1 *The UN as Sovereign Power?*

UNTAET issued its first regulatory instrument, *Regulation 1999/1*,<sup>46</sup> on 27 November 1999. Acting pursuant to *Security Council Resolution 1272*, the SRSG vested all legislative and executive authority with respect to East Timor, including the administration of the judiciary, in UNTAET. Such authority would be exercised by the Transitional Administrator, in consultation with representatives of the East Timorese people.

Together, *Security Council Resolution 1272* and *Regulation 1999/1* vest what appears to be sovereign authority over a territory and its inhabitants in UNTAET.<sup>47</sup> This power has enabled it, inter alia, to legislate and enter into international agreements on behalf of East Timor.<sup>48</sup> This transfer of sovereign power has not occurred in other UN transitional administrations<sup>49</sup> such as the

<sup>45</sup> The problem of resources has been one that has soured the relations between UNTAET and the jurists for most of 2000, culminating in strikes at the districts courts: ‘Strike Cripples East Timor’s Legal System’, *ABC News Online*, 10 October 2000, <[http://www.abc.net.au/news/2000/10/item20001010023441\\_1.htm](http://www.abc.net.au/news/2000/10/item20001010023441_1.htm)> at 10 March 2001 (copy on file with author).

<sup>46</sup> UNTAET, above n 35.

<sup>47</sup> The view that the UN cannot have territorial sovereignty is a well-established one: see Ian Brownlie, *Principles of Public International Law* (5<sup>th</sup> ed, 1998) 172: ‘The existence of such administrative powers rests legitimately on the principle of necessary implication and is not incompatible with the view that the United Nations cannot have territorial sovereignty.’

<sup>48</sup> See, eg, the *Memorandum of Understanding between the Republic of Indonesia and the UNTAET Regarding the Cooperation in Legal, Judicial and Human Rights Related Matters* (entered into force 6 April 2000), *Official Gazette of East Timor*, UNTAET/GAZ/2000/Add.2, 93.

<sup>49</sup> See Chopra, above n 37. The Secretary-General has noted that the UN has ‘never before attempted to build and manage a State’: *Report of the Secretary-General on the UN Transitional Administration in East Timor*, UN Doc S/2000/738 (2000) [64].

UN Transitional Administration in Cambodia<sup>50</sup> and the UN Transitional Administration in Eastern Slavonia, Baranja and Western Sirmium.<sup>51</sup> The UN Interim Administration Mission in Kosovo is the transitional administration for Kosovo, which remains part of the Federal Republic of Yugoslavia. It acts as the co-ordinator of the international effort in Kosovo, and is mandated to develop provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections.

UNTAET's 'sovereignty' is limited by the duty of all public officials to act in accordance with international standards and the law in force in East Timor.<sup>52</sup> An obligation to consult the East Timorese was enshrined from the start: the Transitional Administrator is required to consult and co-operate closely with representatives of the East Timorese people.<sup>53</sup> Within the umbrella of 'consultation' there is to be found genuine consultation and cursory consultation carried out for the sake of appearance. An elite group of hand-picked (not democratically elected) East Timorese forms the National Consultative Committee, now the National Council, and reviews draft regulations produced by UNTAET,<sup>54</sup> before adoption as legislation by the Transitional Administrator. In the transitional period, few issues are subject to debate in public fora and legislation tends to be rushed through in a way that does not permit meaningful discussion and evaluation. The consultation that does take place occurs at the end of the process that UNTAET has initiated, and fails to draw the East Timorese into decision-making in a truly meaningful way.

## 2 *The Continued Application of Indonesian Law in East Timor*

Section 3.1 of *Regulation 1999/1* provides that:

Until replaced by UNTAET regulations or subsequent legislation of democratically established institutions of East Timor, the laws applied in East Timor prior to 25 October 1999 shall apply in East Timor insofar as they do not conflict with the standards referred to in section 2, the fulfillment of the mandate given to UNTAET under United Nations Security Council resolution 1272 (1999), or

<sup>50</sup> Cambodia remained the sovereign state and the UN acted in a caretaking capacity, to ensure the implementation of the *Agreement on a Comprehensive Political Settlement of the Cambodia Conflict*, opened for signature 23 October 1991, 1663 UNTS 27, 31 ILM 174 (entered into force 23 October 1991).

<sup>51</sup> Eastern Slavonia was occupied by forces of the Federal Republic of Yugoslavia although legally part of the Republic of Croatia. The UN was there to keep the peace and administer the eventual return of the territory to Croatia, pursuant to the *Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium*, opened for signature 12 November 1995, 35 ILM 184, UN Doc S/1995/951, annex (entered into force 22 November 1995).

<sup>52</sup> *Regulation 1999/1*, above n 35, ss 2 and 3.

<sup>53</sup> *Ibid* s 1.1.

<sup>54</sup> East Timor's NGO Forum told the visiting Security Council delegation on 13 November 2000 that:

The National Council is not a democratically elected parliament. UNTAET should not treat it as such. Until there is a democratically elected Congress, UNTAET must make greater efforts to ensure the participation of interested East Timorese groups in the law and policy making processes.

*ET NGO Forum Statement for UN Security Council Mission (13 November 2000)* (2000) <<http://etan.org/et2000c/november/12-18/13etngo.htm>> at 10 March 2001 (copy on file with author) ('*ET NGO Forum Statement*').

the present or any other regulation and directive issued by the Transitional Administrator.

Like INTERFET before it, UNTAET chose to apply the Dutch civil law-based Indonesian legal regime. This decision to continue to apply Indonesian law was a controversial one and remains so to this day. Part of the objection stems from a lack of appreciation that UNTAET is simply a transitional administration and the choice of law that will eventually be applied in the independent East Timor is a decision to be made by the new state and its officials. If it is recognised that the choice is that of the East Timorese, UNTAET's enthusiasm for law-making would seem to be misplaced. There is indeed live public discussion as to the type of legal system that should be adopted but there has been no common position taken by the East Timorese to date.

Section 3.1 of *Regulation 1999/1* does not make provision for international treaties to have direct effect or applicability in East Timor, but provides for the existing laws to be read subject to them. The existing laws also need to be read in light of UNTAET's mandate and the regulations and directives issued by the Transitional Administrator. Several laws were expressly declared to be no longer applicable in East Timor.<sup>55</sup> There has since this time been no review carried out to determine which provisions of the remaining laws are inconsistent with s 3.1. For example, some of the provisions of the *Indonesian Criminal Code* could be regarded as running counter to international standards on gender equality and non-discrimination.<sup>56</sup>

Without precise instruction on what is or is not an internationally acceptable legal provision, it remains at the discretion of the relevant prosecutor whether a certain offence will be pursued. When inexperienced persons are put in positions of power without adequate guidance, this can be dangerous. A striking illustration of this occurred when long-time Japanese Timor activist Takeshi Kashiwagi was arrested in Dili on 22 August 2000 for criticising Xanana Gusmao, the independence movement leader widely expected to become independent East Timor's first President.<sup>57</sup> That criticism included some colourful language interpreted as a threat. He spent 18 days in detention before being released on 9 September 2000. This case led to the issue by the Transitional Administrator of an immediately effective executive order stating that defamation is not a criminal offence in East Timor and should never be the basis for criminal charges or detention. Sections 310–21 of the *Indonesian Criminal Code* were repealed.

<sup>55</sup> The laws specified in *Regulation 1999/1* s 3.2, above n 35, were the notorious Indonesian laws on Anti-Subversion, Social Organizations, National Security, National Protection and Defense, Mobilization and Demobilization and Defense and Security. The Regulation does not specify any years or law numbers and it is not clear which laws are referred to.

<sup>56</sup> See below Part III(E)(3)(e). The *Kitab Undang-Undang Hukum Pidana* ('*Indonesian Criminal Code*') is based on the *Wetboek van Strafrecht voor Indonesia 1915* (Ned), and has been subjected to numerous revisions and amendments.

<sup>57</sup> See Shinichi Murakami, 'Japanese Activist Fights Corruption in East Timor', *Asahi Evening News* (Tokyo, Japan), 26 October 2000 <<http://etan.org/et2000c/november/1-4/00japan.htm>> at 10 March 2001 (copy on file with author). Kashiwagi was held under s 310 of the *Indonesian Criminal Code*, which penalises defamation.



C UNTAET Regulation No 2000/11 on the Organisation of Courts  
in East Timor

1 *Overview*

*Regulation 2000/11*<sup>58</sup> was passed on 6 March 2000 to regulate the functioning and organisation of the courts in East Timor during the transitional period. Judicial authority was expressly vested in the judges of eight newly established District Courts.<sup>59</sup> However, s 7.3 provided that: ‘For a transitional period and until otherwise determined by the Transitional Administrator, the judges appointed to the District Court in Dili shall have jurisdiction throughout the entire territory of East Timor.’

Although the District Courts of Baucau, Oecussi and Suai are now in existence and cases have been handed over to the relevant prosecutors and judges, the District Court of Dili retains a special leadership role. This is particularly clear when one considers that this court was chosen to be the parent court of the Special Panels trying the cases of atrocities pursuant to *Regulation 2000/15* and is the only court that is able to hear habeas corpus applications under UNTAET’s *Criminal Procedure Code*.<sup>60</sup>

2 *Prosecuting International Crimes in the District Court of Dili*

The conceptual foundations for the prosecution of massive violations of human rights that occurred in 1999 are set out in s 10 of *Regulation 2000/11*. It is questionable whether UNTAET entered into genuine consultation with the East Timorese on the ways and means of dealing with the atrocities of the past, and whether there was close examination, with input from experts in the area, of the different ways of dealing with this situation. Issues of justice, truth, vengeance and forgiveness need to be resolved in order that a nation be able to overcome its traumatic past and move forward. For this to occur, the ordinary person must be able to have a sense of ownership or involvement in this important process. What is known is that the regime was based upon that which was then being proposed by the UN for Cambodia.<sup>61</sup> There is indeed a sense of reproach of UNTAET’s attitude in the November 2000 report of the Mission of the Security Council to East Timor and Indonesia, which stressed that ‘decisions on handling serious crimes investigations should, to the extent possible, reflect East Timorese

<sup>58</sup> UNTAET/REG/2000/11 (entered into force 6 March 2000), *Official Gazette of East Timor*, UNTAET/GAZ/2000/Add.1 (*Regulation 2000/11*).

<sup>59</sup> The eight District Courts were to have been located at Dili, Baucau, Los Palos, Viqueque, Same, Maliana, Ermera and Oecussi as set out in s 7.1 of *Regulation 2000/11*: *ibid.* This was an unrealistically large number of courts to establish, given the population of East Timor, its physical area and the considerable amount of resources needed to create and sustain each court. The number of District Courts was in fact reduced to four (Dili, Baucau, Suai and Oecussi) in UNTAET *Regulation 2000/14*, above n 44.

<sup>60</sup> See below Part III(G).

<sup>61</sup> See *Press Briefing by Deputy Legal Adviser, UN Mission in East Timor*, Press Briefing (19 April 2000) <<http://www.un.org/peace/etimor/DB/DB20000419.htm>> at 10 March 2001 (copy on file with author): ‘The credibility of these trials would be ensured because the model under consideration for Cambodia was being used in East Timor’.

expectations.<sup>62</sup> Yet, in all fairness, UNTAET may have been simply responding to the calls of the Security Council for prosecution of those responsible for atrocities,<sup>63</sup> and the Secretary-General's specific recommendation that UNTAET's capacity to conduct its own investigations should be strengthened.<sup>64</sup> However, neither recommended the model that was ultimately adopted by UNTAET.<sup>65</sup>

Section 10 of *Regulation 2000/11* provides that the District Court of Dili is to have exclusive jurisdiction over genocide, war crimes and crimes against humanity. It also gives the District Court of Dili exclusive jurisdiction over the crimes of torture, murder and sexual offences that were committed between 1 January 1999 and 25 October 1999. Under this provision, the prosecution of torture by the District Court of Dili would only be possible if the acts occurred between 1 January 1999 and 25 October 1999.<sup>66</sup> Section 10 simply sets out the basic concept that panels of judges, composed of both East Timorese and international judges, were to be established to try the s 10 cases in the District Court of Dili, and it was not until 6 June 2000 that the implementing legislation was passed.

### 3 The Investigating Judge

On 7 January 2000, two judges had been appointed as 'investigating judges', although there was no such office in the Indonesian criminal system and no provision was made by UNTAET setting out the powers and duties of this office.<sup>67</sup> It was the import of a major feature of certain European civil law systems to the developing hybrid legal regime in East Timor, and there was no guidance on what the investigating judge was supposed to do.

However, despite the problems with the role of the investigating judges being widely known, *Regulation 2000/11* failed to set out the duties and responsibili-

<sup>62</sup> See *Report of the Security Council Mission to East Timor and Indonesia*, UN Doc S/2000/1105 (2000) [8].

<sup>63</sup> See *Security Council Resolution 1264*, above n 28: '[The Security Council] ... *stressing* that persons committing such violations bear individual responsibility ... [c]ondemns all acts of violence in East Timor, *calls* for their immediate end and *demands* that those responsible for such acts be brought to justice' (emphasis in original); *Security Council Resolution 1272*, above n 4, [14]: 'persons committing such violations bear individual responsibility'.

<sup>64</sup> The strengthening of UNTAET's investigative capacity was originally a recommendation of the International Commission of Inquiry on East Timor ('International Commission of Inquiry') established by the Secretary-General to gather and compile information on possible violations of human rights and acts which might constitute breaches of international humanitarian law committed in East Timor since January 1999. Reporting on its findings on 31 January 2000, it recommended, inter alia, the establishment of an international tribunal for East Timor (at [153]) and the strengthening of UNTAET's own capacity to investigate (at [152]): *Report of the International Commission of Inquiry*, above n 23.

<sup>65</sup> See below Part III(E).

<sup>66</sup> Fortunately, this was later corrected in s 7.1 of *Regulation 2000/15*, above n 8, which recognises there can be no temporal limitations on the prosecution of genocide, war crimes, crimes against humanity and torture.

<sup>67</sup> Under the *Indonesian Code of Criminal Procedure*, there is a clear distinction between the roles of interrogator, investigator, prosecutor and judge. There are provisions for a judge to review detention after the first 110 days; that judge is not an 'investigator' and may in fact try the case. UNTAET appears to have considered at the time that this official equated with the European model of the investigating judge (for example an *Untersuchungsrichter* in the German legal system).

ties of that office. Section 13 simply states that there must be at least one investigating judge in each District Court and it provides that the investigating judge has the powers defined in the *Indonesian Code of Criminal Procedure* (it did not define any such powers as there was no such office) and other relevant UNTAET regulations (there were no relevant regulations).

#### D UNTAET Regulation No 2000/14 Amending Regulation No 2000/11

##### 1 *The Situation Necessitating the Introduction of Regulation 2000/14*

Under the *Indonesian Code of Criminal Procedure*, responsibility for arrest, detention and investigation in criminal cases rests with the investigators, who may detain a person independently of the judicial institutions for up to 20 days. In East Timor in the early months of 2000, very few people had copies of the *Indonesian Criminal Code* in a language they understood, let alone the *Indonesian Code of Criminal Procedure*; this led to a confused situation. CIVPOL took on the role of investigators, and so did the prosecutors and investigating judges. Members of the CNRT were informally exercising effective powers of arrest and detention, which they used to interrogate returnees suspected of being members of the militia. In the confusion, CIVPOL investigators opted to approach the investigating judges (one of whom spoke fluent English and Portuguese) instead of the prosecutors (who spoke very little English and some Portuguese) for guidance. Thus, the situation arose that the investigating judges began to supervise and instruct CIVPOL. This was an exercise of non-existent powers, whether under the Indonesian system or that of UNTAET. Most worrying was the possibility that arrests and detentions ordered by the investigating judges were unlawful as they did not have the legal authority to take such measures.

