

# PROSECUTING ATROCITIES AT THE DISTRICT COURT OF DILI

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*[A special regime for the prosecution of atrocities has been set up by the United Nations in East Timor. A panel of judges of the District Court of Dili, known as the Special Panel, is currently trying those accused of committing offences such as crimes against humanity, torture and violations of the Indonesian Penal Code. This paper examines the early jurisprudence that is emerging from the decisions of the Special Panel and East Timor's Court of Appeal in these cases. Public and international expectation was that they would be tried as international crimes, but the vast majority have controversially been pursued as violations of domestic law. This article therefore focuses on the issue of whether these cases would have been more appropriately pursued as violations of international humanitarian or international criminal law, most notably as war crimes or crimes against humanity.]*

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I INTRODUCTION

After hundreds of years of colonisation and occupation, East Timor is well on its way towards nationhood. Addressing its bloody history is a key part of that journey. Amid persistent calls for the creation of an international tribunal to prosecute those responsible for atrocities during Indonesia's 24 year occupation<sup>1</sup> and, in particular, the massive violations of human rights that occurred after the East Timorese exercised their right to reject autonomy within Indonesia in a United Nations sponsored referendum on 30 August 1999, the United Nations Transitional Administration in East Timor ('UNTAET') has commenced with its own mechanism for bringing those responsible to justice. The chosen venue for this is the District Court of Dili, whose Special Panel of East Timorese and international judges has exclusive jurisdiction over cases which involve what have been collectively named 'Serious Crimes'.<sup>2</sup> In addition, a Commission for

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<sup>1</sup> See UK Groups in Solidarity with East Timor, 'Petition for International Tribunal on East Timor' <<http://www.pcug.org.au/~wildwood/01maytribunalpetition.htm>> at 24 August 2001; 'Nobel Laureate Appeals For East Timor Tribunal', *Associated Press* (Sydney, Australia), 23 April 2001 <<http://www.pcug.org.au/~wildwood/01aprbelo.htm>> at 24 August 2001; 'International Court Must Be Set Up in Timor Lorosae as Fast as Possible', *Suara Timor Lorosae* (Dili, East Timor), 11 April 2001 <<http://www.pcug.org.au/~wildwood/01aprfast.htm>> at 24 August 2001; East Timor NGO Forum, *Expression of Concern at Xanana's Statement Regarding an International Tribunal*, Press Release (23 April 2001) <<http://www.etan.org/news/2001a/04ngofor.htm>> at 24 August 2001. The International Commission of Inquiry on East Timor was established by the Secretary-General to 'gather and compile systematically 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 the establishment of an international tribunal for East Timor: *Report of the International Commission of Inquiry on East Timor to the Secretary-General*, UN Doc A/54/726, S/2000/59 (2000) ('*Report of the International Commission of Inquiry*'). 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. The Special Rapporteurs of the Commission on Human Rights on extrajudicial, summary or arbitrary executions, on the question of torture, and on violence against women 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 criminal tribunal. The various reports are contained in *Report Submitted by the Secretary-General to the General Assembly on the Situation on Human Rights in East Timor*, UN Doc A/54/660 (1999) ('*Special Rapporteurs' Reports*'). See also TAPOL, *East Timor: Crimes Against Humanity Must Not Go Unpunished*, Press Release (31 January 2001) <<http://www.gn.apc.org/tapol/pr010131.htm>> at 24 August 2001; East Timor Action Network ('ETAN'), *East Timor Still Awaits Justice One Year after UN Call for International Tribunal*, Press Release (31 January 2001) <<http://www.etan.org/news/2001a/01tribl.htm>> at 24 August 2001.

<sup>2</sup> *Regulation No 2000/11 on the Organisation of Courts in East Timor*, UNTAET/REG/2000/11 (entered into force 6 March 2000), *Official Gazette of East Timor*, UNTAET/GAZ/2000/Add.1 ('*Regulation 2000/11*'). The *Kitab Undang-Undang Hukum Pidana* ('*Indonesian Penal Code*') is based on the *Wetboek van Strafrecht voor Indonesia 1915* (Ned), and has been subjected to numerous revisions and amendments, the most recent of which can be viewed in its original language at <[http://www.indonesialaw.org/kuhp/indonesia\\_kuhp\\_penal\\_code.htm](http://www.indonesialaw.org/kuhp/indonesia_kuhp_penal_code.htm)> at 24 August 2001.

Reception, Truth and Reconciliation has recently been established to investigate the pattern and scope of historical human rights violations in East Timor, and facilitate the return and community acceptance of East Timorese perpetrators of lesser crimes through amnesties.<sup>3</sup>

UNTAET was established as a peacekeeping mission by the Security Council in *Resolution 1272*.<sup>4</sup> It is the successor to the United Nations Mission to East Timor ('UNAMET'), which organised and oversaw the 30 August 1999 referendum that paved the way for East Timor's freedom,<sup>5</sup> and to the Australian-led international force created to restore law and order after the violence of September 1999.<sup>6</sup> UNTAET is tasked with taking East Timor to independence. Through the Transitional Administrator, it exercises all legislative and executive authority, including the administration of justice. It is responsible for ensuring 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>7</sup> Now in the final months of its mandate, UNTAET operates in a unique power-sharing arrangement with the East Timor Transitional Administration, which has taken over responsibility for the administration of the courts.<sup>8</sup>

Almost two years have been spent in creating a criminal justice system out of the rubble left by the departing Indonesian forces and the trials in relation to the 1999 atrocities are now well underway. The entire process is historic, for despite international domination of the process, never before have East Timorese judges sat in judgment over their own people, and never before have East Timorese prosecutors and defence lawyers appeared as legal professionals in their own land. This paper will examine the first two Serious Crimes judgments to be delivered by the Special Panel of the District Court of Dili, both involving incidents that arose in the course of the September 1999 violence. These cases are of Joao Fernandes and Julio Fernandes, both of whom are East Timorese. It will also examine key decisions of the Court of Appeal of East Timor dealing with detentions of suspects indicted for Serious Crimes, and its decisions on the appeals of both Joao Fernandes and Julio Fernandes. The paper then examines

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<sup>3</sup> See *Regulation No 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor*, UNTAET/REG/2001/10 (entered into force 13 July 2001).

<sup>4</sup> 54 UN SCOR (4057<sup>th</sup> mtg), UN Doc S/Res/1272 (1999) [1].

<sup>5</sup> The Security Council established UNAMET on 11 June 1999 to organise and conduct the popular consultation, originally scheduled for 8 August 1999: SC Res 1246, 54 UN SCOR (4013<sup>th</sup> mtg), UN Doc S/Res/1246 (1999).

<sup>6</sup> On 15 September 1999, following Indonesia's consent to the sending of an international force to restore peace and security in East Timor, the Security Council, acting under its Chapter VII powers, authorised the creation of INTERFET, a multinational force headed by Australia: SC Res 1264, 54 UN SCOR (4045<sup>th</sup> mtg), UN Doc S/Res/1264 (1999). INTERFET's task 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': at [3].

<sup>7</sup> *Resolution 1272*, above n 4, [2].

<sup>8</sup> For the purposes of this article, references to UNTAET shall include the East Timor Transitional Administration.

alternative ways in which the two cases could have been approached under international humanitarian and international criminal law.

## II OVERVIEW OF THE SERIOUS CRIMES PROCESS

At the outset it is necessary to explain briefly the legislative framework of East Timor under United Nations administration and the unusual mechanism through which these prosecutions are taking place.

UNTAET's vision for the prosecution of gross violations of human rights first became publicly apparent when it passed *Regulation 2000/11*. Section 10 provides that the District Court of Dili is to have exclusive jurisdiction over genocide, war crimes, torture and crimes against humanity, and over murder and sexual offences committed between 1 January 1999 and 25 October 1999 (collectively known as 'Serious Crimes').<sup>9</sup> The Transitional Administrator, in consultation with the Court Presidency, was empowered to appoint panels of judges to the District Court of Dili, composed of both East Timorese and international judges. Further legislation was required to establish the framework for the process, which included the establishment of a prosecution service for East Timor.

*Regulation 2000/15* provides the 'nuts and bolts' to construct the vehicle of justice envisaged in s 10 of *Regulation 2000/11*. The unusual terminology 'Serious Crimes' draws upon the distinction in the *Indonesian Penal Code* between felonies and misdemeanors. The crimes are defined in detail, following almost word for word the subject matter jurisdiction of the *Rome Statute of the International Criminal Court*.<sup>10</sup> Other substantive legal provisions, such as defences and the procedure for a guilty plea, also replicate the *Rome Statute*. Provisions for bringing charges under the *Indonesian Penal Code* for murder and sexual offences committed between 1 January 1999 and 25 October 1999 give the prosecution flexibility in charging. Both of the Serious Crime judgments discussed in this paper have arisen from prosecutions of atrocities under the *Indonesian Penal Code*, rather than international law.

*Regulation 2000/15* creates an 'internationalised' regime of domestic prosecution within the District Court of Dili. Under s 1.1 two international

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<sup>9</sup> *Regulation 2000/11*, above n 2. See also *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 ('*Regulation 2000/15*') which corrects the temporal limitation initially placed on the prosecution of torture in *Regulation 2000/11*. The mechanism of an 'internationalised tribunal' is based on the model for prosecutions which was being mooted for Cambodia. See, eg, *Press Briefing by Deputy Legal Adviser, UN Mission in East Timor*, Press Briefing (19 April 2000) <<http://www.un.org/News/briefings/docs/2000/20000419.untaetbrf.doc.html>> at 24 August 2001: 'The credibility of these trials would be ensured because the model under consideration for Cambodia was being used in East Timor'. It was also reputedly based on Kosovo's now abandoned War Crimes and Ethnic Crimes Court (although international prosecutors and judges still work within the existing criminal justice system).

<sup>10</sup> Opened for signature 17 July 1998, UN Doc A/CONF.183/9 (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.

judges and one East Timorese judge sit on the panel known as the Special Panel for Serious Crimes. The laws applicable in Serious Crimes cases are those of Indonesia (as amended or replaced by UNTAET) and, where appropriate, applicable treaties and recognised principles and norms of international law, including the established principles of the law of armed conflict. The Public Prosecution Service was established simultaneously in *Regulation 2000/16*.<sup>11</sup> Situated within this service is the Office of the Deputy General Prosecutor for Serious Crimes, which has exclusive responsibility for the Serious Crimes cases.<sup>12</sup>

A state-of-the-art system for prosecuting international crimes has been grafted onto the fledgling criminal justice system of East Timor, drawing much from the regime designed for the proposed International Criminal Court. There has been much NGO and media concern expressed about the Serious Crimes project, in particular UNTAET's failure to provide it with adequate support, and the perceived failure of those involved in the process to grasp the true extent of the atrocities committed.<sup>13</sup> Other United Nations institutions have also voiced their apprehensions.<sup>14</sup> The indications are that UNTAET has overreached itself and

<sup>11</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.

<sup>12</sup> *Ibid* s 14.4.

<sup>13</sup> See Seth Mydans, 'Modest Beginnings for East Timor's Justice System', *New York Times* (New York, USA), 4 March 2001, 10:

And so the tiny courthouse in Dili — with its ill-prepared staff, its shortage of translators, its missing records, its lack of a court reporter or copy machine, its confused schedule and its inadequate budget — is for the moment the sole venue for justice for this ravaged country. Prosecutors misplace their indictments, the police misplace defendants who are free on bail and cases recess in midstream when foreign judges break for vacations. No money has been allocated to house and support witnesses from outside Dili.

According to the ETAN, above n 1:

Both Indonesian and UN prosecutorial efforts have proven inadequate. ... UN prosecutions in East Timor are fraught with procedural and other problems. [Charles Scheiner, National Coordinator of ETAN] attended the first day of the trial of Joao Fernandes in Dili District Court on January 10. He observed a lack of resources and professionalism in the prosecution, the defense, and the management of the court.

See also Mark Dodd, 'Massacres Go Unpunished as UN Crimes Unit Heads for Collapse', *Sydney Morning Herald* (Sydney, Australia), 1 May 2001, 1; Joanna Jolly, 'E Timor: 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.

<sup>14</sup> See, eg, *Report of the High Commissioner for Human Rights on the Situation of Human Rights in East Timor*, UN Doc E/CN.4/2001/37 (2001) [13] ('*Report of the High Commissioner*');

A serious lack of resources, both human and material, has hampered the investigative work of the Serious Crimes Investigation Unit. This has prevented investigations being undertaken in connection with the overwhelming majority of crimes against humanity and war crimes committed during 1999. Because of the delay in or non-existence of investigations, a number of detainees, who had been held for months in pre-trial detention, have been released by the General Prosecutor on grounds of insufficient evidence.

has not met the demands of the Serious Crimes process or the raised expectations of the East Timorese people. Although the Special Panel is undoubtedly processing cases efficiently given the difficult conditions under which it operates, this costly and complex process is regarded by few East Timorese or international observers as bringing justice for the many atrocities committed in East Timor.<sup>15</sup>

### III THE FIRST TWO JUDGMENTS OF THE SPECIAL PANEL<sup>16</sup>

#### A General Prosecutor v Joao Fernandes

Joao Fernandes was indicted on 14 November 2000 in relation to the killing of a village chief, Domingos Goncalves Perreira, during a massacre at the police station in Maliana on 8 September 1999.<sup>17</sup> He and other members of the Daderus Merah militia were assembled by their commander and handed samurai swords.<sup>18</sup> They stopped at the Indonesian Army command post (KORAMIL) in Maliana, near the Indonesian West Timor border, where they painted their faces black. They then proceeded to the police station, where they carried out an attack on civilians sheltering there. During the attack, Joao Fernandes stabbed Domingos Goncalves Perreira to death.

The killings in Maliana, often referred to as the Maliana POLRES Massacre, have been identified by the General Prosecutor of East Timor as a priority crimes against humanity investigation.<sup>19</sup> The International Commission of Inquiry reported on the incident as follows:

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See also *Report of the Security Council Mission to East Timor and Indonesia*, UN Doc S/2000/1105 (2000). Concerns about the enterprise were also voiced by the Security Council when renewing UNTAET's mandate: SC Res 1338, UN SCOR (4268<sup>th</sup> mtg), UN Doc S/Res/1338 (2001) [8].

<sup>15</sup> See, eg. UK Groups in Solidarity with East Timor, above n 1:

The judicial system in East Timor has also failed to deliver justice to date. Investigations by the Serious Crimes Investigation Unit (SCIU) of UNTAET have been unacceptably slow. The SCIU initially concentrated on a select few cases and major atrocities, such as that committed at the Suai church compound on 6 September 1999 when dozens were murdered, have not been properly investigated. There are persistent reports that the SCIU's work is severely hampered by problems relating to a lack of resources, management conflicts, poor communications, the lack of clear policy guidelines, and a reluctance to expose the systematic nature of the 1999 violence. There are also allegations of political interference in the judicial process.

<sup>16</sup> The judges of the Special Panel in the cases examined were Italian employment law specialist Luca Ferrero (President), Sylver Ntukamazina (Burundi) and Maria Natercia Gusmao Perreira (East Timor). Judge Ferrero has since left and Marcelo Dolzany da Costa (Brazil) and Benetio Mosso Ramos (Cape Verde) have joined the bench.

<sup>17</sup> 'Indictment', *General Prosecutor v Joao Fernandes*, Case No BO-13-99-SC (14 November 2000) ('*Joao Fernandes Indictment*').

<sup>18</sup> The indictment in fact acknowledges coercion in that he 'was ordered to come to the house' of the militia leader: *ibid* 2.

<sup>19</sup> Mohamed Othman, East Timor General Prosecutor, *Daily Briefing*, Press Release (1 December 2000) <<http://www.un.org/peace/etimor/DB/db011200.htm>> at 24 August 2001.

On 8 September 1999, over 100 militia entered the police station in Maliana, where about 6000 people had sought shelter against the attacks of the military and militia. The police station was entirely surrounded with concentric rings: militia, the Mobile Police Unit and TNI. The people inside the police station were first attacked with machetes. When they fell down, they were hacked into pieces. This was done in front of the people, who were forced to watch. ... Forty-seven dead bodies were found later in the river. A witness testified that he had transported four bodies to the river in a vehicle.<sup>20</sup>

In marked contrast, the prosecution limited its description of the Maliana incident to the following:

- 5 Having reached the POLRES Station, Joao Fernandes got the order to enter the compound and kill all the males.
- 6 Joao Fernandes and one other militia leader, Joao Gomblo, were led by the chief of the POLRES Station to one room where the village chief of Ritabou Village, Domingos Gancalves Perreira was hiding.
- 7 Joao Fernandes pulled Domingos Gancalves Perreira out from his hiding place by Joao Fernandes and stabbed with his sword in the back.
- 8 After having fallen to the ground Joao Gomblo stabbed Domingos Gancalves Perreira twice in the chest.
- 9 Since the victim was still alive and tried to get up, Joao Fernandes stabbed him a second time in the back.
- 10 After this Domingos Gancalves Perreira was died [sic].<sup>21</sup>

In line with this interpretation of the incident, the charge laid against Joao Fernandes was not one of crimes against humanity, but of murder in violation of article 340 of the *Indonesian Penal Code*. This provides that '[t]he person who with deliberate intent and with premeditation takes the life of another person, shall, being guilty of murder, be punished by capital punishment, life imprisonment or a maximum imprisonment of twenty years.' The Special Panel questioned the prosecution as to why only one murder charge was laid when the evidence revealed the commission of multiple murders and indicated that crimes against humanity had been perpetrated. The prosecution acknowledged that in 1999 there had been widespread and systematic attacks against the civilian population (of which the Maliana Massacre was a part), but explained the charge of murder as being because 'there is no evidence of crimes against humanity, the accused is detained and seek a quick justice [sic]'.<sup>22</sup>

<sup>20</sup> *Report of the International Commission of Inquiry*, above n 1, [88]–[89].

<sup>21</sup> *Joao Fernandes Indictment*, above n 17, 2.

<sup>22</sup> 'Judgment', *General Prosecutor v Joao Fernandes*, Case No 001/00.C.G.2000 (25 January 2000) 3 ('*Joao Fernandes Judgment*'). See also Dan Murphy, 'Conviction in East Timor Falls Short of Calls for Justice', *The Christian Science Monitor* (Boston, USA), 30 January 2001:

In Fernandes's case, prosecutors felt they couldn't yet make a case for the more muscular charge of a crime against humanity. "There's tons of evidence. But we haven't gone out and gotten it yet," says one prosecutor. "This man participated in one of the worst massacres and all they come up with is one count of murder," fumes Mr Gutierrez [director of the East Timor Human Rights Foundation]. "The evidence is everywhere. Perhaps they're not up to the job."

At his appearance before the Special Panel on 10 January 2001, Joao Fernandes pleaded guilty to the charges against him. Under s 29A.1 of *Regulation 2000/30 on Transitional Rules of Criminal Procedure*, the court is required 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 alleged in the indictment and admitted by the accused; any materials presented by the prosecutor which support the indictment and which the accused accepts; and any other evidence, such as the testimony of witnesses, presented by the prosecutor or the accused.<sup>23</sup>

The accused, whilst acknowledging his guilt, claimed that he had killed his victim at the orders of the Indonesian Army and the militia leadership. This raised the issue of superior orders. Under s 21 of *Regulation 2000/15*:

The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if a panel determines that justice so requires.<sup>24</sup>

The accused did not claim to have committed the murder under duress which, if proved, would have constituted a complete defence to the charges against him.<sup>25</sup> The Special Panel accepted that the guilty plea satisfied s 29A and on 25 January 2001 Joao Fernandes was sentenced to twelve years imprisonment.

Bound by the insistence of the prosecution on proceeding with charges under the *Indonesian Penal Code* and the evidence that it led, the judgment does not place the incident in the wider context of what happened during the Maliana POLRES massacre and elsewhere in East Timor. It is worth noting that the Special Panel did in fact accept that Joao Fernandes had killed in pursuance of the orders of the Indonesian Army and militia leadership, and that this went to the mitigation of his sentence.<sup>26</sup> The sentence took into consideration what the Special Panel considered to be exceptional mitigating circumstances: he had been cooperative with the prosecution in investigating the atrocities in the Maliana district; he had confessed and pleaded guilty; he was young and had no previous convictions; and he had been following the orders of the Indonesian Army and militia commanders. Aggravating factors were that the accused had also intended to kill the son of the victim but had been restrained from doing so,

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<sup>23</sup> *Regulation No 2000/30 on Transitional Rules of Criminal Procedure*, UNTAET/REG/2000/30 (entered into force 25 September 2000), *Official Gazette of East Timor*, UNTAET/GAZ/2000/Add.4, s 29A ('*Transitional Rules of Criminal Procedure*').

<sup>24</sup> *Regulation 2000/15*, above n 9, s 21.

<sup>25</sup> *Ibid* s 19.1(d).

<sup>26</sup> *Joao Fernandes Judgment*, Case No 001/00.C.G.2000 (25 January 2000) 6. Unusually, the indictment stated that '[t]he victim was killed on order of TNI and Militia Commanders for being a pro-independence supporter': *Joao Fernandes Indictment*, Case No BO-13-99-SC (14 November 2000).

and that he and all the other attackers planned to kill all the males at the police station. A further aggravating factor was that Joao Fernandes forced his victim out of hiding and killed him in the presence of his daughters.