##### 2 *The Case of Victor Alves*

The situation reached a head with the case of Victor Alves, a FALINTIL<sup>68</sup> member regarded as a local hero for having killed a pro-Indonesian leader on the island of Atauro. Alves had confessed to killing Antonio Miguel Pacheco on 22 September 1999 and had been arrested by INTERFET on 12 December 1999. On 28 April 2000, his lawyers filed an application challenging his continued detention, alleging that he had been unlawfully detained. Numerous irregularities were cited, including that the time limit of detention under the *Indonesian Code of Criminal Procedure* had expired. The application sought immediate release of Alves, along with damages for unlawful detention.

As already noted, Indonesian law, as amended by UNTAET regulations, continues to apply in East Timor, to the extent that it is compatible with international standards. Articles 24 to 29 of the *Indonesian Code of Criminal Procedure* contain complex and detailed regulation of pre-trial detention by the police, prosecutors and judges. If proceedings have not been initiated within 110 days of

<sup>68</sup> The FALINTIL is the armed wing of the Fretilin, the main Timorese resistance party, and a founding member of the National Council of East Timorese Resistance. The FALINTIL were until recently commanded by Xanana Gusmao. They are currently in barracks in Aileu and the process to develop them into a conventional army is under way.

detention, the suspect has to be released. UNTAET had in fact been aware of the confusion faced by its law and order agencies in applying Indonesian law under the regime it had created in *Regulation 1999/1* and *Regulation 2000/11*.<sup>69</sup> It issued internal guidelines explaining its understanding of the criminal justice system and what the roles of CIVPOL, prosecutors and investigating judges were. Although clearly expressed as guidelines, they provided detailed provisions concerning the role of the investigating judge, about whom Indonesian law was silent and whose role *Regulation 2000/11* failed to regulate.

UNTAET rushed through *Regulation 2000/14*<sup>70</sup> on 10 May 2000, the day before Alves' hearing at the District Court of Dili. It took immediate effect. Among its provisions were two that would seem to be fatal to Alves' application for release: first, the time limits imposed by the *Indonesian Code of Criminal Procedure* were replaced with provisions allowing a panel of judges to extend detentions beyond six months in certain circumstances; and second '[p]ursuant to Security Council resolutions 1264 (1999) and 1272 (1999) and taking into consideration the prevailing circumstances in East Timor', all arrests and detentions carried out by the investigating judges and prosecutors prior to 10 May 2000 were retroactively validated.

The hearing commenced the next day before Judge Rui Perreira dos Santos, who sat as a single judge. This was the first hearing in the District Court of Dili in the transitional period, and the first time an East Timorese judge, prosecutor and defence counsel made their public debut in an East Timorese court. Judge Perreira dos Santos' decision was issued on 17 May 2000: he found that Alves had indeed been unlawfully detained. In a striking display of judicial indiscipline, Judge Perreira dos Santos refused to apply *Regulation 2000/14*, which seemed to have been rushed through to address the problems raised by the Alves case.<sup>71</sup> Judge Perreira dos Santos found that the new provisions allowing for extensions of detention without time limits within which the state apparatus has to act were discriminatory and in violation of fundamental human rights. He found the provision retroactively validating previously unlawful detentions by the investigating judges and prosecutors violated the principle of legality and universal standards. Finally, he refused to accept the prosecution's argument that, as a single judge, he had no jurisdiction in the matter, stating that, when the motion was filed and the case assigned to him as a single judge, the *Indonesian Code of Criminal Procedure* applied. Judge Perreira dos Santos therefore relied on Indonesian law to decide the case. He noted various irregularities in Alves' detention, including the fact that the time limit under the *Indonesian Code of Criminal Procedure* had passed. He stressed that Indonesian law governed Alves' detention from the moment INTERFET surrendered its jurisdiction to the civilian judicial authorities, namely on 11 January 2000. Calculation of the detention periods should therefore start from 11 January 2000; time spent in the custody of INTERFET was not regulated by the *Indonesian Code of Criminal*

<sup>69</sup> UNTAET, above n 58.

<sup>70</sup> UNTAET, above n 44.

<sup>71</sup> (Unreported, District Court of Dili, Judge Perreira dos Santos, 17 May 2000) Putusan Nomor: 01/Pen.Pra/2000/PD.DIL (copy on file with author).

*Procedure* and therefore should not be considered. Judge Perreira dos Santos also found that the UNTAET guidelines had force of law; they supplemented the *Indonesian Code of Criminal Procedure*. Whilst the investigating judges had no authority under the Indonesian procedure, it was clear from the guidelines what the ruling power regarded as their duties and obligations.

The case of Victor Alves reveals worrying legislative activity that appears to have been initiated with the intent of affecting the outcome in the case.<sup>72</sup> If this was indeed the case, a deplorable precedent has been set for the East Timorese. The policy considerations may have included the fear that the release of Alves would open the floodgates, resulting in the release of many other detainees, causing destabilisation of a still fragile situation. It may also have been feared that Alves' release would not be matched by the release of militia members, some of whom had been held in detention since September 1999. For the militia members not to be released when a local hero was would have called into question the independence and impartiality of the members of the Bench.

Judge Perreira dos Santos seems to have regarded himself as faced with a blatant abuse of legislative power that was deliberately carried out to affect his decision in the case of Alves. UNTAET's actions would presumably have appeared to him to be distressingly like the conduct of East Timor's previous rulers. Judge Perreira dos Santos' written decision does not indicate that, in refusing to apply *Regulation 2000/14*, he considered the doctrine of separation of powers, which stresses that the judicial role is simply to apply the laws passed by the legislature, and not to pick and choose the laws which the judge approves of, discarding those that are disagreeable. Rather than following the generally accepted practice of recording his concerns but nevertheless applying the law, the young East Timorese judge took a calculated decision not to apply a law he felt was unjust and violated the fundamental rights of Victor Alves. The first decision to emerge from the UNTAET administered District Court of Dili is therefore one where the judge refused to apply the law. The obvious conclusion to be drawn is that, having appointed novices to such heavy responsibilities, UNTAET then failed to provide them with adequate training and mentoring.

With respect to the issue of whether Judge Perreira dos Santos was competent to decide on the application of Victor Alves, the fact that the application for release was initially governed by the *Indonesian Code of Criminal Procedure* was irrelevant. In light of new legislation taking immediate effect, and providing for a new way of dealing with such cases, the case should have been immediately reassigned to a panel of judges as required by law. As it is, Judge Perreira dos Santos did not have competence to sit as a single judge or to make any rulings on the case in that capacity.

<sup>72</sup> See the criticisms of Pene Mathew, 'Take Four Legal Systems and Stir!', ABC Radio National, The Law Report, 11 July 2000, <<http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s150455.htm>> at 10 March 2001 (copy on file with author):

[I]t gives the appearance of the law being manipulated to secure a further period of detention. And yet all public officials in East Timor are bound by UNTAET Regulation no 1, to act in accordance with accepted human rights standards. So it does look as though in fact those human rights standards are not being abided by. And there's a real risk that UNTAET might be seen to perpetuate the style of government of the Soeharto era, which can't be good for its legitimacy in the eyes of the East Timorese.

Judge Perreira dos Santos' elevation of the status of UNTAET's informal guidelines to that of law is legally unsound. His reasoning was that UNTAET had been given legislative powers by the Security Council and the issuing of the guidelines was an exercise of those powers. The fact is that the guidelines were simply internal instructions to UNTAET's law and order agencies, to assist in the interpretation and application of criminal procedure in East Timor. They were not passed by the legislature as having any legal effect. It is pertinent to recall that article 9(1) of the *ICCPR* provides that '[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law'.<sup>73</sup> By 'inventing' the powers of the investigating judge in East Timor, the guidelines did not, as Judge Perreira dos Santos suggested, supplement the *Indonesian Code of Criminal Procedure*. They in fact conflicted with a system which provided for others to have the duties and responsibilities which the guidelines expressed as vesting in the investigating judge. In the event of any conflict, laws have to take precedence over guidelines, which cannot simply be elevated to the status of legislation without going through recognised law-making procedures. The decision should have found all arrests and detentions by the investigating judges up to 10 May 2000 (the date that *Regulation 2000/14* was passed) were unlawful because they were not in accordance with the procedures established by law, namely, the *Indonesian Code of Criminal Procedure*. Thereafter the provisions of the new law could have been applied to validate those decisions retroactively.

Judge Perreira dos Santos' finding that the *Indonesian Code of Criminal Procedure* applied from 11 January 2000 — when the handover from the military regime of INTERFET to UNTAET's civilian authorities took place — is logical in view of the fact that INTERFET had created its own regime for dealing with arrests and detentions.<sup>74</sup> On handover of the cases, the applicability of Indonesian law resumed. However, to ignore the time spent in INTERFET detention, which in some cases amounted to over three months, is unfair and defeats the purpose of the close regulation of detention periods as set out in the *Indonesian Code of Criminal Procedure*. The right to liberty is fundamental and Judge Perreira dos Santos' decision to ignore this period of detention effectively penalises those unfortunate enough to have been under INTERFET detention by extending the periods under which they may continue to be detained.<sup>75</sup>

No appeal was possible because, although the Court of Appeal had existed on paper since the passing of *Regulation 2000/11* on 6 March 2000, no judges had been appointed to it. The Bench was empty and the prosecutor had nowhere to appeal. Victor Alves was therefore released and his case has now been transferred to the office now dealing with the 1999 atrocities, the Serious Crimes Unit, which has yet to file an indictment.

<sup>73</sup> Above n 43.

<sup>74</sup> See below Part III(D)(3).

<sup>75</sup> See Amnesty International, above n 2, pt 4.12: 'Amnesty International is concerned that the lack of clarification of procedures has created a situation in which the suspect in this case, and others arrested by INTERFET, appear to be penalised because their original detention took place at a time when INTERFET, rather than CPF [CIVPOL] was responsible for enforcing law and order'.

### 3 Clarifying Procedures for Arrest and Detention and the Role of the Investigating Judge

Despite the criticisms of *Regulation 2000/14*, it provides much-needed clarification of the role of the investigating judge, something that was absent in *Regulation 2000/11* and the *Indonesian Code of Criminal Procedure*. The investigating judge's role is described as being 'to ensure that the rights of every person subjected to criminal investigations and the rights of victims shall be safeguarded.'<sup>76</sup> The judge's duties and responsibilities are finally spelt out; these include issuing arrest warrants and detention orders, and holding reviews of detentions every 30 days. Arrests can only be carried out with a warrant issued by an investigating judge, who issues them upon application from the prosecutors. In exceptional circumstances, such as when someone is caught 'in the act', cases of 'hot pursuit', or where there is an immediate danger to the safety or security of persons, arrests may be made without a warrant. In all cases, the arrested person must be brought before an investigating judge within 48 hours.<sup>77</sup>

*Regulation 2000/14* also attempts to ensure that international standards on deprivation of liberty and fair trial are respected in East Timor. Pre-trial detention is to be regarded as the exception and only to be ordered in cases involving punishment of at least 12 months' imprisonment on conviction. Where it is ordered, detention should normally not exceed six months. If detention longer than six months is ordered, the matter must be reviewed by a panel of judges and then only in respect of crimes carrying heavier sentences:

12a.7 Taking into consideration the prevailing circumstances in East Timor, in the case of a crime carrying imprisonment for more than five years under the law, a panel of the District Court may, at the request of the Public Prosecutor and if the interest of justice so requires, and based on compelling grounds, extend the detention by an additional three months.

12a.8 On exceptional grounds, and taking into account the prevailing circumstances in East Timor, for particularly complex cases of crimes carrying an imprisonment sentence of ten years or more under the law, a panel of the District Court may, at the request of the Public Prosecutor, order the continued detention of a suspect, if the interest of justice so requires, and as long as the length of pre-trial detention is reasonable in the circumstances and having due regard to international standards of fair trial.<sup>78</sup>

Section 12a.7 provides no guidance on what is 'in the interests of justice' or what amounts to 'compelling grounds' justifying detention beyond six months. In the case of detention exceeding nine months, there is no guidance as to what could be regarded as 'exceptional grounds' (beyond the situation in East Timor), what could be 'in the interests of justice' and what could be reasonable in the circumstances. In such a situation, recourse to international jurisprudence and interpretive guidance provided by bodies, such as the Human Rights Committee in its General Comments, would be warranted. It is peculiar that it is only in

<sup>76</sup> *Regulation 2000/11*, above n 58, s 12.2.1, as amended by *Regulation 2000/14*, above n 44, s 4.

<sup>77</sup> *Regulation 2000/14*, above n 44, s 4.

<sup>78</sup> *Ibid* s 5.

relation to s 12a.8 that specific reference is made to the need for the detention to comply with international standards of fair trial. It would be perverse (and unlawful pursuant to *Regulation 1999/1*) if UN courts were not at all times complying with international standards such as those governing the deprivation of liberty and fair trial, as set out in articles 9 and 14 of the *ICCPR*.

Consideration of the 'prevailing conditions' in East Timor is one of the grounds under which prolonged deprivation of liberty would be permissible.<sup>79</sup> However, using the *ICCPR* as an example of the international standards to which UNTAET is bound to adhere, those 'prevailing conditions' must reach the threshold of a public emergency which 'threatens the life of the nation and the existence of which is officially proclaimed',<sup>80</sup> before its provisions can be derogated from. Certain rights cannot, even in an emergency threatening the life of a nation, be derogated from. The rights to liberty and fair trial, enshrined in articles 9 and 14 are not of that category; in other words, where an emergency exists and subject to the procedures set out in article 4 of the *ICCPR*, the right to liberty and fair trial can be derogated from. However, in East Timor, whilst conditions are very difficult, at the time of the passing of *Regulation 2000/14* and since then, there has been no emergency threatening the life of the nation and its existence. It would therefore appear that reliance on East Timor's 'prevailing conditions' as grounds for prolonged detention violates the fundamental rights to liberty and expeditious trial.<sup>81</sup>

## E UNTAET Regulation No 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences

### 1 Introduction

*Regulation 2000/15*<sup>82</sup> was passed on 6 June 2000 and draws upon the vision set out in s 10 of *Regulation 2000/11*. Building upon the distinction in the *Indonesian Criminal Code* between crimes and misdemeanours, it utilises the

<sup>79</sup> See *Regulation 2000/11*, above n 44, ss 12a.7 and 12a.8 amended in *Regulation 2000/14*, above n 59, s 5.

<sup>80</sup> Art 4(1) of the *ICCPR*, above n 43, states:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

<sup>81</sup> These provisions have been maintained in UNTAET's *Regulation 2000/30 on Transitional Rules of Criminal Procedure* UNTAET/REG/2000/30 (passed 25 September 2000), *Official Gazette of East Timor*, UNTAET/GAZ/2000/Add.4 ('*Regulation 2000/30*') discussed in below Part III(G). See critical remarks of Amnesty International, above n 2, pt 4.12:

The organisation is further concerned that new legislation should not contravene rights to fair trial, including the right to trial within a reasonable time or to release, enshrined in art 9(3) of the *ICCPR*. While Amnesty International appreciates the particular difficulties experienced by UNTAET in meeting the time limits set in the *Indonesian Code of Criminal Procedure*, which result from the fact that no functioning judicial system was in place when UNTAET entered East Timor, Amnesty International is concerned that extensions of pre-trial detention, including under Article 12a.8 of *Regulation 2000/14*, should not result in violations of the rights to which all those held in pre-trial detention are entitled under international human rights law.

<sup>82</sup> *Regulation 2000/15*, above n 8.



rather unfortunate terminology ‘Serious Crimes’ — are other crimes not to be regarded as serious? These are defined as being the crimes of genocide, war crimes, crimes against humanity, murder, sexual offences and torture. The regulation establishes the legal framework for the investigation, prosecution and trial of such cases.