The only East Timorese judge on the Special Panel, Maria Natercia Gusmao Perreira J, expressed concern that the case had been prosecuted as a domestic crime and not a crime against humanity.<sup>27</sup> She questioned how this practice could bring justice to a people who had suffered so much during the many years of occupation.<sup>28</sup> She also voiced concern at the fact that all but one of the twelve Serious Crimes indictments filed at the District Court of Dili at that stage charged suspects with domestic criminal offences.<sup>29</sup>

Public and international reaction to the judgment was hostile; it was felt to be too lenient.<sup>30</sup>

### B General Prosecutor v Julio Fernandes

After 24 years of brutal occupation culminating in the systematic destruction of life and property across East Timor in September 1999, it is ironic that the first trial for 1999 atrocities involved a member of the East Timorese resistance forces, the FALINTIL. Julio Fernandes was indicted on 16 November 2000 for the murder of a captured militiaman, Americo de Jesus Martens, on 26 September 1999, a violation of article 340 of the *Indonesian Penal Code*. At a preliminary hearing on 10 January 2001 Julio Fernandes admitted to killing Americo de Jesus Martens, but claimed that he had been forced to do so by an angry crowd — an equivocal plea. The Special Panel correctly declined to accept this as a guilty plea under s 29A of the *Transitional Rules of Criminal Procedure* and put the matter down for trial.

The trial commenced on 6 February 2001. As the facts were generally not in dispute, the defence agreed to the prosecution submitting the statements of seven witnesses in evidence. Apart from Julio Fernandes, only three witnesses testified in court. The defence admitted the prosecution's allegations that Julio Fernandes had stabbed Americo de Jesus Martens twice amid a hysterical crowd shouting, 'kill him, kill him'. However, the defence claimed that: (1) the victim would probably have been killed anyway; (2) there was duress resulting from the threat of imminent death coming from the crowd; and (3) the victim had already been

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<sup>27</sup> This section is compiled from notes taken during the proceedings. Perreira J's orally delivered Separate Opinion has not been made part of the official record of the proceedings nor incorporated as part of the judgment.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> See Murphy, above n 22:

But no one in East Timor, thirsty for justice after a 24-year occupation, is satisfied with the result. "We reject this verdict," said Catalina Pereira, the victim's daughter, outside the courthouse. "So many men were slaughtered, and this is it?"

See also 'Rights Groups Say Justice Still Long Way Off for E Timor', *Associated Press* (Dili, East Timor), 25 January 2001 <<http://www.etan.org/et2001a/january/21-27/25rights.htm>> at 24 August 2001.

seriously maltreated and there was no evidence that the wounds inflicted by Julio Fernandes caused his death.

The judgment of the Special Panel was delivered on 27 February 2001. Julio Fernandes was sentenced to seven years imprisonment for the deliberate and premeditated murder of Americo de Jesus Martens.<sup>31</sup> The defence submissions were rejected. According to the Special Panel, premeditation ‘does not necessarily imply long-term planning of the conduct’, and it is sufficient to have thought about acting and to have decided whether or not to take the life of the victim.<sup>32</sup> It considered the vital factor to be that ‘nothing exceptional interferes with the decision.’<sup>33</sup> It was found that Julio Fernandes approached the victim, questioned him and, having listened to his answers, decided to kill him and then stabbed him twice: ‘It was not an instinctive reaction to a very peculiar situation, but a decision reached by reasoning’.<sup>34</sup>

In rejecting the allegation of duress under s 19 of *Regulation 2000/15*, the Special Panel found that the crowd was not threatening Julio Fernandes, but calling on him, as a representative of the FALINTIL, to punish the captured militiaman in an ‘official way’. It found that the crowd had called for the killing of the militiaman, but whilst it may have reacted in a hostile manner had Julio Fernandes refused to kill him, it would not have threatened his life. It was considered relevant that another person had refused to kill the militiaman and had walked away unscathed. As the Special Panel noted:

Finally there were more than two option [sic] for Julio Fernandes. It was also open to the accused, as a FALINTIL member, to have decided to take Americo into his custody and to hand him to the authorities. Had he made this choice it is unlikely that the accused would have been threatened by the crowd, since his decision would more likely have been supported by the majority.

It is also relevant to underline that, before the hearing on 6.02.2001, Julio Fernandes had never mentioned that he had felt threatened by the crowd and that had caused his conduct. On 10.01.2001 he simply acknowledged that he killed Americo because he was a FALINTIL member with a duty to keep law and order in community [sic].

Duress is clearly the defense of the very last moment.<sup>35</sup>

The Special Panel does not appear to have drawn any guidance from the rich jurisprudence in relation to duress that has arisen at the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’). In the case of Drazen Erdemovic, discussed below in greater detail, the ICTY Appeals Chamber examined the issues raised by the defence of duress, the content of international law on the

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<sup>31</sup> ‘Judgment’, *Prosecutor v Julio Fernandes*, Case No 002/00.C.G.2000 (1 March 2000) 11 (‘*Julio Fernandes Judgment*’).

<sup>32</sup> *Ibid* 7.

<sup>33</sup> *Ibid* 7.

<sup>34</sup> *Ibid* 8.

<sup>35</sup> *Ibid* 9.

issue, and the questions of the ‘wasted sacrifice’ and the inevitability of death.<sup>36</sup> In the *Erdemovic Appeal Judgment*, Stephen and Cassese JJ noted that the victim would have been killed anyway, regardless of what the accused did, and pointed to jurisprudence indicating that this was a relevant factor to be taken into account.<sup>37</sup> However, the majority did not agree. McDonald and Vohrah JJ rejected this ‘strict utilitarian logic based on the fact that if the victim will die anyway, the accused is not at all morally blameworthy for taking part in the execution’.<sup>38</sup> Li J found the Stephen–Cassese line of reasoning to be absurd ‘because it would justify every one of the criminal group who participated in the joint massacre of innocent persons’.<sup>39</sup> At the District Court of Dili, the Special Panel did not feel that the victim would necessarily have been killed had Julio Fernandes not murdered him.<sup>40</sup> It did not enter into discussion of the ‘wasted sacrifice’ or the inevitability of death, and simply rejected that there had been duress in this case.<sup>41</sup>

In sentencing, the Special Panel found Julio Fernandes’ position as a platoon leader of the FALINTIL and his violation of an order not to kill militia members to be aggravating factors. Likewise, the fact that the victim was killed when he had been rendered *hors de combat* through captivity and injury was an aggravating factor.<sup>42</sup> According to the Special Panel, the sentence was a ‘contribution to reconciliation and to [the deterrence of] such crimes even in the hard times during which they occurred’.<sup>43</sup> Working against this reconciliatory objective, however, is the fact that the mitigating factors seem to have been given more consideration in this case. In particular, the Special Panel considered in mitigation the reactions of those East Timorese who had survived the recent carnage and had captured someone who was presumed to have been involved in atrocities.<sup>44</sup> It recognised that even if Julio Fernandes had not acted under duress, the situation was an extremely tense one and he was certainly under pressure.<sup>45</sup>

Public reaction to this decision was more positive than that which greeted the Joao Fernandes verdict.<sup>46</sup> The sentence was in fact considerably lighter than that given to the militiaman, and was sensitive to the psychological situation of the survivors of the atrocities in September 1999. This contrasts with the Special

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<sup>36</sup> *Prosecutor v Erdemovic*, Case No IT-96-22-A (7 October 1997) (*‘Erdemovic Appeal Judgment’*). A Joint and Separate Opinion was delivered by McDonald and Vohrah JJ (*‘Joint and Separate Opinion’*) and Separate and Dissenting Opinions delivered by Cassese J, Stephen J and Li J.

<sup>37</sup> *Ibid* [62] (Stephen J), [43] (Cassese J).

<sup>38</sup> *Ibid* [80] (Joint and Separate Opinion).

<sup>39</sup> *Ibid* [11] (Li J).

<sup>40</sup> *Julio Fernandes Judgment*, Case No 002/00.C.G.2000 (1 March 2000) 8–9.

<sup>41</sup> *Ibid* 8.

<sup>42</sup> *Ibid* 10.

<sup>43</sup> *Ibid* 11.

<sup>44</sup> *Ibid* 10.

<sup>45</sup> *Ibid*.

<sup>46</sup> ‘Rights Groups Welcome Conviction of East Timor Guerrilla’, *Dow Jones Newswires* (Dili, East Timor), 2 March 2001 <<http://www.etan.org/et2001a/march/1-3/02rights.htm>> at 24 August 2001.

Panel's approach in the Joao Fernandes case, where no attempt was made to understand why the accused behaved as he did. In that case, there was no examination of why Joao Fernandes joined the militia and why, absent any duress, he and his group followed the orders of militia leaders and the Indonesian Army and attacked their own people. The resolution of this issue is essential for any reconciliation in East Timor. However, much has been made of the fact that Julio Fernandes, a FALINTIL member, has been convicted of murder by the Special Panel — it is cited as proof that the process is an even-handed one.

#### IV SELECTED JUDGMENTS OF THE COURT OF APPEAL OF EAST TIMOR<sup>47</sup>

##### A *Detentions*

Detentions have been a problematic issue in East Timor since INTERFET arrived and established the authority of the international community in September 1999. In the chaos caused by a total collapse of law and order, hastily introduced laws have resulted in much confusion. Arrests and detentions were ordered and carried out by those with no legal authority to do so, suspects were held in extended detention with no investigative work being carried out due to lack of resources, and there was a dispute over which of UNTAET's agencies would be responsible for investigating the atrocities.<sup>48</sup>

Since May 2001 the law of East Timor has provided that the Investigating Judge of the Special Panel is responsible for all matters of arrest and detention for a six month period from the date of arrest.<sup>49</sup> Thereafter, the matter by law becomes the responsibility of a panel of the District Court of Dili.<sup>50</sup> Confusion arose as to which of the panels had jurisdiction over the detentions of Serious Crimes suspects: the Ordinary Panels (composed entirely of East Timorese judges) or the Special Panel (two international judges and one East Timorese judge). Although the law is clear that the Special Panel has exclusive jurisdiction over Serious Crimes cases, the confusion arose because the Special Panel was not constituted for several months after its establishment in *Regulation 2000/15* and there were many in detention for Serious Crimes whose detentions required

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<sup>47</sup> The Court of Appeal judges for the detention related cases examined in this section were Claudio Ximenes de Jesus (Portugal), Jacinta Correia da Costa (East Timor) and Frederick Egonda-Ntende (Uganda). Jacinta Correia da Costa has since been appointed an Electoral Commissioner and two additional East Timorese judges have been appointed to the Court of Appeal: Cirilio Jose Cristovao and Carmelita Caetano Moniz. Judge Cirilio Jose Cristovao joined Judge Ximenes de Jesus and Judge Egonda-Ntende for the appeals of Joao Fernandes and Julio Fernandes. The Court of Appeal was established on 6 March 2000 by *Regulation 2000/11*, above n 2, s 14.

<sup>48</sup> Amnesty International, 'East Timor' in *Amnesty International Report* (2001). See also Human Rights Watch, 'East Timor' in *HRW World Report 2001* (2001); Human Rights Watch, *Unfinished Business: Justice for East Timor* (2000) <<http://www.hrw.org/backgrounder/asia/timor/etimor-back0829.htm>> at 24 August 2001.

<sup>49</sup> *Transitional Rules of Criminal Procedure*, above n 23, ss 20.1–20.10.

<sup>50</sup> Extended detention is governed by the *Transitional Rules of Criminal Procedure*, above n 23, s 20.11–20.12.

review. The judges of the Ordinary Panel stepped in to fill the void. However, they did not relinquish this responsibility when the Special Panel was appointed.

This issue of which panel had jurisdiction was first presented to the Court of Appeal in the case of Joao Bosco,<sup>51</sup> who was arrested and detained for murder in September 1999. Both the defence and the prosecution agreed that only the Special Panel had jurisdiction over Serious Crimes cases, and that this included detention reviews. The Court of Appeal, however, inexplicably failed to resolve the question of which panel had jurisdiction. It released Joao Bosco, of whom it said there was no evidence that he had committed a Serious Crime, and seems to have regarded the question of jurisdiction to be an academic one not suitable for determination by a court of law. The confusion over jurisdiction thus continued.

The question of Serious Crimes detainees was next raised before the Court of Appeal in the case of Julio Fernandes and 19 other Serious Crimes detainees.<sup>52</sup> The issue this time turned on the way in which the Special Panel handled the detentions of those indicted for Serious Crimes.

Once the first Serious Crimes indictments were filed, no applications for continued detention were made and no reviews of detention were held. This problem came to light in the course of the pre-trial hearing on 10 January 2001 in Julio Fernandes' case. It was there realised that since the 20 accused had been charged, their detention orders had lapsed, or were about to lapse. Julio Fernandes was consequently released as his last detention order had long expired. In other words, he had been unlawfully detained, a highly embarrassing situation for the United Nations. On 11 January 2001 the prosecution filed an urgent motion for the continued detention of Julio Fernandes and the 19 other Serious Crimes indictees. The next day, the Special Panel, without holding a hearing, effected a 'blanket' extension of the detention of all those detainees. Rather than issuing detention extensions as requested, it chose to use a convoluted means of extending those detentions de facto by issuing warrants of arrest for all the identified detainees, even though all except one continued to be held in detention.

The defence appealed, alleging that the order was made without examining the history and merits of each case against the requirements of the law. In addition, the defence alleged that it had not been notified of the proceedings, and that the rights of the accused had been violated by a decision that was taken in their absence and without the knowledge of their legal representatives. After a public hearing, the Court of Appeal's decision was delivered on 14 February 2001. A majority decision was issued in Portuguese and a separate opinion in

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<sup>51</sup> *Joao Bosco v Prosecutor General*, Case of Appeal No 2 of 2000 (6 October 2000). The author relied upon an official English translation of this judgment (copy on file with author).

<sup>52</sup> *Julio Fernandes and 19 Others v Prosecutor General*, Criminal Appeal No 1 of 2001 (14 February 2001) ('*Julio Fernandes and 19 Others Appeal — Majority Judgment*'), with a separate opinion by Egonda-Ntende J, 'Ruling of the Court of Appeal of East Timor', *Julio Fernandes and 19 Others v Prosecutor General*, Criminal Appeal No 1 of 2001 (14 February 2001) 8 ('*Julio Fernandes and 19 Others Appeal — Egonda-Ntende Separate Opinion*').

English by Egonda-Ntende J (dissenting in part).<sup>53</sup> East Timor's courts still lack adequate facilities for translation and interpretation and Egonda-Ntende J felt it necessary to record his decision in a language which he understood. The two decisions differ in their reasoning, rather than in the conclusions they reach.

The Court of Appeal unanimously found that it was wholly inappropriate for the Special Panel to have issued warrants under article 19 of the *Transitional Rules of Criminal Procedure* for the arrest of the nineteen persons who had already been detained, since the provision deals with fresh cases coming into the criminal system.<sup>54</sup> Even in the case of the remaining appellant, Julio Fernandes, who was released pending trial because of irregularities in his detention, it was held to be inappropriate to issue a new arrest warrant unless it was in relation to a new offence.<sup>55</sup> The Special Panel reasoned that as the detention warrants had expired or were about to expire, it could issue new arrest warrants in order to effect detention. The majority of the Court of Appeal was scathing about the Special Panel's 'mental juggling' and 'misinterpretation' of the law. It declared that it was 'totally useless and made no sense to issue warrants of arrest against accused already in custody according to indictments filed with the court'.<sup>56</sup> Egonda-Ntende J set out guidance for dealing with detention. He stressed that:

It is incumbent on the trial court, as soon as it is seized with a matter for trial, to review the necessity of further detention of an accused if he or she is in custody. One of the reasons for this is that contained in Article 9(3) of the International Covenant for Civil and Political Rights. And that is that it shall not be the general rule that persons awaiting trial shall be detained in custody.<sup>57</sup>

Citing s 29.5 of the *Transitional Rules of Criminal Procedure*, Egonda-Ntende J found that the law did in fact set out what is to happen with respect to detentions once an indictment is filed:

At their own motion or at the request of the accused, or his or her legal representative, the panel of judges or the competent judge, shall assess the necessity of the detention of the accused in accordance with Section 20 of the

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<sup>53</sup> Portuguese has controversially been chosen by the unelected political leaders of East Timor to be its national language. It is not the language of the majority of East Timorese, and is not the language used in court by the East Timorese judges, prosecutors and defence counsel, who were mainly educated in Bahasa Indonesia. Documents and proceedings often require translation into Bahasa Indonesia, Portuguese, Tetum and English if all involved are to understand what is going on. Ensuring reliable multiple language translation, even for the courts, has proven a particularly onerous task for this resource-strapped peacekeeping mission.

<sup>54</sup> *Julio Fernandes and 19 Others — Majority Judgment*, Criminal Appeal No 1 of 2001 (14 February 2001) 9; *Julio Fernandes and 19 Others Appeal — Egonda-Ntende Separate Opinion*, Criminal Appeal No 1 of 2001 (14 February 2001) 6.

<sup>55</sup> *Julio Fernandes and 19 Others — Majority Judgment*, Criminal Appeal No 1 of 2001 (14 February 2001) 11.

<sup>56</sup> *Ibid* 9.

<sup>57</sup> *Julio Fernandes and 19 Others Appeal — Egonda-Ntende Separate Opinion*, Criminal Appeal No 1 of 2001 (14 February 2001) 8.

present regulation and may order any measure consistent with Section 20.6 of the present regulation.<sup>58</sup>

He stressed that it is a fundamental principle that detention in criminal proceedings is not the norm. In the absence of an application by either party, it was clear that the Special Panel should have *proprio motu* examined the detentions of all persons indicted for Serious Crimes and whether continued detention was justified. The provisions of the *Transitional Rules of Criminal Procedure* governing the review of detention by the Investigating Judge should, *mutatis mutandis*, guide the Special Panel, and these require the presence of an accused at a review of detention.<sup>59</sup> Egonda-Ntende J stressed that in the proceedings before the trial court, an accused, along with legal counsel, must be present:

The presence of an accused at his trial, or at a proceeding where a matter that affects him is in issue, is one of the tenets of a fair hearing provided for in Section 2.1 of Regulation 2000/30 [the *Transitional Rules of Criminal Procedure*]. The accused is entitled to be heard before a decision, especially an adverse decision, is made in the course of proceedings for which he has been arraigned before the court.<sup>60</sup>

This is at odds with the approach of the majority, which found:

There is no requirement for a public hearing session to re-evaluate the preventive detention according to Section 20.9, nor to an order of extension of continued preventive detention in the cases stated on Section 20.11 and 20.12 of Regulation 2000/30. Thus, it cannot be concluded as the appellants invoke an irrevocable nullity based on Section 54.2 – c).<sup>61</sup>

It is submitted that the approach of Egonda-Ntende J is correct. His conclusion, which requires that accused persons be present at legal proceedings where a matter affecting them is in issue, is consistent with s 2.1 of the *Transitional Rules of Criminal Procedure*. This stresses that ‘[i]n the determination of any criminal charge against a person or of the rights and obligations of a person in a suit of law, that person shall be entitled to a fair and public hearing by a competent court’.<sup>62</sup> Egonda-Ntende J’s approach reveals an appreciation of the object and purpose of *Regulation 1999/1*,<sup>63</sup> which requires not only that ‘[i]n exercising their functions, all persons undertaking public

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<sup>58</sup> *Transitional Rules of Criminal Procedure*, above n 23, s 29.5, quoted in *Julio Fernandes and 19 Others Appeal — Egonda-Ntende Separate Opinion*, Criminal Appeal No 1 of 2001 (14 February 2001) 6.

<sup>59</sup> *Transitional Rules of Criminal Procedure*, above n 23, s 20.

<sup>60</sup> *Julio Fernandes and 19 Others Appeal — Egonda-Ntende Separate Opinion*, Criminal Appeal No 1 of 2001 (14 February 2001) 8.

<sup>61</sup> *Julio Fernandes and 19 Others Appeal — Majority Judgment*, Criminal Appeal No 1 of 2001 (14 February 2001) 3.

<sup>62</sup> *Transitional Rules of Criminal Procedure*, above n 23, s 2.1.

<sup>63</sup> *Regulation No 1999/1 on the Authority of the Transitional Administration in East Timor*, UNTAET/REG/1999/1 (entered into force 25 October 1999), *Official Gazette of East Timor*, UNTAET/GAZ/2000/1.

duties or holding public office in East Timor shall observe internationally recognized human rights standards',<sup>64</sup> but also that the laws of East Timor must not conflict with international standards, including those contained in the *International Covenant on Civil and Political Rights*.<sup>65</sup> The purpose of closely regulating extended pre-trial detention is to ensure that detention is justified in the circumstances and that fundamental rights are not violated by the prolonged deprivation of liberty; thus the requirement that a panel of judges review detentions in excess of six months.<sup>66</sup> The values protected by these provisions would clearly be violated if detained persons, who stand to be detrimentally affected, are not informed and are not heard as part of the process leading to the decision. As Egonda-Ntende J pointed out, a fair process is one where detainees are present and are heard before a decision — especially an adverse decision — is made in the course of legal proceedings before a court.<sup>67</sup> The Special Panel's failure to ensure a hearing in the presence of the accused and receive any submissions was not 'a mere irregularity' (in the words of the majority),<sup>68</sup> but a fundamental issue going to the heart of fair trial guarantees in international law.

The Special Panel's decision to arrest Julio Fernandes and the other 19 persons in detention was also unanimously overruled for the way in which the proceedings were conducted, ie without considering the facts of each case. The majority was scathing about the Special Panel's mere recital of the law and its failure to evaluate the facts of each case in light of the legal requirements.<sup>69</sup> The Court of Appeal was emphatic that detention should not be regarded as the norm in criminal cases.<sup>70</sup> The appellate judges also made it clear that those who were deprived of their liberty after their detention orders had expired had continued to be illegally detained, and that the Special Panel erred in trying to 'fix' the situation by issuing new arrest warrants. According to the majority, 'one can

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<sup>64</sup> Ibid s 2.