This regulation is of fundamental importance. It is the true test of the commitment of UNTAET and the UN to the rule of law in East Timor. After 24 years of brutal occupation and a culture of impunity for massive violations of human rights, the East Timorese are closely watching to see what comes of the enterprise to investigate and prosecute Serious Crimes. Expectations are extremely high and the demand for accountability is strong. Given that this is an internationalised enterprise, the East Timorese are also looking to see justice dispensed with full respect for all the fundamental human rights and principles that the UN promotes. They expect those involved to demonstrate the highest standards of professionalism and ethics. Beyond the international community’s interest in individual criminal responsibility for atrocities that have threatened international peace and security, it has been noted that the UN has a particular responsibility because the violations of human rights and international humanitarian law were directed against a Chapter VII decision of the Security Council and international undertakings given by Indonesia to the UN.<sup>83</sup>

This creative enterprise is not the first of its kind: the UN Mission in Kosovo has created a War and Ethnic Crimes Court, also of a mixed international/local composition, which deals with similar crimes.<sup>84</sup> Cambodia has recently approved legislation for an internationalised panel sitting as an Extraordinary Panel to try former leaders of the Khmer Rouge,<sup>85</sup> as earlier noted, this model was in fact the inspiration for the East Timor process. The East Timor experiment is therefore part of a revolutionary trend which is quietly being promoted across the world. It is, however, not the experts’ preferred means of dealing with the situation: the International Commission of Inquiry and the three Special Rapporteurs, pressing the issues of accountability and justice, recommended the establishment of an international tribunal to try the atrocities committed in East Timor.<sup>86</sup> In transmitting the report of the International Commission of Inquiry, the Secretary-General recommended instead that the Indonesian courts first be given an opportunity to investigate and prosecute, and that UNTAET’s own capacity in this area be

<sup>83</sup> *Report of the International Commission of Inquiry*, above n 23, [147].

<sup>84</sup> See Alexandra Poolos, ‘Kosovo: War Crimes Court to Be Established’, *Radio Free Europe/Radio Liberty*, 27 April 2000, <<http://www.rferl.org/nca/features/2000/04/f.ru.000427133027.html>> 10 March 2001 (copy on file with author).

<sup>85</sup> See Chea Sotheacheath, ‘Cambodian National Assembly Passes Khmer Rouge Tribunal Law’, *Associated Press Newswire* (Phnom Penh, Cambodia), 2 January 2001.

<sup>86</sup> *Report of the International Commission of Inquiry*, above n 23, [153]; the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions, the Special Rapporteur of the Commission on the Question of Torture, and the Special Rapporteur of the Commission on Violence against Women, Its Causes and Consequences recommended that, unless the Indonesian government ‘in a matter of months’ brings those responsible to justice, then the Security Council should consider the establishment of an international tribunal: *Situation of Human Rights in East Timor*, above n 23, [74].

strengthened.<sup>87</sup> This trust and confidence in domestic remedies was taken up by the Security Council. Since then, there has been an increase in activity on the Indonesian front which has failed to result in trials. On 31 January 2000, Indonesia's Commission of Inquiry into Human Rights Abuses in East Timor ('KPP-HAM') produced an unexpectedly strong report on its investigations into the East Timor atrocities, confirming the collaboration between East Timorese militia and Indonesian forces in the planning, preparation and perpetration of several atrocities. It went beyond the UN's own investigators in implicating certain key persons, including the former Commander of the Armed Forces, General Wiranto, and the former Governor of East Timor, Abilio Soares.<sup>88</sup> The matter was then taken over by the Attorney-General of Indonesia, who focused on five major cases.<sup>89</sup> Nineteen persons were named as suspects on 1 September 2000, and another four the following month.<sup>90</sup> On 6 November 2000, legislation permitting the establishment of special Human Rights Courts to try the East Timor cases as massive violations of human rights was approved by the Indonesian People's Consultative Assembly, but by the end of 2000 they had yet to materialise.<sup>91</sup>

Recognising the limitations of East Timor's infant court system, and in line with the recommendations of the International Commission of Inquiry,<sup>92</sup> UNTAET has attempted to find a middle path between vengeance and forgiveness. It has been very active in its support for reconciliation and limited amnesties but has always maintained that there can be no amnesties for those involved in Serious Crimes. Public meetings have been organised to canvass East Timorese opinion on reconciliation, militia leaders residing in West Timor have been invited back to 'come and see' the conditions in East Timor and the Cabinet has approved the establishment of a Truth, Reception and Reconciliation Commission ('TRR Commission').<sup>93</sup> East Timor is facing a situation in which

<sup>87</sup> The Secretary-General's own recommendations were contained in the identical letters accompanying the *Report of the International Commission of Inquiry*, above n 23.

<sup>88</sup> *Report on the Investigation of Human Rights Violations in East Timor*, above n 23.

<sup>89</sup> These are (1) the massacre at Liquica church on 6 April 1999; (2) the attack on the house of pro-independence leader Manuel Carrascalao on 17 April 1999; (3) the attack on the residence of Bishop Belo on 6 September 1999; (4) the massacre at Suai church on 6 September 1999; and (5) the murder of Dutch journalist Sander Thoenes on 21 September 1999.

<sup>90</sup> On 1 September 2000, the Attorney-General announced the names of 19 persons suspected of involvement in the 1999 destruction of East Timor (General Wiranto was not one of these, but ex-Governor Abilio Soares was, along with Major-General Adam Damiri, the head of the Udayana army regional command, and Brigadier General Tono Suratman). On 4 October 2000, four others were named, including notorious militia leader, Eurico Guterres. See Dini Djalal, 'East Timor Massacre Suspects Listed', *Christian Science Monitor*, 5 September 2000, <<http://www.csmonitor.com/durable/2000/09/05/p6s1.htm>> (copy on file with author). The trials were supposed to commence in January 2001.

<sup>91</sup> *Law on Human Rights Courts (Law No 26 of 2000)* (Indonesia).

<sup>92</sup> It was recommended that UNTAET should explore different options for truth and reconciliation.

<sup>93</sup> The TRR Commission is to focus on 'facilitating the reintegration of East Timorese returnees, establishing an historical record about human rights abuse, and recommending legal and institutional safeguards to protect human rights in the future': UNTAET, *Daily Briefing*, 13 December 2000 <<http://www.un.org/peace/etimor/DB/db1312000.htm>> at 10 March 2001 (copy on file with author). See Mark Dodd, 'Call for East Timor Reconciliation', *The Age* (Melbourne), 18 December 2000, 7; Mark Dodd, 'Gusmao and Belo on Collision Course over Jus-

one eighth of its population remains in West Timor and the TRR Commission is part of the effort to encourage them to return. Under its auspices, those responsible for less serious offences (such as arson and property damage)<sup>94</sup> can return if they agree to confess, apologise and undertake some sort of community service in accordance with traditional mechanisms. The community-brokered agreement is then to be sent to court for approval so that it acquires the stamp of legality and any charges against the suspect in relation to those acts are dismissed or barred. In addition, the TRR Commission will also fulfil a truth commission function in investigating the violations of human rights since 1974. This mechanism is not designed to be an alternative to justice, but to complement and strengthen the effort to achieve reconciliation.

## 2 *The Basic Concept*

What has been created in East Timor is a partly internationalised institution acting under the jurisdiction of the District Court of Dili, applying both international law and the hybrid laws of UNTAET-administered East Timor. Special Panels are created at the District Court of Dili to exercise jurisdiction over cases of Serious Crimes.<sup>95</sup> In recognition of the need to ensure impartiality and independence, each Special Panel is to comprise two international judges and one East Timorese judge.<sup>96</sup> This provides ‘on the job training’ to the one East Timorese judge, Judge Maria Natercia Gusmao Perreira, who has equal status to her counterparts. A separate regulation, *Regulation 2000/16*, was passed at the same time to regulate the Public Prosecution Service of East Timor.<sup>97</sup> This Service includes the Office of the Deputy General Prosecutor for Serious Crimes, who has exclusive responsibility for the Serious Crime cases. It is striking that this was not balanced by legislation establishing a service providing legal assistance to accused persons.

*Regulation 2000/15* incorporates, almost verbatim, the substantive legal provisions dealing with subject matter jurisdiction and the general principles of law contained in the proposed *Rome Statute of the International Criminal Court*.<sup>98</sup> This highly ambitious document has imported a regime created for a radically different setting, the International Criminal Court (‘ICC’), into a district court of one of the world’s poorest nations. The *Rome Statute* was drafted by states which

‘...’, *Sydney Morning Herald* (Sydney), 18 December 2000, 6. The NGO Forum told the visiting Security Council delegation on 13 November 2000 that:

The East Timorese people also seek reconciliation between all sections of their society — but bringing the key perpetrators of war crimes to justice is an essential element of reconciliation.

UNTAET is failing to carry out its mandate to ‘bring to justice’ those responsible for war crimes if it does not provide sufficient resources to the investigation of war crimes.

*ET NGO Forum Statement*, above n 54.

<sup>94</sup> See below Part III(E)(4)(b) for discussion on arson and property damage as a crime against humanity.

<sup>95</sup> *Regulation 2000/15*, above n 8, s 1.

<sup>96</sup> *Ibid* s 22.1.

<sup>97</sup> *Regulation No 2000/16 on the Organization of the Public Prosecution Service in East Timor*, UNTAET/REG/2000/16 (entered into force 6 June 2000), *Official Gazette of East Timor*, UNTAET/GAZ/2000/1/Add.3: s 14.3.

<sup>98</sup> Opened for signature 17 July 1998, UN Doc A/CONF.183/9, 37 ILM 999 (not yet in force) (‘*Rome Statute*’), adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998.

were ultimately concerned to preserve their own interests and limit the law that could be applied to any of their nationals brought before the ICC. It is premised upon the assumption that an international body will be created receiving maximum international support, able to administer and uphold the highest international standards that set an example for all. It is ironic that, although UNTAET had been preparing for this enterprise since the passing of *Regulation 2000/11*, when *Regulation 2000/15* was passed, taking immediate effect, no budget had been approved to ensure that immediate implementation.<sup>99</sup>

By adopting provisions meant for the ICC, UNTAET may have 'bitten off more than it can chew'. As it is slowly discovering, *Regulation 2000/15* has created a tremendous legal and financial burden. The investigation and prosecution of international crimes is a complex and very costly enterprise, even for developed nations and international tribunals.<sup>100</sup> By way of comparison, the budget of the ICTY for 2000 was US\$95 942 600, borne by the regular budget of the UN.<sup>101</sup> UNTAET, for the period from 1 July 2000 to 20 June 2001, sought US\$563 000 000 for its entire mission.<sup>102</sup> The inability of the Serious Crimes Unit to function adequately, largely due to minimal material and human resources, has been widely publicised by NGOs<sup>103</sup> and in the media.<sup>104</sup> If this enterprise is to be anything more than a token gesture, the institutions set up

<sup>99</sup> This is the same position in which the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia ('ICTY'), established pursuant to SC Res 827, 48 UN SCOR (3217<sup>th</sup> mtg), UN Doc S/Res/827 (1993), 32 ILM 1203, found itself in 1993 — it had been created, its Prosecutor was appointed and his office established, but it had no budget: Richard Goldstone, *For Humanity: Reflections of a War Crimes Investigator* (2000) 104.

<sup>100</sup> See the review of the funding of international tribunals carried out by Cesare Romano, *The Cost of International Justice* (1997) <<http://www.cic.nyu.edu/pubs/TheCost.html>> at 10 March 2001 (copy on file with author).

<sup>101</sup> In 1999, the Tribunal's budget was \$94 103 800 with \$2 601 000 for the Chambers, \$26 853 000 for the Office of the Prosecutor, \$47 876 000 for the Registry, and \$16 773 000 for support: ICTY, *ICTY Key Figures*, <<http://www.un.org/icty/glance/keyfigure-e.htm>> at 10 March 2001 (copy on file with author).

<sup>102</sup> See *Discussion of UNTAET's Budget Commences in Fifth Committee*, Press Release, UN Doc GA/AB/3411 (17 November 2000).

<sup>103</sup> See Amnesty International, above n 2, pt 3.4: 'While recognising the size and complexity of its work, Amnesty International is concerned by the slow pace at which UNTAET investigations are proceeding ... A number of suspects have already spent more than ten months in detention without indictment'.

<sup>104</sup> See, eg, Joanna Jolly, 'Investigators Struggle with Criminal Lack of Resources', *South China Morning Post* (Hong Kong, China), 14 November 2000, 18; 'UN Pledges More Resources to East Timor's Chief Investigator', *Agence France-Presse* (Jakarta, Indonesia), 20 November 2000:

The UN chief investigator for serious crimes in East Timor has agreed not to resign after last minute pledges by the body's administrators to supply his unit with desperately needed resources ... Two-thirds of the 56 people arrested on suspicion of serious crimes in the province have been released because the Special Crimes Unit lacked the resources to continue their investigations ... East Timor's Non Government Organisations (NGOs) Forum reinforced the message to the [Security Council] delegation, telling them that UNTAET was failing 'to carry out its mandate to bring to justice' those responsible for last year's violence. 'These war crimes took place over a year ago and the longer the investigations are delayed the less likely it is that there will ever be successful prosecutions' ... 'The Serious Crimes Unit has only been allocated the resources to investigate a very small proportion of the alleged war crimes,' the report said. 'It is grossly understaffed, and lacking anything like sufficient basic necessities as interpreters, transport and computers.'

under *Regulation 2000/15* have to be provided with enormous material resources, along with substantial and appropriate personnel, and total institutional support.

The adoption of *Regulation 2000/15* was received with great hostility by the East Timorese judges, prosecutors and public defenders, who publicly voiced anger and disappointment that they were not included in any meaningful way in the consultation process that led to its adoption. The East Timorese jurists perceived that, as in previous times, they were being denied the right of meaningful participation in momentous decisions affecting them. The Presidency of the District Court of Dili was particularly outraged that, despite the provisions of s 10.3 of *Regulation 2000/11*, it had not been consulted about the establishment of Special Panels.<sup>105</sup> There was a strong feeling that the international community was taking the cases away from the East Timorese; there was a loss of ownership and involvement in this crucial process.

### 3 *Subject Matter Jurisdiction*

In adjudicating the Serious Crime cases, the Special Panels are empowered by s 3 of *Regulation 2000/15* to apply the law of East Timor and, where appropriate, applicable treaties and recognised principles and norms of international law, including the established principles of the international law of armed conflict. No interpretative document accompanied *Regulation 2000/15*, and it would therefore be relevant for the Special Panels to consider the records of the proceedings of the Rome Conference on the establishment of the ICC, and also the final agreed version of the Elements of Crimes.<sup>106</sup> It must be emphasised that these documents were drafted for a radically different sort of institution, and great care must be taken when resorting to them.

In examining recognised principles and norms of international law, including the established principles of the international law of armed conflict, the Special Panels should have recourse to the jurisprudence of the post-World War II prosecutions, the ICTY and the International Criminal Tribunal for Rwanda ('ICTR'),<sup>107</sup> and the jurisprudence of national courts dealing with international crimes. It is particularly helpful that the international tribunals have been applying rules of international humanitarian law which are beyond any doubt part of customary law.<sup>108</sup> Included in this category are the *Geneva Conven-*

<sup>105</sup> 'The Transitional Administrator, *after consultation with the Court Presidency*, may decide to establish panels with the expertise to exercise exclusive jurisdiction vested in the court by Section 10.1 of the present regulation': *Regulation 2000/11*, above n 58, s 10.3 (emphasis added).

<sup>106</sup> See *Report of the Preparatory Commission for the International Criminal Court, Part II, Finalized Draft Text of the Elements of Crimes*, UN Doc PCNICC/2000/1/Add.2 (2000).

<sup>107</sup> International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, established pursuant to SC Res 955, 49 UN SCOR (3452<sup>nd</sup> mtg), *Statute of the International Tribunal for Rwanda* UN Doc S/Res/955 (1994), 33 ILM 1598.