<sup>65</sup> Ibid s 3.

<sup>66</sup> *Transitional Rules of Criminal Procedure*, above n 23. Section 20.11 provides:

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, based on compelling grounds, extend the maximum period of pretrial detention by an additional three months.

Section 20.12 provides:

On exceptional grounds, and taking into account the prevailing circumstances in East Timor, for particularly complex cases of crimes carrying imprisonment 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>67</sup> *Julio Fernandes and 19 Others Appeal — Egonda-Ntende Separate Opinion*, Criminal Appeal No 1 of 2001 (14 February 2001) 8.

<sup>68</sup> *Julio Fernandes and 19 Others Appeal — Majority Judgment*, Criminal Appeal No 1 of 2001 (14 February 2001) 3.

<sup>69</sup> Ibid 9.

<sup>70</sup> Ibid 5.

neither continue an illegal detention nor legalise it by issuing a retrospective continuation of preventive detention.<sup>71</sup> The Special Panel's decision with respect to the 19 detainees was declared a nullity and was ordered to be set aside. The Special Panel was ordered to review the necessity of further detention of the 19 accused. The decision to arrest Julio Fernandes was declared void ab initio and his immediate release was ordered (the earlier decision of the Special Panel to release Julio Fernandes was reinstated).

This case is striking because United Nations institutions violated fundamental human rights. First, they illegally detained those whose orders of detention had expired. Second, they compounded these violations when a panel of judges (dominated by international judges) sought to 'remedy' that situation by issuing new arrest warrants in order to effect continued detention, giving no opportunity to the accused to challenge the situation, and without considering the facts of each case. The actions of the Special Panel in the second situation are of more concern than prosecutorial and judicial failure to monitor detentions. Rather than setting the standard and observing internationally recognised human rights standards pursuant to s 2 of *Regulation 1999/1*, it further violated the rights of Julio Fernandes and others. The only consolation is that the Court of Appeal demonstrated the necessary independence in rightly overturning the Special Panel's decision and pointing out the elementary but fundamental errors made.

Faced with enormous challenges in building a viable criminal justice system, the United Nations has now seen first-hand how difficult it is to manage detentions in accordance with international standards. Even so, those illegally detained persons are entitled to commence actions against UNTAET for illegal detention in violation of their fundamental right of liberty.<sup>72</sup>

#### B *Appeal by Joao Fernandes against the Judgment of the Special Panel of the District Court of Dili*

The judgment of the Court of Appeal was delivered on 29 June 2001, and the judges were unanimous in finding the appeal against conviction and sentence to be without merit.<sup>73</sup> The judgment consists of a majority decision written in Portuguese, which at the time of writing had yet to be translated, and a separate opinion by Egonda-Ntende J, written in English.<sup>74</sup> This paper will therefore only examine the findings of Egonda-Ntende J.

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<sup>71</sup> Ibid 6.

<sup>72</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Article 2(3) sets out the obligation of states to provide effective remedies for those whose rights have been violated.

<sup>73</sup> 'Ruling of the Court of Appeal of East Timor', *Joao Fernandes v Prosecutor General*, Criminal Appeal No 2 of 2001 (29 June 2001) ('*Joao Fernandes Appeal — Egonda-Ntende Separate Opinion*').

<sup>74</sup> It is a matter of much concern that UNTAET appears unwilling (perhaps unable) to translate this and other key decisions into a language understood by the accused/defence (Bahasa Indonesia and Tetum) or the prosecution (English), despite its obligation to adhere to international human rights standards and the fact that all three are also officially sanctioned languages used in the courts of East Timor.

Although the matter was not the subject of appeal, Egonda-Ntende J *proprio motu* raised the issues of whether a trial court can proceed to sentence without first convicting an accused of an offence, and the duties of a trial court faced with a guilty plea.<sup>75</sup> His findings conclude that the proceedings of the Special Panel, notably the sentencing decision and the orders made therein, were a nullity.<sup>76</sup> Egonda-Ntende J also called for new proceedings to be initiated pursuant to s 41.4 of the *Transitional Rules of Criminal Procedure*. It should be noted that no submissions were made by the parties on these issues as the Court of Appeal judges, being bound by an oral ruling of their President, are prevented from questioning the parties on legal issues.<sup>77</sup>

According to Egonda-Ntende J, the official record of proceedings contradicted the report of proceedings set out in the judgment, and indicated that the Special Panel had failed to convict the accused.<sup>78</sup> Several explanations for this are possible: the Special Panel really had failed to convict, either the official record of the judgment or the official record of proceedings were wrong, or the Special Panel's judgment was prepared without recourse to the official record. This brings to the fore the problem of record-keeping in the courts of East Timor, for until recently there have been no proper transcript facilities or complete records of proceedings. In certain cases, the notes of the judge appointed rapporteur were the only official record. On the basis of the official record, Egonda-Ntende J noted that the panel sentenced Joao Fernandes without a conviction or a judgment on the merits of the case against him, and without properly examining the evidence:

No finding was made that the accused is guilty of a particular offence or crime though note was made of the fact that he had pleaded guilty, and accepted all charges and evidence presented by the Public Prosecutor. The charges accepted are not mentioned or particularised. It is not mentioned if the evidence that the Public Prosecutor could not submit at the time was subsequently submitted or abandoned.<sup>79</sup>

Furthermore, Egonda-Ntende J found that the Special Panel had failed to fulfil its duty under s 29A.1 of Regulation 2000/30 to ensure that the accused fully understood the consequences of pleading guilty to the charges laid against him.<sup>80</sup> Section 29 derives from article 65 of the Rome Statute, which in turn derives from Rule 62 bis of the ICTY Rules of Procedure and Evidence.<sup>81</sup> Rule 62 bis came about as a result of the case of Drazen Erdemovic, who was charged

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<sup>75</sup> *Joao Fernandes Appeal — Egonda-Ntende Separate Opinion*, Criminal Appeal No 2 of 2001 (29 June 2001) 16–34.

<sup>76</sup> *Ibid* 34.

<sup>77</sup> *Ibid* 17.

<sup>78</sup> *Ibid* 19–22.

<sup>79</sup> *Ibid* 20.

<sup>80</sup> *Ibid* 31.

<sup>81</sup> *Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia* (adopted 11 February 1994 and subsequently amended) Doc IT/32/Rev.20 ('*ICTY Rules of Procedure and Evidence*').

with a count of war crimes and with crimes against humanity for his role in the killings committed after the Bosnian Serb Army's takeover of Srebrenica, Bosnia-Herzegovina. He entered a plea of guilty to the charge of crimes against humanity but raised the defence of duress, and the issue of superior orders. A majority of the Appeals Chamber approved the test for determining the validity of a guilty plea set out in the Joint and Separate Opinion of McDonald and Vohrah JJ:

(a) The guilty plea must be voluntary. It must be made by an accused who is mentally fit to understand the consequences of pleading guilty and who is not affected by any threats, inducements or promises.

(b) The guilty plea must be informed, that is, the accused must understand the nature of the charges against him and the consequences of pleading guilty to them. The accused must know to what he is pleading guilty;

(c) The guilty plea must not be equivocal. It must not be accompanied by words amounting to a defence contradicting an admission of criminal responsibility.<sup>82</sup>

Section 29A.1 repeats verbatim the provisions of the *Rome Statute*. With respect to the requirement that the accused be 'informed', Egonda-Ntende J's examination of the official record of the proceedings indicated that the Presiding Judge of the Special Panel had not taken sufficient care to ensure that the accused genuinely understood the consequences of agreeing with the charges made by the prosecution.<sup>83</sup> The accused had, in responding to the Presiding Judge's question, simply said that he was aware of the consequences of his agreement with the prosecution's allegations. This was accepted by the Special Panel without further examination. The record did not demonstrate that the Panel or even defence counsel had explained to the accused the consequences of his actions.

A guilty plea has serious legal consequences of which the accused should be able to demonstrate their understanding, or which should be explained to them by the court or any other officer of the court. By pleading guilty, the accused waives their right to a full trial, to be considered innocent until proven guilty and to test the prosecution case through the cross-examination of witnesses.

Egonda-Ntende J found that one cannot accept that accused persons understand the consequences of a guilty plea simply because they say they do.<sup>84</sup> This is certainly true when one considers that regularly those who appear before the Special Panel have not had formal education, and are unlikely to understand the full legal consequences of a guilty plea. Prudence should require a diligent trial court to take great care to ensure the fairness of the proceedings when dealing with this sort of situation. According to Egonda-Ntende J, it is not

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<sup>82</sup> *Erdemovic Appeal Judgment*, Case No IT-96-22-A (7 October 1997) [8] (Joint and Separate Opinion).

<sup>83</sup> *Joao Fernandes Appeal — Egonda-Ntende Separate Opinion*, Criminal Appeal No 2 of 2001 (29 June 2001) 28–31.

<sup>84</sup> *Ibid* 30.

enough for a court simply to repeat the words of a statute without complying with the substance of those provisions:

What was required here were [sic] a set of questions by the court that could elicit responses from the accused that would show whether he understood the nature and consequences of an admission of guilt. Or, the court could explain to the accused the nature and consequences of his admission of guilt, and thereafter inquire from him, if he understood or not.<sup>85</sup>

In this instance, the record revealed that the Presiding Judge merely repeated the words of *Transitional Rules of Criminal Procedure* and did not explain to the accused that, by pleading guilty, he would lose his right to a trial, to be considered innocent until proven guilty, and to assert his lack of criminal responsibility for the offences. The record did not indicate that the accused understood the consequences of his admission of guilt. However, neither did it show that he did not understand the consequences. Egonda-Ntende J ultimately found that article 29A.1(a) of the *Transitional Rules of Criminal Procedure* was not complied with.

The imposition of a strict duty upon judges to ascertain that the accused genuinely understands the consequences of the plea is consistent with the guidelines agreed to by the majority of the Appeals Chamber at the ICTY in the *Erdemovic Appeal Judgment*, and the overriding concern to ensure that proceedings are fair.<sup>86</sup> The guilty plea must be entered in full cognisance of its legal implications. To uphold a plea not entered with full knowledge and understanding would distort justice; it would jeopardise the fundamental rights of the accused to be presumed innocent until proven guilty and to receive a fair trial.<sup>87</sup> In the *Erdemovic Appeal Judgment* the judges were more concerned about the accused's failure to understand the charges, in particular the difference between crimes against humanity and war crimes. They did not set out the precise means by which the Trial Chamber should elicit information to satisfy itself of the accused's level of understanding, or specify the lengths to which a trial chamber has to go in ensuring that the accused understands the charges and the consequences of a guilty plea.