<sup>108</sup> See, eg, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc S/25704 [34], 32 ILM 1159, 1170.

tions,<sup>109</sup> the *Convention Respecting the Laws and Customs of War on Land*<sup>110</sup> and its attached Regulations, the *Convention on the Prevention and Punishment of the Crime of Genocide*<sup>111</sup> and the *Charter of the International Military Tribunal*.<sup>112</sup>

The following discussion will examine in considerable detail the law to be applied by the Special Panels.

(a) *Genocide*

The definition in *Regulation 2000/15* of the crime of genocide reflects that of the *Rome Statute*.<sup>113</sup>

For the purposes of the present regulation, ‘genocide’ means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Section 4 of *Regulation 2000/15* mirrors the elements of genocide recognised in customary international law and is identical to the definition found in the statutes of the ICTY<sup>114</sup> and ICTR<sup>115</sup> and the *Genocide Convention*. In proving genocide, the prosecutor has to show that the conduct in question was deliberately intended to eradicate, in whole or in part, a national, ethnical, racial or religious group. The ICTR case of *Prosecutor v Akayesu*<sup>116</sup> was the first international judgment on genocide. It confirmed that, in addition to the *mens rea* of the underlying crime, there has to be a *dolus specialis*, that is, a specific intent to commit genocide.<sup>117</sup> This is the deliberate selection of the victims because they

<sup>109</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (‘*Third Geneva Convention*’); *Fourth Geneva Convention*, above n 33.

<sup>110</sup> Opened for signature 18 October 1907, [1910] UKTS 9, [1907] Cmnd 5030 (entered into force 26 January 1910) (‘*Hague Convention IV*’).

<sup>111</sup> Opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) (‘*Genocide Convention*’).

<sup>112</sup> This Charter was annexed to an agreement concluded between the USA, the UK, France and the USSR, concluded in London on 8 August 1945: *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 83 UNTS 279.

<sup>113</sup> *Rome Statute*, above n 98, art 6.

<sup>114</sup> *Statute of the International Tribunal for the Former Yugoslavia*, SC Res 827, 48 UN SCOR (3217<sup>th</sup> mtg), UN Doc S/Res/827 (1993), 32 ILM 1203.

<sup>115</sup> *Statute of the International Tribunal for Rwanda*, above n 107.

<sup>116</sup> Case No ICTR-96-4-T (2 September 1998) (‘*Akayesu*’).

<sup>117</sup> *Ibid* [498].

were part of a group which the perpetrator sought to destroy, whether in whole or in part.<sup>118</sup> This goes further than the victimisation of an individual because of his or her membership of a particular group.

Furthermore, the *mens rea* of genocide must be formed prior to the commission of the genocidal acts; the individual acts themselves, however, do not require premeditation, simply that the act be done in furtherance of the genocidal intent.<sup>119</sup> Recognising that the special intent inherent in the crime of genocide is a mental factor which is difficult, even impossible, to determine, the *Akayesu* Trial Chamber noted that intent can be inferred from a certain number of presumptions of fact.<sup>120</sup> At the ICTY, the Trial Chamber in the case of *Prosecutor v Kupreskic* examined the linkage between genocide and crimes against humanity and found that genocide is an extreme and most inhumane form of persecution; its *mens rea* is the intent to discriminate, accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong.<sup>121</sup>

There have over the years been many allegations that the East Timorese were victims of genocide during the 25 year occupation.<sup>122</sup> In this context, it is worth noting that the alleged forced relocation of East Timorese to guarded settlement camps and ‘resettlement villages’ where many perished due to sickness and famine<sup>123</sup> could amount to the infliction of certain conditions of life which were calculated to bring about their physical destruction in whole or in part. The Trial Chamber in the case of *Akayesu* found that within this category of crime are to be found methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.<sup>124</sup> The Trial Chamber found such maltreatment could include ‘subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement.’<sup>125</sup> Allegations of the involuntary sterilisation of East Timorese women and use of the drug Depo Provera through the Family Planning Programme raise the issue of biological genocide.<sup>126</sup> The *Akayesu* Trial Chamber found that the imposition

<sup>118</sup> Ibid [521].

<sup>119</sup> Ibid [498]; see also *Prosecutor v Rutaganda*, Case No ICTR-96-3 (6 December 1999) [59]; 39 ILM 557, 569 (*Rutaganda*).

<sup>120</sup> Case No ICTR-96-4-T (2 September 1998) [523]; see also the decision of Trial Chamber 1 of the ICTY in *Karadzic and Mladic*, Review of the Indictment within the Framework of Rule 61 of the Rules of Procedure and Evidence (Case Nos IT-95-5-R61 and IT-95-18-R61) [94].

<sup>121</sup> Case No IT-95-16-T (14 January 2000) [636] (*Kupreskic*).

<sup>122</sup> See the discussion in below Part III(E)(4)(c) on the prosecution of pre-1999 atrocities. Allegations of genocide in East Timor can be found in the extensive reports of leading NGOs such as TAPOL, East Timor Action Network (‘ETAN’), Amnesty International and Human Rights/Asia Watch, and publications such as Arnold Kohen and John Taylor, *An Act of Genocide: Indonesia’s Invasion of East Timor* (1979); Taylor, *East Timor: The Price of Freedom*, above n 9; Roger Clark, ‘Does the Genocide Convention Go Far Enough? Some Thoughts on the Nature of Criminal Genocide in the Context of Indonesia’s Invasion of East Timor’ (1981) 8 *Ohio Northern University Law Review* 321; Antonio Barbedo de Magalhaes, *East Timor: Indonesian Occupation and Genocide* (1992).

<sup>123</sup> See Taylor, *East Timor: The Price of Freedom*, above n 9, chs 6 and 7.

<sup>124</sup> *Akayesu*, Case No ICTR-96-4-T (2 September 1998) [505].

<sup>125</sup> Ibid [506].

<sup>126</sup> See Taylor, *East Timor: The Price of Freedom*, above n 9, 158–60.

of measures intended to prevent births within the group, whether by way of sterilisation, forced birth control, separation of the sexes or prohibition of marriages, may be a form of genocide.<sup>127</sup> In the context of widespread sexual assault, it found that the systematic rape of women can be an act of genocide.<sup>128</sup>

However, defining the group against which the atrocities were directed is problematic in the East Timor situation. The East Timorese as a national,<sup>129</sup> ethnic,<sup>130</sup> racial<sup>131</sup> or religious<sup>132</sup> group do not appear to have been targeted *per se*, as those who collaborated with the Indonesian regime and supported integration were not subjected to atrocities. In fact, some East Timorese even took part in the attacks on their brethren. Rather, it can be argued that it was a political group within the East Timorese, namely supporters of independence, that was the target.<sup>133</sup> Trial Chambers at the ICTY and ICTR have noted that political, economic and social groups were deliberately excluded from the ambit of the crime of genocide set out in the *Genocide Convention*.<sup>134</sup> This suggests that crimes against humanity, rather than genocide, have been perpetrated in East Timor. However, the judgment in the ICTR case of *Rutaganda* pointed out that, there being no internationally recognised precise definitions of the protected groups, it falls to the decision-makers to assess each of these concepts of national, ethnical, racial and religious groups in light of the particular political, social and cultural context of the country in which the genocide is alleged to have occurred.<sup>135</sup> There does appear to be evidence that massive criminality was perpetrated in East Timor over the period of the occupation. However, to satisfy a court of law that the members of the Indonesian armed forces and their militia allies, with the support or even at the instigation of the political leadership, committed genocide in East Timor will be a huge task. Proving the additional *mens rea* of the 'intent to destroy in whole or in part' is a particularly onerous task.<sup>136</sup> Lessons are to be learnt from the tribulations of the ICTY prosecution team in *Jelusic* where the Trial Chamber found that, although Jelusic obviously

<sup>127</sup> *Akayesu*, Case No ICTR-96-4-T (2 September 1998) [507].

<sup>128</sup> *Ibid* [504], [507], [508], [731]; see also *Rutaganda*, Case No ICTR-96-3 (6 December 1999) [51]; 39 ILM 557, 568.

<sup>129</sup> *Akayesu*, Case No ICTR-96-4-T (2 September 1998) [512]: 'Based on the *Nottebohm* decision rendered by the International Court of Justice, the Trial Chamber holds that a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.' See *Nottebohm (Liechtenstein v Guatemala) (Second Phase)* [1955] ICJ Rep 4.

<sup>130</sup> *Akayesu*, Case No ICTR-96-4-T (2 September 1998) [513]: 'An ethnic group is generally defined as a group whose members share a common language or culture.'

<sup>131</sup> *Ibid* [514]: 'The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.'

<sup>132</sup> *Ibid* [515]: 'The religious group is one whose members share the same religion, denomination or mode of worship.'

<sup>133</sup> Others take a less conservative view. See, eg, Kohen and Taylor, above n 122; Clark, above n 122; Barbedo de Magalhaes, above n 122.

<sup>134</sup> *Prosecutor v Jelusic*, Case No IT-95-10 (14 December 1999) [69] ('*Jelusic*'); *Rutaganda*, Case No ICTR-96-3 (6 December 1999) [55]-[57]; 39 ILM 557, 568-9; *Akayesu*, Case No ICTR-96-4-T (2 September 1998) [516].

<sup>135</sup> *Rutaganda*, Case No ICTR-96-3 (6 December 1999) [56]; 39 ILM 557, 568.

<sup>136</sup> *Akayesu*, Case No ICTR-96-4-T (2 September 1998) [523].



singled out Muslims, his actions were opportunistic and inconsistent, and he killed arbitrarily rather than with the clear intention to destroy a group.<sup>137</sup>

(b) *Crimes against Humanity*

Section 5.1 of *Regulation 2000/15* defines crimes against humanity as:

[A]ny of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in Section 5.3 of the present regulation, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the panels;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Section 5.1 must be read together with s 5.2, which defines its terms.

The definition of crimes against humanity reiterates the provisions of article 7 of the *Rome Statute*, although it not only requires the prosecution to prove that the attack was committed as part of a widespread or systematic attack directed against the civilian population, but also that the act in issue was itself directed against the civilian population. Crimes against humanity in East Timor can therefore only be prosecuted if they are committed against the civilian population, that is, those who have not taken an active part in hostilities, or are no longer doing so, including members of the armed forces who have laid down their arms and those rendered *hors de combat* by sickness, wounds, detention or any other reason.<sup>138</sup> From the catch-all provisions of s 5.1(k), it is clear that all

<sup>137</sup> *Jeliscic*, Case No IT-95-10 (14 December 1999) [108].

<sup>138</sup> *Akayesu*, Case No ICTR-96-4-T (2 September 1998) [582]; *Prosecutor v Tadic*, Case No IT-94-1-T (7 May 1997) [637]–[639]; 36 ILM 908, 939–40 (*Tadic Trial Judgment*); *Jeliscic*, Case No IT-95-10 (14 December 1999) [54].

acts amounting to crimes against humanity have to meet the threshold of intentionally causing great suffering or serious injury to body or to mental or physical health. Other important aspects to note are that s 5 is in line with customary international law in not requiring a nexus with the armed conflict, and in recognising that crimes against humanity can be committed both in times of peace and times of armed conflict.

It is important to note that the 'widespread or systematic' elements are expressed in the alternative rather than cumulative. An accused must have knowledge of the nature of the widespread or systematic nature of the attack on the civilian population; this means they must understand the overall context of their act, should be aware of the greater dimension and have actual or constructive knowledge of the broader context of the attack.<sup>139</sup> *Regulation 2000/15* does not incorporate article 7(2)(a) of the *Rome Statute*, which defines the 'attack directed against any civilian population'. The Special Panels will therefore have to examine international jurisprudence to establish the position of the requirement of s 5.1 that there be an act 'committed as part of a widespread or systematic attack and directed against any civilian population' in customary international law. According to the *Akayesu* Trial Chamber, 'widespread' means that the atrocities were committed on a large scale against multiple victims; it includes 'massive, frequent, large scale action carried out collectively with considerable seriousness'.<sup>140</sup> The Trial Chamber in the *Tadic Trial Judgment* found that the term referred to the number of victims; acts committed on a large scale are those that are directed against a multiplicity of victims.<sup>141</sup>

What distinguishes crimes against humanity from other crimes is the element of state involvement, rather than the acts of a private individual who has an animosity towards a certain group or the public generally.<sup>142</sup> If the East Timor prosecutions for crimes against humanity are to succeed, it must be shown that attacks on the civilian population were either part of Indonesian governmental policy, sponsored by it or at least tolerated by it.<sup>143</sup> To be systematic, the attacks will need to be shown to be 'thoroughly organised and following a regular pattern on the basis of a common policy and involving substantial public or private resources.'<sup>144</sup> The policy need not be explicitly formulated, nor does it need to amount to the actual policy of a state.<sup>145</sup> Such policy need not be formalised and can be deduced from the way in which the acts occur; if the acts occur on a widespread basis, that demonstrates a policy to commit those acts,

<sup>139</sup> *Prosecutor v Kayishema*, Case No ICTR-95-1-T (21 May 1999) [133]–[134]; *Tadic Trial Judgment*, Case No IT-94-1-T (7 May 1997) [659]; 36 ILM 908, 946.

<sup>140</sup> *Akayesu*, Case No ICTR-96-4-T (2 September 1998) [580].

<sup>141</sup> *Tadic Trial Judgment*, Case No IT-94-1-T (7 May 1997) [648]; 36 ILM 908, 642–3.

<sup>142</sup> *R v Finta* [1994] SCR 701; 112 DLR (4<sup>th</sup>) 513; *Tadic Trial Judgment*, Case No IT-94-1-T (7 May 1997) [649]; 36 ILM 908, 943.

<sup>143</sup> *Kupreskic*, Case No IT-95-16-T (14 January 2000) [552]; *Tadic Trial Judgment*, Case No IT-94-1-T (7 May 1997) [648]; 36 ILM 908, 942–3. It should also be noted that an entity holding de facto authority over a territory may also be capable of promoting such policy, sponsorship or toleration of it: *Kupreskic*, Case No IT-95-16-T (14 January 2000) [552].

<sup>144</sup> *Akayesu*, Case No ICTR-96-4-T (2 September 1998) [580].

<sup>145</sup> *Ibid*; *Kupreskic*, Case No IT-95-16-T (14 January 2000) [551].

whether formalised or not.<sup>146</sup> It should be noted that the attack need not be of a violent nature; the imposition of inherently unlawful acts such as apartheid, if orchestrated on a massive scale or in a systematic manner, will count.<sup>147</sup>

The General Prosecutor of East Timor has identified persecution and deportation as key core offences in the crimes against humanity charges to be brought against the Indonesian military leadership.<sup>148</sup> Persecution is an all-encompassing offence, defined in s 5.2 as the ‘intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.’<sup>149</sup> Under s 5.1(h), the prosecution is required to prove that there was

[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in Section 5.3 of the present regulation, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the panels.

Multiple offences, ranging from religious discrimination, murder, torture and deportation, not amounting to crimes against humanity in their own right, can be fitted under the umbrella of persecution. The *Kupreskic* judgment confirms that persecution is an offence grounded in discrimination, and that ‘[i]t is based on the notion that people who share ethnic, racial or religious bonds different to those of a dominant group are to be treated as inferior to the latter’.<sup>150</sup> The ICTY Appeals Chamber in the appeal against the *Tadic Trial Judgment* has confirmed that it is only in relation to persecution as a crime against humanity that the act need be committed with a discriminatory intent.<sup>151</sup> It should be noted that persecution under *Regulation 2000/15* is restricted to acts perpetrated ‘in connection’ with any of the other acts which may constitute crimes against humanity (such as murder, extermination and enslavement) or with the other Serious Crimes such as war crimes. This is to ensure that the same threshold of gravity is reached. It is possible to meet this condition by ‘charging persecution in connection with “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”.’<sup>152</sup>

*Kupreskic* offers useful guidance in light of the extent of property damage in East Timor. The Trial Chamber confirmed that attacks on property based on discriminatory grounds can constitute persecution, and that, to some extent, this may depend on the type of property involved.<sup>153</sup> The parameters of that threshold, however, were not specified. There may be certain types of property the

<sup>146</sup> *Tadic Trial Judgment*, Case No IT-94-1-T (7 May 1997) [653]; 36 ILM 908, 944.