The Appeals Chamber left open the question of whether the Trial Chamber is required to explain in detail the elements of the crimes with which the accused is charged, and each and every consequence of making a guilty plea, or whether the Trial Chamber's obligations are satisfied if it simply makes reasonable enquiries or provides a basic explanation. This problem was raised by Shahabuddeen J, a member of the Trial Chamber to which the case of *Erdemovic* was remitted for retrial. Shahabuddeen J observed that both the *Statute of the ICTY*<sup>88</sup> and the Appeals Chamber left the Trial Chamber with a free hand in the way that it

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<sup>85</sup> Ibid 31.

<sup>86</sup> *Erdemovic Appeal Judgment*, Case No IT-96-22-A (7 October 1997) [7]–[9] (Joint and Separate Opinion).

<sup>87</sup> Ibid [7] (Joint and Separate Opinion), [10] (Cassese J).

<sup>88</sup> *Statute of the International Tribunal of the Former Yugoslavia*, SC Res 827, 48 UN SCOR (3217<sup>th</sup> mtg) (1993), 32 ILM 1203.

complies with its obligations arising from a guilty plea, and proposed that the matter could be addressed as follows:

The duty is to ensure that the accused understands the charge, and this is not necessarily identical with a duty to explain each and every element of it: without doing that, a trial judge may be satisfied, on suitable inquiry, that the accused understands the charge, as happens in many jurisdictions. An explanation of the elements of the charge, or of relevant elements, is given where something in the status or condition of the accused (such as his being legally unrepresented) or something in what he says when making his plea or some critically important element or other special reason alerts the trial judge to a need to give such an explanation in order to ensure that the accused understands what he is pleading to.

Naturally, the graver the charge, the more onerous is the responsibility of the trial judge. Recognising that, I am yet not persuaded that the discharge of that responsibility mechanically requires an element-by-element parsing of offences. That could be oppressive to a court without being needed to protect the right of the accused to a fair hearing. I would not understand the Appeals Chamber to have intended to lay down such a requirement.<sup>89</sup>

It is noteworthy that neither of the two Trial Chambers hearing the *Erdemovic* case exhaustively questioned the accused on his understanding of the charges against him and the consequences of pleading guilty. However, in light of the Appeals Chamber decision, the second trial chamber did go further in the steps it took to explain the two charges and the consequences of a guilty plea to Erdemovic, as well as questioning him on his understanding. Although Egonda-Ntende J made no explicit reference to international practice or jurisprudence, it appears that his concerns about the level of diligence exercised by the Special Panel to ensure that the accused made an informed plea are justified, for this seems to have fallen short of standards applied in the international arena.<sup>90</sup>

With respect to s 29A.1(b), Egonda-Ntende J was satisfied that the trial court had adequately ascertained that the admission of guilt was voluntarily made by the accused after sufficient consultation with defence counsel. He had more concerns over whether the Special Panel had satisfactorily ascertained that the admission of guilt was supported by the facts of the case contained: (i) in the indictment, and admitted by the accused; (ii) in any materials presented by the prosecutor that supported the indictment and which the accused accepted; and (iii) in any other evidence, presented by the prosecutor or the accused. Egonda-Ntende J noted the Panel's apparent failure to distinguish both between documentary materials simply presented to it and those admitted as evidence, and to distinguish between witness statements and oral testimony.<sup>91</sup>

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<sup>89</sup> 'Sentencing Judgment', *Prosecutor v Erdemovic*, Case No IT-96-22 (5 March 1998) (Shahabuddeen J) (footnote omitted).

<sup>90</sup> The Special Panel is obliged to comply with applicable treaties and recognised principles and norms of international law, including the established principles of the international law of armed conflict: *Regulation 2000/15*, above n 9, s 3.

<sup>91</sup> *Joao Fernandes Appeal — Egonda-Ntende Separate Opinion*, Criminal Appeal No 2 of 2001 (29 June 2001) 33.

While East Timor's laws provide that the Court may accept all evidence that is 'relevant and has probative value with respect to issues of dispute',<sup>92</sup> the point that seems to be made here is that the Court failed to evaluate the material before it in determining if it were in fact fully agreed to by the parties. Egonda-Ntende J found that the official record did not detail the nature of the evidence against Joao Fernandes nor at what point the evidence was admitted on the record of trial. For him, the materials described in the record of the trial of the case did not amount to 'evidence' pursuant to ss 33–37 of the *Transitional Rules of Criminal Procedure*:

In the case at hand the record does not support the suggestion that some evidence was tendered in this case.

Whatever facts gathered in this case ought therefore to have been gathered from the materials supplied by the Public Prosecutor and accepted by the accused. The record of the trial court should show the specific nature of these materials, and indicate specifically which material was accepted by the accused. Then the facts can be garnered therefrom to ascertain if the plea of guilty is consistent with the admission of guilt. These facts must be ascertained before the plea of guilty is accepted. On the record of the trial court, all we have is the Presiding Judge asking, "Do you agree with the evidence and witness statements presented by the Public Prosecutor?" The record must particularise the evidence and the witness statements that are being referred to, and it is preferable that the defendant signifies his acceptance in respect of each item of evidence, or material, after its purport has been made clear to him.<sup>93</sup>

In other words, it was not clear exactly which of the prosecution's charges and other materials or evidence were accepted by the accused. Rule 29A.1(c) simply sets out what materials can be used to support the factual basis underlying the guilty plea. By way of comparison, rule 62 *bis* of the *ICTY Rules of Procedure and Evidence* requires that there must be a sufficient factual basis for the crime and the accused's participation in it, either on the basis of independent indicia or on the lack of any material disagreement between the parties about the facts of the case. In the case of Joao Fernandes, the parties agreed on the facts. Thus, whilst it may be procedurally correct to have the parties examine every item of evidence and record their agreement on each fact, the Special Panel's failure to do so is not inconsistent with international practice and was not fatal to the fairness of the proceedings.

Surprisingly, in view of his general approach, Egonda-Ntende J did not consider the issue of superior orders and how the Special Panel dealt with it. Nor did he address the issue of whether the agreement between the prosecution and Joao Fernandes affected his freedom of choice; in particular, whether prosecution undertakings to an accused regarding sentencing submissions amounted to inducements or promises that impacted upon the voluntary nature of

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<sup>92</sup> *Transitional Rules of Criminal Procedure*, above n 23, s 34.1.

<sup>93</sup> *Joao Fernandes Appeal — Egonda-Ntende Separate Opinion*, Criminal Appeal No 2 of 2001 (29 June 2001) 32–3.

the guilty plea.<sup>94</sup> Although made without reference to international jurisprudence, it identifies key issues which have also caused difficulties elsewhere in the international arena. It is hoped that Egonda-Ntende J's identification of serious inconsistencies in the Special Panel's record-keeping will lead to some improvement in the equipment and personnel provided to enable its proceedings to be properly recorded. Likewise, the guidance he provides in relation to the duties incumbent upon a trial court when taking a guilty plea, evaluating evidence and entering a conviction before sentencing is sound, in accordance with international practice, and should be implemented in future proceedings before the Special Panel.

C *Appeal by Julio Fernandes against the Judgment  
of the Special Panel of the District Court of Dili*

On 29 June 2001 Julio Fernandes was denied leave of the Court of Appeal to file a 'written appeal statement' out of time.<sup>95</sup> However, another document that had been filed on 14 May 2001 was accepted as valid, so the appeal will proceed. In allowing the appeal, the Court of Appeal exercised a discretion under s 50.2 of *Regulation 2000/30*. It did so despite finding that the applicant did not establish good cause for failing to file a written statement of appeal in good time, and that 'counsel were not diligent in pursuing the applicant's appeal'.<sup>96</sup> The Court of Appeal concluded that '[t]here are times when the consequences of dereliction of duty on part of counsel should not be visited upon a party. This may be one such occasion'.<sup>97</sup>

There is nothing exceptional here that would justify the use of the Court of Appeal's wide discretion. There is no satisfactory explanation why, despite there being no sound reason for the delay in the application and given the indications of professional misconduct, it was allowed to proceed. It would seem that the judges were satisfied that the document filed in good time contained the grounds

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<sup>94</sup> In their Joint and Separate Opinion in the *Erdemovic Appeal Judgment*, Case No IT-96-22-A (7 October 1997) [8], McDonald and Vohrah JJ identified the position in customary international law as requiring that:

The guilty plea must be voluntary. It must be made by an accused who is mentally fit to understand the consequences of pleading guilty and *who is not affected by any threats, inducements or promises* (emphasis added).

Rule 62 *bis* (1) of the *ICTY Rules of Procedure and Evidence*, above n 81, simply requires that 'the guilty plea has been made voluntarily'. Article 65.1(b) of the *Rome Statute*, above n 10, requires that '[t]he admission is voluntarily made by the accused after sufficient consultation with defence counsel'. It is submitted that in order for a guilty plea to be made voluntarily, it must have been made irrespective of whether there were threats, inducements or promises made to the accused. The role of defence counsel introduced in *Regulation 2000/15* and the *Rome Statute* is to ensure that the accused has legal advice and his or her rights are considered in the course of making this crucial decision. It is submitted that this is an element that is not as relevant to 'voluntariness' as it is to whether the accused is adequately 'informed'.

<sup>95</sup> 'Ruling Of The Court Of Appeal Of East Timor', *Julio Fernandes v Prosecutor General*, Criminal Appeal No 7 of 2001 (29 June 2001) 3.

<sup>96</sup> *Ibid* 2.

<sup>97</sup> *Ibid* 3.

of appeal, and that regardless of whether it was in the correct form, this provided the respondents with notice of the grounds upon which the appeal in this case was being made. They held that '[t]he respondent will not suffer any prejudice if this applicant is granted leave to proceed with this appeal.'<sup>98</sup>

It is useful to note the difference in standard being applied here with that of the International Criminal Tribunal for Rwanda, where the Appeals Chamber in the matter of Clement Kayishema and Obed Ruzindana rejected a cross-appeal by the Prosecutor because certain key documents were not submitted on time.<sup>99</sup> The Prosecutor had appealed the Trial Chamber's acquittal of Kayishema and Ruzindana on certain counts of crimes against humanity and war crimes, and that Ruzindana's sentence be increased to life.

## V REMARKS

Of the approximately 25 cases pending before the Special Panel, only four bring charges of crimes against humanity. The first to be filed was the Lospalos case, tracking the criminal activities of a militia group known as Team Alfa between April 1999 and September 1999. The second case involves atrocities committed in the Lolotoe area, and includes charges of rape and sexual enslavement as a crime against humanity. The third relates to murders and deportation committed in the Lliquiça district. A fourth indictment deals with murder, disappearances and other inhumane acts committed in the Batugade district. In the first two, minor Indonesian officers are charged, along with East Timorese with no hierarchical significance. There are no indictments alleging the commission of war crimes or genocide.

Given the many concerns voiced about the prosecution's failure to lay charges for international crimes, it is necessary to examine the first two cases, Joao Fernandes and Julio Fernandes, in order to ascertain if charges under domestic law were justified.