<sup>147</sup> *Akayesu*, Case No ICTR-96-4-T (2 September 1998) [581].

<sup>148</sup> See General Prosecutor of East Timor in UNTAET, *Daily Briefing, 1 December 2000*, <<http://www.un.org/peace/etimor/DB/db011200.htm>> at 10 March 2001 (copy on file with author).

<sup>149</sup> *Regulation 2000/15*, above n 8, s 5.2(f).

<sup>150</sup> *Kupreskic*, Case No IT-95-16-T (14 January 2000) [751].

<sup>151</sup> *Prosecutor v Tadic*, Case No IT-94-1-A (15 July 1999) [305]; 38 ILM 1518, 1577 (‘*Tadic Appeal Judgment*’).

<sup>152</sup> *Kupreskic*, Case No IT-95-16-T (14 January 2000) [580].

<sup>153</sup> *Ibid* [631].

destruction of which may not meet the threshold of gravity required to constitute a crime against humanity, even if the destruction is perpetrated on discriminatory grounds: an example is the burning of a car (unless the car is an indispensable and vital asset to the owner). The Trial Chamber felt that, where the attack on property involves the comprehensive destruction of homes and property, this constitutes a destruction of the livelihood of a certain population and may have the same inhumane consequences as a forced transfer or deportation.<sup>154</sup> In light of this, it could be possible in appropriate circumstances to charge those accused of extensive property damage in East Timor with a crime against humanity in the form of persecution and an inhumane act of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.<sup>155</sup>

Deportation or forcible transfer of population, a potential crime against humanity under s 5.1(d), is defined in s 5.2(c) as the ‘forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law’. Drawing on *Kupreskic*, it would also be possible to charge this as an inhumane act under s 5.1(k) of *Regulation 2000/15*. During the Indonesian occupation, there were many allegations of forced displacement of the civilian population. It is also clear that huge movements of the civilian population such as occurred in East Timor in September 1999 are not possible without the organisational and logistical support of the state apparatus, particularly when one considers the speed at which East Timor was emptied of the majority of its population. It is generally accepted that the Indonesian military provided massive assistance by land, air and sea to those who wished to leave for West Timor. There is also much evidence that thousands who did not want to go to West Timor were forced out of their homes onto ships, aeroplanes and vehicles and taken to West Timor.

### (c) *War Crimes*

Mirroring article 8(2) of the *Rome Statute*, s 6.1 of *Regulation 2000/15* recognises that war crimes can consist of:

- (a) Grave breaches of the Geneva Conventions of 12 August 1949;
- (b) Other serious violations of the laws and customs applicable in international armed conflict;
- (c) Serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 in armed conflicts not of an international nature; and
- (d) Serious violations of the laws and customs applicable in armed conflicts not of an international nature.

Very importantly, s 6 has omitted the threshold of article 8(1) of the *Rome Statute*, namely the provision focusing on war crimes ‘committed as part of a

<sup>154</sup> *Ibid.*

<sup>155</sup> This raises the issue of the limited amnesties which UNTAET’s TRR Commission is said to be prepared to offer those who were ‘only’ involved in arson or property damage during the 1999 violence. Some of them may in fact have committed crimes against humanity, for which amnesties cannot be given.

plan or policy or as part of a large-scale commission of such crimes.’ This makes it clear that an individual act can amount to a war crime under *Regulation 2000/15*.

Classification of the situation in East Timor is key to identifying, firstly, whether international humanitarian law applied at all and, secondly, the rules, conventional or customary, that do in fact apply.<sup>156</sup> In its landmark *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, the ICTY Appeals Chamber found that the conflict in the former Yugoslavia was both international and non-international.<sup>157</sup> It is for the Trial Chambers to resolve the issue of conflict classification in each case through the application of law to the facts. In dealing with conflict classification, the Trial Chambers at the ICTY have focused first of all on the general issue of identifying the type of conflict that applied at the time the offences were committed.<sup>158</sup> Only then have specific questions about the status of the accused and the victim in the case at hand been addressed.

Like the conflict in the former Yugoslavia, what happened in East Timor can be seen in stages, to which different rules of international humanitarian law apply, with the basic protections of the laws and customs of war applicable at all stages where there is an armed conflict. This approach reveals a complex situation involving some of the most controversial areas of international law.

The conflict can be seen as beginning on 7 December 1975 with the invasion of East Timor, a non-self-governing territory administered by Portugal, by the armed forces of Indonesia in violation of the *UN Charter* and customary *jus ad bellum*.<sup>159</sup> Both Portugal and Indonesia had ratified the *Geneva Conventions*: Indonesia ratified on 30 September 1958 and Portugal ratified on 14 March 1961. Therefore, the *Geneva Conventions* applied to the invasion and occupation as treaty law, with the laws and customs of war applying alongside in the form of customary international law. The invasion, which met local resistance, eventually led to occupation as Indonesia consolidated its authority over East Timor. Some of the articles of the *Fourth Geneva Convention* ‘expired’ a year after the occupation, but core provisions continued to apply during the

<sup>156</sup> See Daniel Machover, ‘International Humanitarian Law and the Indonesian Occupation of East Timor’ in Catholic Institute for International Relations and the International Platform of Jurists for East Timor, *International Law and the Question of East Timor* (1995) 205 for an analysis of the Indonesian occupation in terms of violations of international humanitarian law.

<sup>157</sup> *Prosecutor v Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, Case No IT-94-1 (2 October 1995) [77].

<sup>158</sup> See William Fenrick, ‘The Application of the Geneva Conventions by the International Criminal Tribunal for the Former Yugoslavia’ (1999) 834 *International Review of the Red Cross* 317.

<sup>159</sup> The Indonesian argument is that it was asked to restore law and order in a civil war and that the Timorese exercised their right to self-determination by seeking to join the Republic of Indonesia. This has never been accepted by the UN or the vast majority of states, Australia being the notable exception. Another view is that Indonesia invaded the Democratic Republic of East Timor, the declaration of independence having been made by the Fretilin administration on 28 November 1975 on the eve of the invasion, with Indonesian troops having already infiltrated East Timor. Whilst several countries did recognise the Democratic Republic of East Timor, it is generally felt that the criteria for statehood were not met. See Roger Clark, ‘The “Decolonization” of East Timor and the United Nations Norms on Self-Determination and Aggression’ (1980) 7 *Yale Journal of World Public Order* 2, 38; James Crawford, ‘The Criteria for Statehood in International Law’ (1976–1977) 48 *British Yearbook of International Law* 93, 106; Keith Suter, ‘International Law and East Timor’ in James Cotton (ed), *East Timor and Australia* (1999) 181; Machover, above n 156.

entire period of Indonesia's occupation. Throughout the occupation of East Timor, the Indonesian forces met with local armed resistance engaged in a struggle for national liberation. The intensity of the encounters between the two forces varied over time, with the Indonesian forces being assisted by domestic militias and other paramilitary groups. This situation continued until the retreat of the last Indonesian forces at the end of October 1999 and formally terminated when Indonesia handed its authority and control over East Timor to the UN on 25 October 1999. Although the crucial month of September 1999 stands out for the extent of the atrocities committed, the same laws and customs governing the occupation continued to apply during that month. In relation to hostilities, it should also be noted that during this time there were few armed engagements between the Indonesian forces and the FALINTIL, which were under orders not to engage.

(i) *Grave Breaches of the Geneva Conventions as War Crimes*

The *Fourth Geneva Convention* expressly applies '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.'<sup>160</sup> Historical accounts maintain that the invading Indonesian forces only encountered domestic East Timorese resistance; the Portuguese had fled during the civil war to the nearby island of Atauro (part of East Timor).<sup>161</sup> This absence of belligerency does not affect the applicability of the *Fourth Geneva Convention*: article 2 is clear that the absence of engagement between the forces of the High Contracting Parties will not prevent its applicability to a state of occupation. Some may still question the correctness of viewing the situation as an international armed conflict between Indonesia and Portugal and whether East Timor was part of the territory of Portugal.<sup>162</sup> The *Fourth Geneva Convention* is intended to protect civilians and does not affect the legal status of territories. To enter into extensive debate on whether East Timor was part of the territory of Portugal would be to miss the point of humanitarian protection for civilians in armed conflict. The Trial Chamber in *Prosecutor v Delalic* called for a 'broad and principled approach to the application of the basic norms of international humanitarian law, norms which are enunciated in the four Geneva Conventions.'<sup>163</sup> The Trial Chamber stressed that all who take 'no active part in hostilities and yet find themselves engulfed in the horror and violence of war should not be denied the protection of the Fourth Geneva Convention'.<sup>164</sup> Thus, it is correct to proceed on the basis that the *Geneva Conventions* applied to the situation in East Timor.

<sup>160</sup> Above n 33, art 2.

<sup>161</sup> See Catholic Institute for International Relations and the International Platform of Jurists for East Timor, above n 9; Dunn, above n 9; Taylor, *Indonesia's Forgotten War*, above n 9; Taylor, *East Timor: The Price of Freedom*, above n 9.

<sup>162</sup> See above n 9. Professor Adam Roberts has characterised the Indonesian occupation of East Timor as the clearest example of occupation of territory whose status is disputed or uncertain, noting that the General Assembly has never used the term 'occupation' to define the situation: Adam Roberts, 'What Is a Military Occupation?' (1984) 55 *British Yearbook of International Law* 249, 280.

<sup>163</sup> IT-96-21-T (16 November 1998) [275] ('*Celebici*').

<sup>164</sup> *Ibid.*

Occupation is defined in *Hague Convention IV*, which sets out fundamental rules governing combat activities on land and the administration of occupied territory. By 1946, it had been recognised by the International Military Tribunal at Nuremberg as being declaratory of the laws and customs of war; as such, all states are bound to abide by its terms.<sup>165</sup> Article 42 provides that: ‘Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation only extends to the territory where such authority has been established and can be exercised.’

The essence of occupation is the de facto exercise of control over territory by an invading force. Thus, it is a question of fact as to whether East Timor was occupied in whole or in part, and this will eventually have to be determined by the judges of the Special Panels. International law recognises that, in occupied territory, the sovereignty of the occupied state is suspended and is superseded by that of the occupying power. This is a recognition of the status quo that in no way derogates from the fundamental rule that acquisition of territory by force is unlawful and cannot result in a transfer of sovereignty to the sovereign state.<sup>166</sup> International law is pragmatic in recognising that the occupying power, whilst not sovereign, owes certain duties to the territory and its citizens (and vice versa). This is necessary to prevent there being complete anarchy and to promote a return to some kind of normal life in the occupied territory.

Article 6 provides that the provisions of the *Fourth Geneva Convention* apply from the outset of occupation and cease one year after the general close of military operations. It is a question of fact as to exactly when the occupation began (as prior to the 7 December 1975 invasion, Indonesian forces had already infiltrated East Timor). However, for the duration of Indonesia’s occupation, including the crucial periods of September and October 1999, it continued to be bound to respect certain key provisions, which include most of the provisions relating to occupied territories.<sup>167</sup>

<sup>165</sup> [B]y 1939 these rules laid down in [*Hague Convention IV*] were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war’: *Trial of the Major War Criminals before the Military Tribunal, Nuremberg* (1948) vol 22, 497, reproduced in Adam Roberts and Richard Guelff (eds), *Documents on the Laws of War* (3<sup>rd</sup> ed, 2000) 178. *Hague Convention IV* was ratified by Portugal on 13 April 1911. Although Indonesia was not a party, it is bound to abide by the provisions of *Hague Convention IV* as they form part of customary international law binding on all states.

<sup>166</sup> See Roger Clark, ‘Timor Gap: The Legality of the “Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia”’ (1992) 4 *Pace Yearbook of International Law* 69, 76–92, pointing to UN practice as evidence of the existence of a general rule that territorial acquisitions by illegal use of force are not recognised in international law. 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, 25 UN GAOR (1883<sup>rd</sup> plen mtg), UN Doc A/Res/2625 (1970), annex (preamble), provides that: ‘The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognised as legal.’ Professor Clark also cites the Resolution on the Definition of Aggression, GA Res 3314, 34 UN GAOR (2319<sup>th</sup> plen mtg) UN Doc A/Res/3314 (1974), annex, art 5(3), which states that: ‘No territorial acquisition or special advantage resulting from aggression is or shall be recognised as lawful’. The existence of this general rule was also supported by Judge ad hoc Skubiszewski in his dissent to the judgment in the *Case Concerning East Timor (Portugal v Australia)* [1995] ICJ Rep 90, 262–3. Judge ad hoc Skubiszewski was of the view that the rule is firmly part of general international law, and could become *jus cogens*.

<sup>167</sup> The articles that continue to apply are arts 1–12, 27, 29–34, 47, 49, 51–3, 59, 61–77 and 143.

An important question to be resolved is that of the status of the East Timorese militia and other pro-integration forces which were so visibly engaged in the September 1999 violence. Were they just thugs or could they, as is stressed by so many observers and experts,<sup>168</sup> really be considered as part of the Indonesian forces? Article 4 of the *Third Geneva Convention*<sup>169</sup> lays down criteria for the persons who, if captured, are entitled to prisoner of war status; such persons are in fact 'combatants' and entitled to take part in combat activities. Within the list of identified groups are (1) members of militias or volunteer corps forming part of the armed forces of a party to a conflict and (2) other militias or volunteer corps belonging to a party to a conflict, provided they were commanded by a person responsible for his subordinates, had a fixed distinctive emblem recognisable at any distance, carried arms openly, and conducted their operations in accordance with the laws and customs of war. There should be control exercised by the party to the conflict, and 'by the same token, a relationship of dependence and allegiance of those irregulars vis-à-vis that [p]arty'.<sup>170</sup>

Thus, as a matter of law, it will be necessary to consider whether there is sufficient linkage between the militias and the Indonesian armed forces or Indonesian civil structures to allow a finding that an individual acted as a de facto organ of the state. There is conflicting international jurisprudence in this area, with different tests applicable.

One test is that employed by the International Court of Justice in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*,<sup>171</sup> seized with determining state responsibility for paramilitary activities. The *Nicaragua* test would require it to be proved that the militias were either the agents of, or under the 'effective control' of, Indonesia.

A second test is that employed by the majority of the ICTY Appeals Chamber in the *Tadic Appeal Judgment*,<sup>172</sup> seized with determining individual criminal responsibility for Grave Breaches of the *Geneva Conventions*. The majority of the Appeals Chamber rejected the *Nicaragua* test as being contrary to the very logic of state responsibility and at variance with state and judicial practice. The correct test was held to require the demonstration of 'overall control'; it would have to be shown that Indonesia had a role in organising, co-ordinating or planning the military actions of the militias.<sup>173</sup> There was also held to be another

<sup>168</sup> See *Report of the International Commission of Inquiry*, above n 23; *Report on the Investigation of Human Rights Violations in East Timor*, above n 23; reports of Amnesty International, Human Rights Watch, TAPOL and ETAN.

<sup>169</sup> Above n 109.

<sup>170</sup> *Tadic Appeal Judgment*, Case No IT-94-1-A (15 July 1999) [94]; 38 ILM 1518, 1537.

<sup>171</sup> (*Nicaragua v USA*) [1986] ICJ Rep 14, 64–5 ('*Nicaragua*').

<sup>172</sup> Case No IT-94-1-A (15 July 1999) [115]–[145]; 38 ILM 1518, 1540–6.

<sup>173</sup> *Ibid* [137] (emphasis in the original); 38 ILM 1518, 1545:

[C]ontrol by a State over subordinate *armed forces or militias or paramilitary units* may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation ... The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members



test, that of ‘the assimilation of individuals to state organs on account of their actual behaviour within the structure of a state (and regardless of any possible requirement of state instructions).’<sup>174</sup>

The Special Panels will therefore need to determine which is the correct test to apply when examining the status of the East Timorese militias in a case alleging war crimes. However, experts applying the ordinary person’s ‘common sense’ standard have been able to conclude that the militias were clearly operating together with, and as part of, the Indonesian armed forces. This strongly suggests that they can be considered as members of the armed forces of Indonesia, that is, combatants under the *Third Geneva Convention*. For example, the International Commission of Inquiry found that:

There is evidence that the policy of engaging militias was implemented by the Kopassus (Special Forces Command of TNI) and other intelligence agencies of the Indonesian army. The policy manifested itself in the form of active recruitment, funding, arming and guidance and of the provision of logistics to support the militias in intimidation and terror attacks.

There is evidence to show that, in certain cases, Indonesian army personnel, in addition to directing the militias, were directly involved in intimidation and terror attacks.<sup>175</sup>

This was also the conclusion reached by Indonesia’s KPP-HAM, which reported that:

Members of the TNI, POLRI and the militias were the key figures responsible for this campaign which involved the creation of conditions, choice of acts committed, scheduling and planning of the forced deportation. ... The facts and evidence also shows [*sic*] that the civil authorities and military, including the police force, worked in cooperation with the militias to created [*sic*] conditions that supported crimes against humanity, and which were carried out by the civil authorities, military police and the militias ...<sup>176</sup>

The *Fourth Geneva Convention* affords its greatest coverage to ‘protected persons’ defined in article 4 as being ‘those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals’. Certain serious violations of the provisions protecting them amount to Grave Breaches. During the occupation, East Timorese, who had Portuguese nationality, were made to become Indonesian nationals despite the prohibition against forced allegiance in the *Fourth Geneva Convention*, which reflects that of article 45 of *Hague Convention IV*. It is here relevant to note the finding of the *Celebici* Trial Chamber that it could refuse to recognise or give effect to a state’s granting of nationality to individuals for the purposes of applying international law.<sup>177</sup> The question of nationality and protected person status in relation to

thereof may be regarded as acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.

<sup>174</sup> *Ibid* [141]; 1545 (emphasis omitted).

<sup>175</sup> *Report of the International Commission of Inquiry*, above n 23, [137]–[138].

<sup>176</sup> KPP-HAM, above n 23, [31], [63].

<sup>177</sup> IT-96-21-T (16 November 1998) [259].

article 4 was examined in *Celebici*, where the Trial Chamber adopted the broad and principled approach examined earlier in this paper.<sup>178</sup> This approach was approved in the *Tadic Appeal Judgment* which found that article 4, when viewed in light of its object and purpose, is directed to the protection of civilians to the maximum extent possible.<sup>179</sup> Its applicability does not depend on formal bonds and purely legal relations. The *Tadic Appeal Judgment* found that, in determining whether a person is protected, nationality alone is not determinative; what is most important is allegiance to a state and diplomatic protection and, in certain situations, ethnicity may become determinative of national allegiance.<sup>180</sup> If this pragmatic and nuanced line of reasoning is followed by the Special Panels at the District Court of Dili, the issue of the forced change of nationality of the East Timorese should not affect the applicability of article 4 in the majority of cases.

It is therefore possible to conclude that the *Geneva Conventions* applied during Indonesia's occupation of East Timor. Grave Breaches of the *Geneva Conventions* are prosecutable at the District Court of Dili under s 6 of *Regulation 2000/15* where the following acts were committed against protected persons or property:

- (i) Wilful killing;
- (ii) Torture or inhuman treatment, including biological experiments;
- (iii) Wilfully causing great suffering or serious injury to body or health;
- (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile power;
- (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- (vii) Unlawful deportation or transfer or unlawful confinement;
- (viii) Taking of hostages.

(ii) *Serious Violations of the Laws and Customs Applicable in International Armed Conflict as War Crimes*

Section 6.1(b) of *Regulation 2000/15* follows the *Rome Statute* in providing a long list of offences relating to the means and methods of warfare, much of which is derived from *Hague Convention IV*.<sup>181</sup> As already noted, the rules of *Hague Convention IV* applied during periods of armed conflict during the invasion and occupation of East Timor, being declaratory of customary international law. These are to be distinguished from the Grave Breaches regime of the *Geneva Convention*, which can only be prosecuted under s 6.1(a).

<sup>178</sup> See above n 163 and accompanying text.

<sup>179</sup> Case No IT-94-1-A (15 July 1999) [168]; 38 ILM 1518, 1550.

<sup>180</sup> Ibid [166]; 1550.

<sup>181</sup> Above n 110.

To establish the applicability of the laws and customs of war, it is first necessary to consider whether there was a state of armed conflict preceding the occupation, and during periods of the occupation when resistance forces engaged with the Indonesian army. The ICTY Appeals Chamber in its *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* found that ‘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’.<sup>182</sup> Clearly, the existence of an armed conflict will be determined by the evidence presented to the Special Panels. Particular issues arise in relation to the roles of Portugal and the East Timorese resistance. Was Portugal a belligerent party to the conflict? As already noted, it was the administering power of East Timor, but the Portuguese colonial administration and its forces had fled from Dili to the nearby island of Atauro during the civil war and had not resisted the Indonesian troops. Arms were taken up by the East Timorese, who were Portuguese nationals (eventually made Indonesian nationals during the occupation). Their taking up of arms can be seen as self-defence in response to the invasion; at some stage this appears to have developed into a national liberation struggle — a fight against colonial domination and alien occupation — by an identifiable guerrilla movement, the FALINTIL. While the right of self-determination is recognised as one of the most fundamental rules of international law,<sup>183</sup> the questions of whether national liberation forces are entitled to use force to exercise their right of self-determination and whether international humanitarian law applies to this use of force have been controversial. Despite the adoption of several UN General Assembly resolutions in the area, the position in customary international law is still unclear.<sup>184</sup>

<sup>182</sup> Case No IT-94-1 (2 October 1995) [72].

<sup>183</sup> See *UN Charter* art 1(2), chs XI and XII; *ICCPR* art 1(1); Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514, 15 UN GAOR (947<sup>th</sup> plen mtg), UN Doc A/Res/1514 (1960); *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12, 32; *Barcelona Traction, Light and Power Co, Ltd (New Application: 1962) (Belgium v Spain) (Second Phase)* [1975] ICJ Rep 3, 304 (separate opinion of Judge Ammoun); *Case Concerning East Timor (Portugal v Australia)* [1995] ICJ Rep 90, 102 (although probably obiter dicta considering that the Court declined jurisdiction, the majority found that ‘[t]he right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character ... The principle of self-determination of peoples ... is one of the essential principles of contemporary international law.’)

<sup>184</sup> There has been fierce debate as to whether resolutions such as the following mean that national liberation movements have a right to use force in international law. See, eg, Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 2105, 20 UN GAOR (1405<sup>th</sup> plen mtg), UN Doc A/Res/2105 (1965): The General Assembly ‘recognizes the legitimacy of the struggle by the peoples under colonial rule to exercise their right to self-determination and independence and invites all States to provide material and moral assistance to the national liberation movements in colonial Territories’ (emphasis in original); SC Res 232, 21 UN SCOR (1340<sup>th</sup> mtg), UN Doc S/Res/232 (1966), recognising the legitimacy of the struggle of the people of Southern Rhodesia to freedom and independence; *Declaration on Principles of International Law*, GA Res 2625, 25 UN GAOR (1883<sup>rd</sup> plen mtg), UN Doc A/Res/2625 (1970): ‘In their actions against, and resistance to, such forcible action in pursuit of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter’; Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights, GA Res 3070, 28 UN GAOR (2185<sup>th</sup> plen mtg), UN Doc A/Res/3070 (1973): ‘The struggles of

The question of the pro-integration militias has already been examined. Under international humanitarian law, the East Timorese resistance, the FALINTIL, could have attained belligerent status if they were commanded by a person responsible for their subordinates; had a fixed distinctive emblem recognisable at any distance; carried arms openly; and conducted their operations in accordance with the laws and customs of war.<sup>185</sup> Nevertheless, in an international armed conflict to which the *Protocol Additional to the Four Geneva Conventions of 1949 and Relating to the Protection of Victims of International Armed Conflict*<sup>186</sup> does not apply, these forces still need to 'belong' to a state that is party to the conflict. This is also the case when one considers the provisions of article 4(A)(2) of the *Third Geneva Convention* which categorises as combatants those 'members of other militias and members of other volunteer corps, including those of resistance movements belonging to a Party to the Conflict and operating in or outside their own territory, even if this territory is occupied'. As noted earlier, there are different tests currently being applied to establish whether there are sufficient links between a state and irregular forces: that of the International Court of Justice in *Nicaragua* and those employed by the majority of the ICTY Appeals Chamber in the *Tadic Appeal Judgment*. Whatever the correct test, it does not appear from the information in the public realm that the relationship between Portugal and the East Timorese resistance can satisfy either. Thus, it is most likely that the East Timorese resistance fighters were, in terms of international humanitarian law, civilians who took up arms against the occupying force, to whom there is only limited application of the laws and customs of war. They would have been subject to municipal law and the minimum protection offered by the 'principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity and the dictates of public conscience.'<sup>187</sup>

Article 1(4) of *Additional Protocol I* includes 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and racist regimes in the exercise of their right of self-determination' as conflicts within the scope of its applicability and contains provisions attempting to regulate armed conflicts involving national liberation struggles. However, it has not been ratified by Indonesia (Portugal ratified on 27 May 1992) and is not included in the ambit of s 6 of *Regulation 2000/15*. The question then arises as to whether the provisions of *Additional Protocol I* can be said to part of the customary law of war. The adoption of article 1(4), which extends the situations to which *Additional*

peoples under colonial and alien domination and racist regimes for the implementation of their right to self-determination and independence is legitimate and in full accordance with the principles of international law'. See generally Heather Wilson, *International Law and the Use of Force by National Liberation Movements* (1988); Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1995).

<sup>185</sup> *Hague Convention IV*, above n 110, art 1, reiterated in the *Third Geneva Convention*, above n 109, art 4A(2), determining who is entitled to have prisoner of war status, with the proviso that irregulars must belong to a party to the conflict.

<sup>186</sup> Opened for signature 12 December 1977, 1125 UNTS 3, 16 ILM 1391 (entered into force 7 December 1978) ('*Additional Protocol I*').

<sup>187</sup> *Hague Convention IV*, above n 110, preamble ('Martens Clause'), regarded as part of customary international law: see *Legality of the Threat or Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* [1996] ICJ Rep 66, 258–9.

*Protocol I* applies, was a particularly controversial issue during the negotiations.<sup>188</sup> The United States has resisted ratifying *Additional Protocol I*; among its concerns are that article 1(4) would legitimise the claims of terrorists to prisoner of war privileges and promote various liberation movements to state or quasi-state status.<sup>189</sup> The United Kingdom and Spain registered interpretive statements on article 1(4).<sup>190</sup> Whilst it has been said that the number and standing of the ratifying states enhances the Protocol's character as an instrument largely declaratory of customary law,<sup>191</sup> thus binding all states, it is not at all clear if this can be said to include those provisions relating to 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and racist regimes in the exercise of their right of self-determination'.

(iii) *Serious Violations of Article 3 Common to the Four Geneva Conventions and the Laws and Customs Applicable in Armed Conflicts Not of an International Nature*

These provisions mirror those of the *Rome Statute*.<sup>192</sup> The only way that the conflict in East Timor would be regarded as non-international in nature would be to view the Indonesian invasion and its annexation as valid. It is therefore unlikely that this provision will be utilised in prosecutions of Serious Crimes at the District Court of Dili.

(d) *Torture*

*Regulation 2000/15* employs two definitions of the crime of torture and potentially provides four separate ways to prosecute this crime (as a means of perpetrating genocide, a crime against humanity, a war crime and torture). Neither definition reflects that of the 1984 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,<sup>193</sup> acknowledged by Trial Chambers at the ICTR and ICTY (*Akayesu*,<sup>194</sup> *Celebici*,<sup>195</sup> *Prosecu-*

<sup>188</sup> See Geoffrey Best, *War and Law since 1945* (1994) 345 (emphasis in original), pointing out that the lengthy negotiation process (1974–77) was due to the elucidation of the political fact that the price of the conference's achieving anything at all was going to be the identification of 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes' as *international* armed conflicts, thus giving their combatants the completest POW protection.

<sup>189</sup> Theodor Meron, *War Crimes Law Comes of Age* (1998) 175.

<sup>190</sup> Roberts and Guelff, above n 165, 509–10.

<sup>191</sup> Meron, above n 189, 179.

<sup>192</sup> Arts 8(2)(c)–(e).

<sup>193</sup> Opened for signature 10 December 1984, 1465 UNTS 85, 23 ILM 1027 with changes at 24 ILM 535 (entered into force 26 June 1987) ('*Torture Convention*'). Art 1(1) provides that the term '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.

<sup>194</sup> Case No ICTR-96-4-T (2 September 1998) [593].

<sup>195</sup> IT-96-21-T (16 November 1998) [459].

*tor v Furundzija*<sup>196</sup>) as reflecting the elements of torture in customary international law.

(i) *Torture as a Crime against Humanity*

Section 5.2(d) of *Regulation 2000/15* provides that:

‘Torture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.

This definition of torture as a crime against humanity, identical to that of article 7(2)(e) of the *Rome Statute*, does not require that there be a specific motive, or that the offence be committed ‘by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’. At the Rome Conference, it was considered necessary to extend the definition of torture beyond that contained in the *Torture Convention* which many regarded as being too restrictive because it excludes acts committed by non-state actors.<sup>197</sup> With the deletion of the purposive element and that of official capacity, this definition caters for torture that is committed by non-state actors, including those acting in a private capacity, and is virtually indistinguishable from inhumane treatment and even ordinary but particularly serious assault.

(ii) *Torture as Torture, a War Crime or as a Means of Perpetrating Genocide*

Section 7.1 of *Regulation 2000/15* 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/her or a third person information or a confession, punishing him/her for an act he/she or a third person has committed or is suspected of having committed, or humiliating, intimidating or coercing him/her or a third person, or for any reason based on discrimination of any kind. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Here too, it would seem that those acting in a private capacity may commit the offence of torture and there is no requirement that at least someone involved in the torture process be a public official or acting in a non-private capacity. There also would appear to be no need for a link with the armed conflict, which should be a vital element of torture as a war crime. This is not consistent with the findings of *Furundzija* which considered that the elements of torture in an armed conflict, which in the context of *Regulation 2000/15* means war crimes, require the following:

<sup>196</sup> IT-95-17/1-T10 (10 December 1998) [160]; 138 ILM 317, 350–1 (*‘Furundzija’*).

<sup>197</sup> Timothy McCormack and Sue Robertson, ‘Jurisdictional Aspects of the *Rome Statute* for the New International Criminal Court’ (1999) 23 *Melbourne University Law Review* 635, 655–6. For jurisprudence supporting this move toward softening the *Torture Convention’s* definition, see *Celebici*, IT-96-21-T (16 November 1998) [473]: ‘In the context of international humanitarian law, this requirement must be interpreted to include officials of non-State parties to a conflict, in order for the prohibition to retain significance in situations of internal armed conflicts or international conflicts involving some non-State entities’.