### A *East Timor and International Humanitarian Law*

#### 1 *Characterising the Situation in East Timor*

In examining the situation of East Timor from an international humanitarian law perspective, it is necessary to go back to when the troubles began a quarter of a century ago. At the time of the invasion of East Timor by Indonesia in December 1975, it was a non-self-governing territory under the administration of Portugal.<sup>100</sup>

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<sup>98</sup> Ibid 3.

<sup>99</sup> *Prosecutor v Kayishema and Ruzindana*, Case No ICTR-95-1-A (1 June 2001) [47].

<sup>100</sup> The United Nations General Assembly had declared East Timor a non-self-governing territory under the administration of Portugal in Res 1542 (XV), 15 UN GAOR (948<sup>th</sup> plen mtg), UN Doc A/Res/1542(XV) (1960).

In accordance with the provisions of *Hague Convention IV*<sup>101</sup> and its attached regulations, recognised as being declaratory of customary international law, East Timor was considered occupied when it was ‘actually placed under the authority of the hostile army’ — that occupation only extended to the territory where such authority was established and exercised.<sup>102</sup> Both Indonesia and Portugal (the lawful administrator) had ratified the *Geneva Conventions* and remained parties throughout the period of Indonesia’s occupation of East Timor.<sup>103</sup> Thus it seems that the *Geneva Conventions* and the grave breaches regime applied as treaty law to the occupation of East Timor, and bound Indonesia as the occupying power, and Portugal (even though it was not a belligerent).<sup>104</sup> This does not apply to the two additional protocols to the *Geneva Conventions*, which have not been ratified by Indonesia.<sup>105</sup> Sovereignty over occupied East Timor did not at any stage pass to Indonesia; Portugal remained de jure the administering power, even if Indonesia administered the territory de facto.<sup>106</sup>

It should be noted that the above is an interpretation that runs counter to the various positions taken by Indonesia, through which it has attempted to justify the invasion, occupation and eventual annexation of East Timor as its 27<sup>th</sup> province on 17 July 1976. These have included arguments that certain East Timorese leaders invited Indonesian intervention to restore law and order during the civil war in 1975, and ultimately asked that the territory be incorporated into Indonesia; that East Timor was historically part of Indonesia because it had once

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<sup>101</sup> Opened for signature 18 October 1907, [1910] ATS 8 (entered into force 26 January 1910).

<sup>102</sup> Ibid art 42. The Judgment of the International Military Tribunal at Nuremberg stresses that ‘[B]y 1939 these rules laid down in the [*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 International 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.

<sup>103</sup> Indonesia ratified on 30 September 1958, Portugal on 14 March 1961.

<sup>104</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 I’*); *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) (*‘Geneva Convention III’*); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (*‘Geneva Convention IV’*), (collectively, *‘Geneva Conventions’*).

<sup>105</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict*, opened for signature 12 December 1977, 1125 UNTS 3 (entered into force 7 December 1978) (*‘Additional Protocol I’*); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict*, opened for signature 12 December 1977, 1125 UNTS 3 (entered into force 7 December 1978) (*‘Additional Protocol II’*).

<sup>106</sup> ‘The international law of belligerent occupation must ... be understood as meaning that the occupying power is not sovereign, but exercises provisional and temporary control over foreign territory’: Hans-Peter Gasser, ‘Protection of the Civilian Population’ in Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (1995) 242.

come under the sway of certain ancient kingdoms that ruled over the area; and that an unstable left-leaning East Timor was not a feasible option in a fragile South-East Asia, which was then polarised by the Cold War.<sup>107</sup> However, few commentators have regarded any of these positions as credible.<sup>108</sup> Certainly, for the United Nations and its various organs — including the Security Council, the General Assembly and its Special Committee on Decolonisation, the Commission on Human Rights and the Special Committee on the Situation with Regard to Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples — East Timor continued to be considered a non-self-governing territory under the administration of Portugal. Also, revealing dicta were made by the International Court of Justice in the *Case Concerning East Timor*.<sup>109</sup> While refusing to accept jurisdiction over the merits of the case, it recognised East Timor's continued status as a non-self-governing territory despite Indonesia's presence.<sup>110</sup>

## 2 Was There an Armed Conflict?

The foregoing discussion establishes the position that East Timor was invaded and occupied by Indonesia between 1975 and 1999. However, what is unclear is whether there was a state of 'armed conflict' during this period, without which the relevant laws and customs of war would not apply. The decision of the ICTY Appeals Chamber in the *Tadic Appeal on Jurisdiction* is regarded as authoritatively setting out the elements of an armed conflict:

[A]n 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>111</sup>

Whether this test is satisfied is a matter that ultimately turns on the evidence before the Special Panel. However, influential studies of the East Timor conflict indicate that this was a war of national liberation, with the firepower of the occupying state unleashed upon a poorly armed but determined and organised resistance movement with extensive grassroots support. John Taylor argues that the struggle for the liberation of East Timor was protracted.<sup>112</sup> The resistance forces, known as the FALINTIL, were always a thorn in the side of the Indonesian armed forces, and their strongholds were in the east and southeastern

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<sup>107</sup> 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; Carmel Budiardjo and Liem Soei Liong, *The War against East Timor* (1984); Bilveer Singh, *East Timor, Indonesia and the World: Myths and Realities* (1995).

<sup>108</sup> *Ibid.*

<sup>109</sup> (*Portugal v Australia*) [1995] ICJ Rep 90.

<sup>110</sup> *Ibid.* 103.

<sup>111</sup> 'Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction', *Prosecutor v Tadic*, Case No IT-94-1-AR72 (2 October 1995) [70] ('*Tadic Appeal on Jurisdiction*').

<sup>112</sup> John Taylor, *Indonesia's Forgotten War: The Hidden History of East Timor* (1991) 79–91.

zones.<sup>113</sup> In the early years of the occupation it seems that there was substantial control of territory by the resistance, who engaged in guerrilla attacks and occasional direct engagements with the Indonesian forces. The Indonesians gained ground through the increased use of heavy counter-insurgency weaponry, the aerial and naval bombardment of towns, artillery attacks and troop deployments in their effort to quell the resistance. In a telling indication of FALINTIL's control of territory, Taylor estimates that in 1978 approximately 259 000 people were living in resistance controlled areas.<sup>114</sup>

Between 1979 and 1980 it appeared as if the FALINTIL had been eliminated as an effective armed movement. However, within months they had managed to regroup and restructure, and resume their sporadic attacks on the Indonesian forces. Successive military operations (eg, Operasi Keamanan, Operasi Persatuan, Operasi Kikis) were launched by the Indonesian Army to quell the resistance to no avail, indicating that the Indonesians had a major problem in exerting control over East Timor. Taylor writes that

it would seem that in the late 1980s we had a situation in which, across about one-third of the territory, mostly in the east and southeast, an average of 10–12 000 Indonesian troops faced 1200–1500 Fretilin troops in a pattern of foray and ambush, with occasional but decreasing numbers of direct confrontations.<sup>115</sup>

In September 1999, when the attacks and destruction unleashed upon pro-independence supporters reached their peak (during which time both Joao Fernandes and Julio Fernandes committed the crimes which are examined in this paper), the resistance forces generally obeyed orders not to engage the Indonesian forces and the militias despite the acts of violence being perpetrated across East Timor.<sup>116</sup> The ceasefire agreements amounted to a temporary cessation of hostilities and did not terminate the state of armed conflict.<sup>117</sup> In any event, there is judicial authority that an armed conflict can continue to exist even if there are no substantial clashes occurring at the time and place of the alleged crime.<sup>118</sup>

It seems therefore that there was a prolonged occupation of East Timor, with the armed forces of the occupying power and its local agents engaged in a

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<sup>113</sup> From 1975 to 1987, FALINTIL was the armed wing of FRETILIN, one of the leading East Timorese political parties. In 1979 the resistance forces were reorganised and the FALINTIL became a national liberation army not linked to or dominated by a political party.

<sup>114</sup> Taylor, above n 112, 90.

<sup>115</sup> *Ibid* 162.

<sup>116</sup> On 21 April 1999, a ceasefire agreement was signed. Another agreement on cessation of hostilities was signed on 18 June 1999 in connection with the tripartite agreement on the holding of the referendum between Indonesia, Portugal and the UN. However, even before the accords were signed, FALINTIL was operating a *de facto* ceasefire.

<sup>117</sup> 'It has generally been accepted that a peace treaty or some other clear indication on the part of the belligerents that they regard the state of war as ended is required': Christopher Greenwood, 'Scope of Application of Humanitarian Law' in Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (1995) 54. See also H Lauterpacht (ed), *Oppenheim's International Law* (7<sup>th</sup> ed, 1952) vol II, 597–9.

<sup>118</sup> *Prosecutor v Tadic*, Case No IT-94-1-T (7 May 1997) [573] ('*Tadic Trial Judgment*').

protracted armed conflict. Following on from the position that East Timor was illegally invaded, occupied and annexed by Indonesia, this armed conflict can be considered to have been international in nature. This holds true despite uncertainty over the customary law status of the relevant provisions of *Additional Protocol I*, under which the FALINTIL would be regarded as being engaged in a struggle for liberation from an alien occupying power, and whether the situation would qualify as one of international armed conflict.<sup>119</sup> In any event, it is unlikely that Serious Crimes prosecutors would categorise the situation in East Timor from 1975 to 1999 as a ‘non-international armed conflict’ because this would mean recognising that the invasion, occupation and annexation of East Timor by Indonesia were in accordance with international law.

### 3 War Crimes — The Applicable Law

Under s 6 of *Regulation 2000/15*, which follows the provisions of the *Rome Statute*, the following categories of offences are recognised as war crimes:

- 1 grave breaches of the *Geneva Conventions*;
- 2 serious violations of the laws and customs of war in an international armed conflict;
- 3 serious violations of article 3 common to the *Geneva Conventions* in non-international armed conflicts;
- 4 serious violations of the laws and customs of war applicable in a non-international armed conflict.

As discussed above, the *Geneva Conventions* applied to the East Timor conflict as treaty law. Running alongside the *Geneva Conventions* would have been the laws and customs of war applicable to occupied territories, and a protracted armed conflict between the forces of the occupying power and local resistance fighters. *Hague Convention IV*, which regulates the ‘means and methods’ of war as well as the belligerent occupation of territory, is well entrenched as part of the customary laws of war.<sup>120</sup> The Martens Clause, contained in its preamble, is also firmly part of that body of law,<sup>121</sup> providing a minimum protection of ‘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 the public conscience’.<sup>122</sup>

It is ‘generally agreed by the community of states and most international lawyers that the fundamental provisions of [*Geneva Convention III*] are valid as customary law. In addition, some provisions are accepted as *ius cogens*.’<sup>123</sup>

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119 See below Part VA(4).