- (i) ... the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition
- (ii) this act or omission must be intentional;
- (iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person ... ;
- (iv) it must be linked to an armed conflict;
- (v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, eg as a de facto organ of a State or any other authority-wielding entity.<sup>198</sup>

(iii) *The Consequences of the Multiple Definitions of Torture*

*Regulation 2000/15* widens the customary international law definition of torture and can be seen as creating four new offences. If so, little of the existing international jurisprudence may be of guidance in the proceedings before the District Court of Dili as they all concern an offence containing different legal elements. One result of the dual definition is that the prosecutor is allowed to choose the torture offence when charging. Obviously, from a victim-oriented human rights perspective, a wider definition is more progressive. For an accused, the situation is confusing. However, the concern here goes beyond good drafting and legal consistency. The prohibition against torture has been identified as a peremptory norm,<sup>199</sup> that is, one leading to obligations *erga omnes*.<sup>200</sup> In the context of the adoption of a new definition of torture at Rome, it should be noted that peremptory norms are said to be rules of customary international law which cannot be set aside by treaties or acquiescence but only by formation of a subsequent customary rule of contrary effect.<sup>201</sup> Furthermore, multiple legal definitions for what is supposed to be torture can confuse the situation and result in a lack of clarity. In East Timor there are two definitions of torture as a Serious Crime, and four ways of charging it. Further confusion is added by the *Indonesian Criminal Code*, which applies to crimes other than Serious Crimes. It criminalises maltreatment and acts of an official who in a criminal case makes use of means of coercion either to force or induce a confession or statement.<sup>202</sup>

<sup>198</sup> IT-95-17/1-T10 (10 December 1998) [162]; 38 ILM 317, 351.

<sup>199</sup> Ibid [151]–[157]; Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law — Historical Development, Criteria, Present Status* (1988); Nigel Rodley, *The Treatment of Prisoners in International Law* (2<sup>nd</sup> ed, 1999) 74.

<sup>200</sup> See especially *Furundzija*, IT-95-17/1-T10 (10 December 1998) [151]; 38 ILM 317, 348; see also art 53 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, 8 ILM 679 (entered into force 27 January 1980) (emphasis added):

[A] peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified *only by a subsequent norm of general international law having the same character* ...

As to obligations *erga omnes*, see *Barcelona Traction, Light and Power Co, Ltd (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3, 32.

<sup>201</sup> Ian Brownlie, *Principles of Public International Law* (4<sup>th</sup> ed, 1990) 513.

<sup>202</sup> *Indonesian Criminal Code*, ch 20 and art 422.

One must ask if the prohibition against torture can really be a peremptory norm when the nature of the underlying offence differs in so many ways.

(e) *Murder and Sexual Offences as Violations of the Indonesian Criminal Code*

The prosecution of murder and sexual offences as violations of the *Indonesian Criminal Code* can only take place in relation to acts perpetrated between 1 January 1999 and 25 October 1999. Prosecutions outside this period can still take place if the crimes are categorised as other Serious Crimes (for example, rape and murder as war crimes), or are prosecuted as Ordinary Crimes (subject to any applicable statutes of limitation).

The resort to the *Indonesian Criminal Code* offers the resource-strapped Serious Crimes Unit an easy way out. Indeed, it appears to be the General Prosecutor of East Timor's preferred means of charging as, of 12 indictments filed by the end of 2000, 11 were for violations of the *Indonesian Criminal Code*. Among the indictments filed is one relating to the Maliana Police Station Massacre on 8 September 1999. This incident is being investigated as a priority crimes against humanity case, but one of the militia held in UNTAET detention has been charged with murder as a violation of the *Indonesian Criminal Code* for his involvement in the killings. The consistency of prosecutorial practice will therefore probably be challenged if another indictment is filed in respect of the same massacre alleging it was a crime against humanity. This practice of charging under domestic law when international provisions are expressly made available is understandable in the circumstances, where the alternative may be to release those against whom there is evidence of involvement in atrocities simply because there are insufficient resources to investigate the true nature of the crime in context. But it has the effect of diminishing the gravity of what occurred in East Timor. It reduces the atrocities, which prompted responses from the Security Council under Chapter VII of the *UN Charter*, to everyday offences. There is also the risk that revisionists may well point to this historical record to deny that international crimes were committed in East Timor.

UNTAET's decision to use the *Indonesian Criminal Code* provisions on sexual offences (contained in a section entitled 'Crimes against Decency', which, inter alia, criminalises adultery<sup>203</sup> and defines rape as being 'forc[ing] a woman to have sexual intercourse ... out of marriage'<sup>204</sup>) is a surprising one. One may well ask if these provisions are consistent with international standards pursuant to s 2 of *Regulation 1999/1*, which include the *Convention on the Elimination of All Forms of Discrimination against Women*<sup>205</sup> and the *ICCPR*. International law, reflecting the trend in domestic courts, has become considerably more progressive in this area in recent years. International jurisprudence reveals that the

<sup>203</sup> 'By a maximum imprisonment of nine months, shall be punished: 1.a any married man who knowing that art 27 of the Civil Code is applicable to him, commits adultery': *Indonesian Criminal Code* art 284(1).

<sup>204</sup> 'Any person who by using force or threat of force forces a woman to have sexual intercourse with him out of marriage, shall, being guilty of rape, be punished by a maximum imprisonment of twelve years': *Indonesian Criminal Code* art 285.

<sup>205</sup> Opened for signature 18 December 1979, 1249 UNTS 13, 19 ILM 33 (entered into force 3 September 1981).



Indonesian provisions are not in line with international standards. Trial Chambers at the ICTY and ICTR have examined the question of sexual assault in international law. The judgments in *Akayesu*, *Celebici* and *Furundzija* concur on the close linkages between torture and rape, and that rape can amount to torture when 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.<sup>206</sup> The Trial Chambers in both *Akayesu* and *Celebici* agreed that rape in international law can be defined as a ‘physical invasion of a sexual nature, committed on a person under circumstances which are coercive.’<sup>207</sup> The Trial Chamber in *Furundzija* found that ‘most legal systems in the common and civil law worlds consider rape to be the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus’.<sup>208</sup> It found that the ‘forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity.’<sup>209</sup> The Trial Chamber in *Furundzija* found the objective elements of rape to require

- (i) the sexual penetration, however slight:
  - (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
  - (b) of the mouth of the victim by the penis of the perpetrator;
- (ii) by coercion or force or threat of force against the victim or a third person.<sup>210</sup>

#### 4 Selected Issues Arising from Regulation 2000/15

##### (a) *The Prohibition against Trying or Punishing a Person Again for an Offence for Which That Person Has Already Been Finally Convicted or Acquitted (Ne Bis in Idem)*

The issue of *ne bis in idem* is a highly relevant one given the efforts of the Indonesian Attorney-General to bring charges against those responsible for the 1999 atrocities in East Timor, the passing of Indonesian legislation envisaging the establishment of special Human Rights Courts on 6 November 2000 and continuing calls for the creation of an international tribunal for East Timor. Section 11.3 of *Regulation 2000/15* provides as follows:

No person who has been tried by another court for conduct also proscribed under Sections 4 to 9 of the present regulation shall be tried by a panel with respect to the same conduct unless the proceedings in the other court:

- (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the panel; or

<sup>206</sup> *Akayesu*, Case No ICTR-96-4-T (2 September 1998) [597]; *Celebici*, IT-96-21-T (16 November 1998) [489]; *Furundzija*, IT-95-17/1-T10 (10 December 1998) [163]; 38 ILM 317, 351–2.

<sup>207</sup> *Akayesu*, Case No ICTR-96-4-T (2 September 1998) [597]–[598]; see also *Celebici*, IT-96-21-T (16 November 1998) [479].

<sup>208</sup> IT-95-17/1-T10 (10 December 1998) [181]; 38 ILM 317, 355.

<sup>209</sup> *Ibid* [183]; 355.

<sup>210</sup> *Ibid* [185]; 355–6.

- (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Section 11.3 is taken from article 20(3) of the *Rome Statute*. It employs the word ‘tried’ as opposed to ‘convicted or acquitted’, which is used elsewhere in s 11 in relation to other prosecutions within East Timor. This is unfortunate, because the mere fact of going to trial in Indonesia, regardless of whether a verdict is ever reached, is sufficient to trigger the *ne bis in idem* provision in *Regulation 2000/15*. The trial of any of the suspects named by the Attorney-General on 1 September 2000 may be terminated midway for perfectly legitimate reasons. However, by virtue of s 11.3, the mere fact of termination of proceedings without reaching a verdict would prevent the East Timorese courts from exercising jurisdiction.

It is also unfortunate that no definition of the word ‘court’ is used, despite the fact that Indonesian legislation for prosecution of East Timor atrocities through specially created Human Rights Courts had long been pending. *Regulation 2000/15* also fails to consider what the position of military courts would be and the issue of how the Indonesian and East Timorese jurisdictions relate to each other in respect of parallel investigations and prosecutions. What of the relationship with a proposed Indonesian truth and reconciliation commission with powers to grant amnesties?<sup>211</sup> And what of the relationship with an international tribunal should it ever be established? Little guidance can be derived from *Regulation 2000/15* or from s 10.4 of *Regulation 2000/11*, which vaguely note that the establishment of panels with exclusive jurisdiction over serious criminal offences shall not preclude the jurisdiction of an international tribunal for East Timor over those offences, ‘once such a tribunal is established’. The *Memorandum of Understanding between the Republic of Indonesia and the UNTAET Regarding the Cooperation in Legal, Judicial and Human Rights Related Matters*<sup>212</sup> of 6 April 2000 is also distinctly unhelpful in this regard, leaving everything up to the goodwill of the parties.

- (b) *Does UNTAET Regulation 2000/15 Limit the Prosecution of Serious Crimes to the Listed Crimes?*

As already noted, *Regulation 2000/15* grants exclusive jurisdiction to the Special Panels of the District Court of Dili over crimes of murder and sexual offences as violations of the *Indonesian Criminal Code* committed between 1 January 1999 and 25 October 1999. However, there is nothing in *Regulation 2000/15* to prevent the prosecution and trial for other violations of the *Indonesian Criminal Code* committed during this period. Section 10.1 of *Regulation 2000/11* provides that the District Court of Dili should have exclusive jurisdiction over certain crimes; it does not provide that the District Court of Dili does not also have jurisdiction over crimes other than those listed. Sections 1 and

<sup>211</sup> Indonesia’s *Law on Human Rights Courts (Law No 26 of 2000)* cl 47 has provided for the establishment of a Truth and Reconciliation Commission.

<sup>212</sup> Above n 48.

2 of *Regulation 2000/15* reiterate that the jurisdiction of the District Court of Dili is exclusive and universal in relation to genocide, war crimes, crimes against humanity and torture without any time limit, and that it has exclusive jurisdiction over murder and sexual offences committed between 1 January 1999 and 25 October 1999. Nowhere does this preclude the prosecution and trial of other offences committed during this period.

This issue is critical in situations in which there is insufficient evidence to demonstrate that an act amounted to one of the listed categories of Serious Crime. If the prosecution is not able to establish sufficient evidence for Serious Crimes but there is clear evidence of a crime, it becomes necessary to consider charging crimes such as arson as offences under the *Indonesian Criminal Code*.<sup>213</sup> Otherwise, there may be impunity for the crimes which resulted in widespread and devastating burning, one of the most striking atrocities committed in East Timor.<sup>214</sup> There is therefore likely to be a conflict between the prosecution's obligation to prosecute and the plans for the TRR Commission to broker amnesties for crimes considered minor, such as arson.

(c) *Pre-1999 Atrocities*

Section 2.4 of *Regulation 2000/11* has extremely far-reaching implications:

The panels shall have jurisdiction in respect of crimes committed in East Timor prior to 25 October 1999 only insofar as the law on which the serious criminal offence is based is consistent with section 3.1 of UNTAET Regulation No 1999/1 or any other UNTAET Regulation.

This should be read in conjunction with s 5.2 of *Regulation 2000/11* which is not limited to Serious Crimes:

Courts shall have jurisdiction in respect of crimes committed in East Timor prior to 25 October 1999 only insofar as the law on which the offence is based is consistent with s 3.1 of UNTAET Regulation 1999/1 or any other UNTAET regulation.

As noted in Part III(B)(2), s 3.1 provides that the laws of East Timor must be compatible with international standards. *Regulation 2000/15* satisfies such conditions.

The absence of a temporal limitation<sup>215</sup> means that the Serious Crimes venture is not restricted to the events of 1999, and there is jurisdiction to investigate and prosecute for atrocities committed during the entire period of the Indonesian occupation of East Timor and even further beyond. Whilst a tremendous opportunity has arisen to address the 24 years of brutality visited upon the East Timorese by the Indonesian occupying forces, the scale of the task renders it

<sup>213</sup> See above Part III(E)(3)(e) concerning using the *Indonesian Criminal Code* as the preferred means of charging for Serious Crimes.

<sup>214</sup> See above Part III(E)(3)(b) concerning arson and property damage as crimes against humanity.

<sup>215</sup> This relates to genocide, torture, crimes against humanity and war crimes, over which the Serious Crimes Unit and the Special Panels of the District Court of Dili have exclusive jurisdiction. The prosecution of domestic crimes of murder and sexual offence, in violation of the *Indonesian Criminal Code* and *Regulation 2000/15*, above n 8, are strictly limited to incidents between 1 January 1999 and 31 October 1999.

simply unworkable in UNTAET's present circumstances. It is worth noting that although the matter technically falls under the jurisdiction of the Serious Crimes Unit, CIVPOL have independently commenced investigations into the 1974 killing of six Australian-based journalists in Balibo, on the border between East and West Timor, as the Indonesian Army infiltrated the town as part of its Operasi Komodo. Investigations have also been opened by CIVPOL into the notorious Santa Cruz cemetery massacre in 1991. It remains to be seen whether these investigations will open the floodgates.

The decision on what to do with atrocities of the Indonesian era may be thought best left to an independent East Timor, but UNTAET has already passed legislation enabling the prosecution of historical atrocities as Serious Crimes. One of the purposes of the TRR Commission is to establish an historical record about human rights abuses committed during the Indonesian occupation. It appears that there will be no amnesties issued in relation to atrocities committed during the Indonesian era. This relationship between the TRR Commission and the Serious Crimes venture needs to be more fully thought through. It should be stressed that UNTAET's officials are obliged to act in accordance with international standards; this means that they are under an enduring obligation to investigate and prosecute, or extradite, those suspected of committing crimes against international law, regardless of amnesties and the passage of time.

#### F *UNTAET Regulation No 2000/16 on the Organisation of the Public Prosecution Service in East Timor*

This regulation establishes and regulates the Public Prosecution Service. In terms of institutional structure, the service is placed within the civil administration, with the General Prosecutor clearly in charge. Care must be taken when making comparisons with the prosecutors of the international tribunals, as the General Prosecutor of East Timor is a state official, responsible for the administration of a national prosecution service. By necessity, the General Prosecutor will have much closer links to the entity represented.

*Regulation 2000/16*<sup>216</sup> develops the distinction between Serious Crimes and Ordinary Crimes (defined as 'all offences of the laws of East Timor with the exception of Serious Crimes'). Serious Crimes are the responsibility of the Deputy General Prosecutor for Serious Crimes, and Ordinary Crimes fall under the ambit of the Deputy General Prosecutor for Ordinary Crimes. The functions of these two officials and their respective offices, along with the public prosecutors, are dealt with in some detail in this regulation, along with those of the office of the General Prosecutor.

The institutional independence of the prosecution service is implied by the fact that it is not by law tied to a particular UNTAET department. This said, UNTAET's Ministry of Justice (formerly the Judicial Affairs Department), which used to be responsible for the prosecution service when it was composed purely of East Timorese prosecutors, continues to play a particularly active and influen-

<sup>216</sup> UNTAET/REG/2000/16 (entered into force 6 June 2000), *Official Gazette of East Timor*, UNTAET/GAZ/2000/Add.3 ('*Regulation 2000/16*').

tial role vis-à-vis the new Public Prosecution Service. In this context, it should be noted that, when exercising their prosecutorial authority, the individual prosecutors are required to act without bias and prejudice, in accordance with their impartial assessment of the facts and their understanding of the applicable law in East Timor and ‘without improper influence, direct and indirect, from any source, whether within or outside the civil administration of East Timor’.<sup>217</sup>

The independence of the General Prosecutor is not expressly provided for. The General Prosecutor has direct reporting lines to the Transitional Administrator in a number of matters, such as those relating to the general administration of the service, including budgetary and staffing functions. No other reporting lines are permitted by law, but one has developed with the Ministry of Justice because of its role in the administration of justice. A provision enabling the Transitional Administrator to issue guidance to the General Prosecutor in ‘matters of legal policy and coherence’<sup>218</sup> has the potential to be abused. Fortunately, this provision is expressly stated as in no way affecting or derogating from the General Prosecutor’s independent authority in respect of the preparation, institution and conduct of investigations or proceedings. Thus, the independence of the General Prosecutor is only implied, in strong contrast to that of the prosecutors of the ICTY and ICTR, whose independence is strongly asserted in the respective statutes.<sup>219</sup>

### G UNTAET Regulation No 2000/30 on Transitional Rules of Criminal Procedure

#### 1 Overview

The long awaited transitional *Criminal Procedure Code* in *Regulation 2000/30*<sup>220</sup> was finally passed on 25 September 2000. East Timor’s criminal procedure, which contains elements of both civil and common law systems, and is a mishmash of different legal systems, represents the background of those involved in its drafting. When originally presented to the East Timorese for ‘consultation’ shortly before the National Council was to meet to debate it, the document was met with anger and deep resentment by the East Timorese jurists. Still outraged at their exclusion from the drafting process of *Regulation 2000/15*, they saw the same thing being repeated in relation to the *Criminal Procedure Code*. Through taking a strong and well-vocalised position, they were able to force genuine and extended consultation that led to the creation of a virtually new document.

Much effort has been made to ensure that *Regulation 2000/30* complies with international standards. The Regulation applies to both Serious and Ordinary

<sup>217</sup> Ibid s 4.1.

<sup>218</sup> Ibid s 12.4.

<sup>219</sup> See the identical provisions of art 15(2) of the *Statute of the International Tribunal for Rwanda*, above n 107, and art 16(2) of the *Statute of the International Tribunal for the Former Yugoslavia*, above n 114: ‘The Prosecutor shall act independently as a separate organ of the International Tribunal [and] shall not seek or receive instructions from any Government or from any other source.’

<sup>220</sup> *Regulation 2000/30*, above n 81.

Crimes and provides detailed regulation of the procedure to be followed at all stages of criminal proceedings, including investigation, arrest, detention,<sup>221</sup> review hearings, preliminary hearings, interlocutory appeals, trials and appeals from judgments of first instance. It provides for statutory protection of accused persons, suspects, victims and minors, and sets out the parameters of the powers of the investigating authorities and the Court. This part will only examine some provisions of particular interest.

## 2 *Provisions of Particular Interest*

The basic evidentiary rule is that evidence that is relevant and of probative value is admissible.<sup>222</sup> In line with article 68 of the *Rome Statute*, the statutes of the ICTY and ICTR and their respective rules of procedure and evidence, there are special evidentiary provisions in sexual assault cases.<sup>223</sup> Drawing upon the enhanced role of victims and witnesses set out in the *Rome Statute*, s 12 of *Regulation 2000/30* deals with the rights of victims. Some effort has been made to tailor this to the situation in East Timor and to allow a role for victims not couched in terms of absolute right, but tempered by the discretion of the Court or prosecution. For example, whilst a victim has a right to request the prosecutor to conduct specific investigations or to take specific measures to prove the guilt of the suspect, the prosecutor is not obliged to comply.<sup>224</sup> It is provided that defects in the notification process shall not deprive the Court of jurisdiction to proceed, no doubt in recognition that, in present circumstances, compliance with s 12 is not feasible.<sup>225</sup>

Admissions of guilt are a prominent feature of the East Timor cases, in both Serious and Ordinary Crimes. Adequate handling of this issue will enable these cases to be moved through the system very quickly. The procedure for dealing with an admission of guilt, mirroring that of article 65 of the *Rome Statute*, is set out in s 29A.1, which requires the Court to establish whether:

- (a) The accused understands the nature and consequences of the admission of guilt;
- (b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and
- (c) The admission of guilt is supported by the facts of the case that are contained in:

<sup>221</sup> Sections 20.11 and 20.12 preserve *Regulation 2000/14*'s reliance on the 'prevailing conditions in East Timor'. See discussion above nn 79–81, indicating that this may not be in accordance with international standards, violating the right to liberty and expeditious trial.

<sup>222</sup> *Regulation 2000/30*, above n 81, s 34.1.

<sup>223</sup> *Ibid* s 34.3 provides that no corroboration of the victim's testimony is required. Consent is not allowed as a defence where the victim 'has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression' or where the victim 'reasonably believed that if the victim did not submit, another person might be so subjected, threatened or put in fear'. Prior to the admission of evidence of consent, the accused has to satisfy the court, *in camera*, that the evidence is relevant and credible. Finally, the prior sexual conduct of the victim is inadmissible as evidence.

<sup>224</sup> *Ibid* s 12.6.

<sup>225</sup> *Ibid* s 12.4.

- (i) The charges as alleged in the indictment and admitted by the accused;
- (ii) Any materials presented by the prosecutor which support the indictment and which the accused accepts; and
- (iii) Any other evidence, such as the testimony of witnesses, presented by the prosecutor or the accused.

If the Court is not satisfied that the aforementioned elements are met, it is obliged to consider the admission of guilt as not having been made, and must order that the trial be continued.<sup>226</sup> It is notable that there is no guidance on the sentencing practice to be followed in such cases, although general sentencing practice is contained in s 10 of *Regulation 2000/15*.

Building upon a provision that first appeared in s 11 of *Regulation 2000/11* and was later elaborated upon in s 3 of *Regulation 2000/14*, s 44 provides for an ‘expedited procedure’ before an individual judge in cases involving penalties of under five years. It therefore applies to Ordinary Crimes. The prosecutor is required to indict the suspect within 21 days of arrest, or within 48 hours of detention. From its early days as s 3 of *Regulation 2000/14*, this clause has been utopian in light of all the limitations under which the criminal justice system operates. Designed to streamline procedures to make processing of minor cases more efficient and expeditious, it has been largely ignored for being unrealistic in the situation of East Timor.

#### IV CONCLUSION

The Secretary-General has identified the establishment of a credible system of justice in which fundamental human rights are respected as a benchmark for assessing the success of UNTAET in East Timor.<sup>227</sup> This draws in two separate issues: the creation of a viable system and the successful management of that system. From the report of the Security Council Mission, it is clear that, despite remarkable achievements in the creation of a system from scratch, UNTAET still has a long way to go with respect to managing that system in accordance with international standards:

While UNTAET has made progress in developing a court administration system, prosecution services, public defender’s system and prison services, the judicial sector remains seriously under-resourced. Consequently, the current system cannot process those suspects already in detention, some of whom have been held for almost a year. Moreover, UNTAET is facing significant difficulties in bringing to justice those responsible for the serious violations of human rights that occurred in East Timor in 1999. In these circumstances, it is particularly important for UNTAET to consider all available ways of attracting the

<sup>226</sup> Ibid s 29A.3.

<sup>227</sup> See *Report of the Secretary-General on the United Nations Transitional Administration in East Timor*, above n 49, [68].

necessary resources and that decisions on handling serious crimes investigations should, to the extent possible, reflect East Timorese expectations.<sup>228</sup>

In light of these findings, the SRSB promised to undertake a review of the judicial sector and to report to the Security Council with proposed solutions. It is hoped that more will come out of this than the internal investigation carried out by the SRSB's office in September 2000 into the malfunctioning of the judicial affairs sector, from which no report or recommendations have emerged. The review offers an opportunity to carry out a genuine, informed and far-reaching audit of the system, and to design realistic and concrete proposals for reform and improvement. It is also important that lessons from mistakes are learnt, and that the review considers how the UN itself can contribute to the success of a peacekeeping mission like UNTAET, for example, by providing it with adequate means and the competent staff to fulfil its particularly ambitious and demanding mandate.

In its examination of the creation of a criminal justice system in East Timor, this paper has followed three identified themes: the degree of consultation with the East Timorese in the decision-making process; the ability of the existing and incoming system to cope with the laws it is expected to enforce; and the investment in human skills that is being undertaken in order to empower the East Timorese to manage their own country after independence. Through this analysis, the problems of the system have been brought to light. The picture that has emerged bodes ill for the future of East Timor.

One of the lessons of East Timor is that appearances can be deceptive. The fact that judges, prosecutors and defence counsel have been appointed to put UNTAET's laws into effect does not mean that there is a viable system. The fact that atrocities are being prosecuted does not mean justice is finally being delivered to the people of East Timor. Beneath the surface, much is amiss. There is a real danger that the mere fact of the creation of institutions has led to a false sense of accomplishment, and raised public expectations to a level which the institutions are not capable of satisfying. It does indeed seem that UNTAET's efforts have gone into creating the institutions of state and making vital decisions on behalf of the East Timorese, rather than creating the conditions in which they are truly empowered to choose the kind of nation and system they wish to have.

The Security Council's Mission cited serious under-resourcing as the reason for the malfunction of the criminal justice system. This paper has shown that under-resourcing, while a major cause, is by no means the only reason for the malfunction. Key contributing factors have been a persistent failure to consult in a genuine and meaningful way with the East Timorese, the inability of the existing system to cope with the demands placed upon it and inadequate investment in training and skills. Only a few of the problems can be explained away as being due to the bureaucratic and inflexible institutional nature of the UN. Despite the Secretary-General's call on UNTAET to make *necessary* amendments to current legislation, always in *consultation* with the East Timorese,

<sup>228</sup> *Report of the Security Council Mission to East Timor and Indonesia*, above n 62, [8] (emphasis omitted).



much unnecessary tampering with the underlying framework has occurred.<sup>229</sup> Indonesian law is not progressive in terms of international human rights standards, but once the offending laws and provisions are removed it provides a workable base for the transitional period.<sup>230</sup> UNTAET's hybrid system has resulted in confusion, contradiction and legal uncertainty. This has, in the case of arrest and detention procedures, resulted in the violation of fundamental human rights. In all of this, there seems to be a tendency to rush legislation through in a reactive manner, without thinking through the issues and consequences.

Another major contributing factor has been that inexperienced jurists were appointed to positions of great responsibility as judges, prosecutors and public defenders, with enormous demands made of them, without adequate training to equip them for the task. Complaints about the standards of professionalism demonstrated by the East Timorese jurists are misplaced; the finger should be pointed at those who have not equipped them to do the job properly. A radical overhaul of the philosophy and mechanisms of training adults 'on-the-job' needs to be considered. It is also most unfortunate that, through a longstanding failure to provide basic support to the East Timorese jurists, UNTAET has in fact alienated those whose loyalty and respect it desperately needs in order to make the system work.<sup>231</sup>

In the rush to establish a criminal justice system, insufficient consideration seems to have been given to whether the system being designed is one that is feasible for East Timor and in line with the expectations of its people. The Serious Crimes project best illustrates the need for UNTAET to take a more realistic and practical approach that considers the actual conditions in East Timor. It is highly commendable to have a 'state of the art' legal regime for prosecuting international crimes in domestic courts but, before embarking on the exercise, it is fundamental to consider whether the existing (or incoming) system can support such a venture. One cannot but wonder at how, even with international assistance, an independent East Timor is expected to cope with continuing this extraordinarily costly and time-consuming experiment in international justice. In a still fragile and volatile society, dangerously high expectations have been created. Failure of the enterprise may have serious consequences for the future peace and stability of East Timor.

The prosecution of Serious Crimes under *Regulation 2000/15* is a highly creative venture. Hampered as it is by the many problems that have been

<sup>229</sup> *Report of the Secretary-General on the Situation in East Timor*, above n 1.

<sup>230</sup> See the concerns of Amnesty International, above n 2. See also Mark Dodd, 'Frustration Grows over Timor Delays', *The Age* (Melbourne), 27 May 2000:

[O]utspoken human rights lawyer Anicetto Guterres accused UNTAET of failing to consult on the complex issue of a new legal code. Mr Guterres, chairman of the Foundation for Legal and Human Rights, said time could have been saved if the UN had stuck to its previous arrangement of adopting as an interim measure the Indonesian legal code and fine-tuning any deficient laws. He said the UN's ambitions to completely reform the legal system had resulted in unnecessary delays in bringing criminals to justice, creating a dangerous legal vacuum.

<sup>231</sup> See above n 45 on how this led to a strike and closedown of the courts in October 2000. After UNTAET promised to provide long overdue and desperately needed vehicles, furniture, stationery and other equipment, the strike was called off: see UNTAET, *Daily Briefing, 11 October 2000* <<http://www.un.org/peace/timor/DB/DB111000.htm>> at 10 March 2001 (copy on file with author).

identified in this paper, it retains the potential to blaze the way for this new mechanism to bring accountability for international crimes even closer to affected communities. It is a testing ground for the effectiveness of many of the provisions of the *Rome Statute*. But, more than anything else, this venture can be regarded as the litmus test of UNTAET's commitment to accountability, justice and rule of law. After many months of being in limbo, the Serious Crimes process is now receiving some of its much needed equipment and personnel. Indictments have now been filed at the District Court of Dili and cases are progressing to court. Yet, the task continues to be an overwhelming one and the effort seems merely to be scratching the surface. Difficult issues still remain and questions need to be answered. Will a crippled enterprise that satisfies no one do irreparable harm to the future peace and stability of East Timor? Can justice be done if these crimes are pursued as ordinary domestic crimes instead of international crimes? Will the prosecution ever be in a position to focus on those truly responsible for the atrocities — the civilian and military leaders who have now fled East Timor? Do the proceedings uphold international standards of fair trial? In particular, is there 'equality of arms' between prosecution and defence, and are the rights of the accused sufficiently protected? Will more locals be trained to take over this process themselves or will it continue to be an international operation until the end of UNTAET's mission?<sup>232</sup>

As this paper has revealed, complaints about UNTAET's persistent failure to consult in a genuine and meaningful way with the East Timorese, the inability of the existing system to cope with the demands placed upon it and inadequate investment in training and skills are not new or isolated. The East Timorese are perhaps the most vocal of its critics. In all fairness, it must be stressed that UNTAET has responded positively to the criticism and has begun taking steps to rectify some of the mistakes of its early days. It has moved away from its early tendency towards benevolent paternalism, which sidelined the East Timorese. For example, the discussions on reconciliation and a constitution have been widely consultative in a way not previously seen. 'Timorisation' has become a key objective of the mission, with East Timorese gradually being moved into leadership positions. As noted, the Serious Crimes Unit is now receiving material and human resources and this is starting to pay off with the start of proceedings before the Special Panels of the District Court of Dili. In the remaining months of UNTAET's mandate, recently renewed until 31 January 2002, there is thus reason for cautious optimism that the efforts being made will improve the situation.

The issues faced by UNTAET are among the most exciting and challenging that the UN has ever faced. In many respects, its achievements have been remarkable in the short time that it has been in existence and in light of the conditions under which it has operated. Groundbreaking work, such as that arising from the prosecution of Serious Crimes at the District Court of Dili, has the potential, if allowed to function properly, to change fundamentally the course of international justice. The challenge for UNTAET is to encourage public

<sup>232</sup> Since the passing of *Regulation 2000/15*, there has only been one East Timorese prosecutor involved in the investigation and prosecution of Serious Crimes.

confidence in its work and institutions by making the system fair, effective and transparent, and by demonstrating accountability by acting decisively on the problems within the criminal justice system. Although it appears to be taking positive steps to address highlighted shortcomings, UNTAET still needs to increase genuine consultation and meaningful East Timorese participation in key decisions, review its approach to law-making, improve its administration of the criminal justice system, and redouble its efforts to train the East Timorese. It is morally bound to ensure that the criminal justice system it bequeaths to the East Timorese at independence is one that is worthy of their terrible struggle for freedom.