120 See above n 101.

121 *Legality of the Threat or Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* [1996] ICJ Rep 66, [78], [84].

122 *Hague Convention IV*, above n 101, preamble.

123 Horst Fischer, ‘Protection of Prisoners of War’ in Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (1995) 325.

While clearly applicable in a situation of international armed conflict, *Geneva Convention III*, with its detailed regulation of the treatment of prisoners of war, also applies in situations of partial or total occupation.<sup>124</sup>

*Geneva Convention IV* is regarded as incorporating much, if not all, of the protections for the populations of occupied territories contained in *Hague Convention IV*, and will therefore apply as customary international law in an occupation.<sup>125</sup> *Geneva Convention IV* is central to the situation of East Timor, for it 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>126</sup> and contains detailed provisions for the administration of occupied territories. The Indonesians faced no armed resistance from the Portuguese colonial administration; it was left to the East Timorese to defend themselves from the invading forces. This self-defence eventually developed into a struggle for national liberation, with a clearly identified resistance movement and armed force (the FALINTIL). The full protection afforded by *Geneva Convention IV* to the civilian population of occupied East Timor lapsed after the first year of occupation; however, certain key provisions continued to apply throughout the occupation.<sup>127</sup> For example, attacks on the civilian population were always prohibited. Protected persons were at all times entitled to be treated humanely, and had especially to be protected against all acts of violence or threats thereof, and against insults and public curiosity.

Article 3 common to the *Geneva Conventions*<sup>128</sup> has been described by the International Court of Justice as reflecting 'elementary considerations of humanity' applicable under customary international law to any armed conflict, whether internal or international.<sup>129</sup> However, as with the *Rome Statute*, Common Article 3 is specifically identified as being prosecutable in armed conflicts not of an international nature under article 6.1(c) of *Regulation 2000/15*, and grave breaches of the *Geneva Conventions* are to be prosecuted as such in an international armed conflict under article 6.1(a). The Appeals Chamber in the *Tadic Appeal on Jurisdiction*, when examining the *Statute of the ICTY's* division of grave breaches in article 2 from the laws and customs of war in article 3, held that grave breaches could only be prosecuted under article 2 and not article 3.<sup>130</sup> Article 3, based on the laws and customs of war, encompasses Common Article 3, which under the *Statute of the ICTY* is not prosecutable elsewhere. This has been a controversial interpretation because the customary

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<sup>124</sup> *Geneva Convention III*, above n 104, art 2.

<sup>125</sup> Gasser, above n 106, 241.

<sup>126</sup> *Geneva Convention IV*, above n 104, art 2.

<sup>127</sup> The articles that continued to apply were arts 1–12, 27, 29–34, 47, 49, 51–3, 59, 61–77 and 143.

<sup>128</sup> *Geneva Conventions*, above n 104, common art 3 ('Common Article 3').

<sup>129</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* [1986] ICJ Rep 14, [218] ('*Nicaragua*'); see also *Tadic Appeal on Jurisdiction*, Case No. IT-94-1-AR72 (2 October 1995) [89].

<sup>130</sup> Case No IT-94-1-AR72 (2 October 1995) [87].

elements of both Common Article 3 and the grave breaches regime are felt by many to be subsumed within the serious violations of the laws or customs of war in an international armed conflict, and probably also within the laws and customs of war in internal armed conflict.<sup>131</sup>

It would seem that the ICTY's decision that grave breaches are not part of the laws and customs of war is one that is limited to the construction of its own Statute, the logic of which cannot be automatically extended to the differently structured provisions of the *Rome Statute*, taken up by UNTAET in *Regulation 2000/15*. Upon a plain reading of s 6.1 of *Regulation 2000/15*, it would seem that by splitting these provisions up, its drafters, like those of the *Rome Statute*, intended that the laws and customs of war in an international armed conflict should not include the customary elements of the grave breaches regime nor Common Article 3, which expressly applies in non-international armed conflicts. The intention of the drafters seems to have been to divide the humanitarian elements of war crimes from its 'means and methods' provisions, and for the two to be addressed as separate offences in an international armed conflict.

It would therefore be prudent to proceed on the basis that *Regulation 2000/15* specifically provides for grave breaches of the *Geneva Conventions* to be prosecuted only in international armed conflicts under s 6.1(a), and for Common Article 3 only to be prosecuted in non-international armed conflicts under s 6.1(c): neither should be included as violations of the laws and customs of war in an international armed conflict. This does not prevent other provisions of the *Geneva Conventions* outside the grave breaches regime, which have attained customary status, from being prosecuted under s 6.1(b) as violations of the laws and customs of war in an international armed conflict.

*Additional Protocol I*, which did not bind Indonesia as treaty law (only Portugal had ratified it), regulates the conduct of both national liberation fighters and the occupying power in the course of an occupation. While *Additional Protocol I* is now largely considered to be reflective of customary international law, the same cannot be said of its controversial articles 1(4) and 44(3) concerning wars of national liberation in occupied territories.<sup>132</sup> Article 1(4) identifies national liberation struggles as falling within the ambit of *Additional Protocol I*, thereby implicitly rendering them international armed conflicts. Article 44(3) provides that resistance fighters who are unable to distinguish themselves from the civilian population during the course of a national liberation struggle, will retain their status as combatants provided that they carry their arms openly during each military engagement, and during such time as they are visible to the adversary while engaged in a military deployment preceding an attack. At

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<sup>131</sup> See Separate Opinion of Judge Abi-Saab in *Tadic Appeal on Jurisdiction*, Case No IT-94-1-AR72 (2 October 1995); *Prosecutor v Delalic*, Case No IT-96-21-T (16 November 1998) [202] ('*Celebici Trial Judgment*'); George Aldrich, 'Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia' (1996) 90 *American Journal of International Law* 64, 68.

<sup>132</sup> See Christopher Greenwood, 'Customary Law Status of the 1977 Additional Protocols' in Astrid Delissen and Gerard Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead, Essays in Honour of Frits Kalshoven* (1991) 93, 107–8, 111–12.

the diplomatic conference leading to the adoption of *Additional Protocol I*, articles 1(4) and 44(3) were highly controversial and led to the perception by some that *Additional Protocol I* was a ‘terrorists charter’.<sup>133</sup> It is thus unclear if these national liberation movement provisions applied to the situation in East Timor as customary international law.

*Additional Protocol II*, applicable to non-international armed conflicts, would only be relevant to East Timor if one accepted that it was not invaded and occupied by Indonesia in 1975 in violation of international law and that it was lawfully annexed as part of that State’s territory the following year. As previously indicated, this is not a position that warrants closer scrutiny.

#### 4 *The Legal Status of the Parties*

The main players in the East Timor conflict were the Indonesian armed forces and police, local pro-Jakarta militias and the East Timorese resistance, FALINTIL. A key matter that needs to be resolved is the relationship between the East Timorese militias and Indonesia, and that between FALINTIL and Portugal. These are crucial issues, because the grave breaches regime of the *Geneva Conventions* is predicated upon certain acts committed against persons and objects categorised as ‘protected’ by those with a sufficient link to a High Contracting Party. Violations of the laws and customs of war will also turn on there being adequate links to a belligerent party.

Determining what that link is will require examination of international jurisprudence. The judgments of the International Court of Justice in *Nicaragua* and the Appeals Chamber of the ICTY in the case of *Dusko Tadic*<sup>134</sup> are crucial to resolving this issue. The tests here are conflicting, with the Appeals Chamber in the *Tadic Appeal Judgment* finding that the *Nicaragua* test was wrong and contrary to the logic of the doctrine of state responsibility. The *Nicaragua* case examined the question of state responsibility for acts performed by private individuals acting as de facto state organs and applied a test requiring the exercise of effective control.<sup>135</sup> In the *Tadic Appeal Judgment* the issue was one of criminal responsibility and the degree of linkage between a state and non-state actors needed to trigger the applicability of the grave breaches regime of the *Geneva Conventions*. The *Tadic Appeal Judgment* applied a test of overall control: the state must have had a role in organising, coordinating or planning the

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<sup>133</sup> The United States and France have yet to ratify. 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>134</sup> *Tadic Appeal Judgment*, Case No IT-94-1-A (15 July 1999).

<sup>135</sup> *Nicaragua* [1986] ICJ Rep 14, [115].

military actions of the militias.<sup>136</sup> It found that this test would apply to the situation before it as well as where state responsibility is at issue. It also proposed another test, which looks for 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>137</sup>

For many years, armed civilian and paramilitary groups of East Timorese operated alongside Indonesian armed forces in East Timor. Trained civilians (*rakyat terlatih* or *ratih*) formed part of the civil defence in East Timor. They were employed by the Indonesian Department of Home Affairs, but trained by and seconded to the military. Associated with them were those engaged in 'people's resistance' (*wanra*) and 'public security' (*kamra*). In the mid-1990s, other formations such as the Gadapaksi emerged, playing a significant role in intelligence gathering and intimidating pro-independence supporters. Towards the end of 1998, and coinciding with the increased momentum towards finding a political solution to the East Timor question, several new and more militant paramilitary groups were formed. Together with the earlier groupings, these militias are alleged to have actively targeted pro-independence supporters through intimidation, house searches, assaults, widespread arson, destruction of property, arbitrary detention, ill-treatment, rape and unlawful killing, and to have played the key role in the orgy of violence unleashed on post-Referendum East Timor in 1999.<sup>138</sup>

There is ample evidence of the close relationship between the East Timorese militias and the Indonesian state apparatus, probably sufficient to satisfy the tests of both 'overall control' and 'effective control'. The Special Rapporteurs found that

even applying the strict standards of the International Court of Justice to establish State responsibility for the acts of armed groups in a context of external intervention ... and the exercise of effective control of the group by the state ... there is already evidence that TNI was sufficiently involved in the operational activities of the militia, which for the most part were the direct perpetrators of the [1999] crimes, to incur the responsibility of the Government of Indonesia.<sup>139</sup>

The reality of Indonesia's involvement was supported by the findings of the International Commission of Inquiry<sup>140</sup> and Indonesia's Commission of Inquiry

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136 *Tadic Appeal Judgment*, Case No IT-94-1-A (15 July 1999) [115]–[145].

137 *Tadic Appeal Judgment*, Case No IT-94-1-A (15 July 1999) [141].

138 For more extensive details on the militia and paramilitary groups, see above nn 1, 49.

139 *Special Rapporteurs' Reports*, above n 1, [72].

140 *Report of the International Commission of Inquiry*, above n 1, [137]–[138]; see also James Dunn, *Crimes Against Humanity in East Timor, January to October 1999: Their Nature and Causes* (2001) <<http://www.etan.org/news/2001a/dunn1.htm>> at 24 August 2001.

into Human Rights Violations in East Timor ('KPP HAM'),<sup>141</sup> although the standards which they used do not appear to be legally based. Ultimately, there seems to be sufficient evidence to establish that the East Timorese militias 'belonged' to Indonesia for the purposes of the *Geneva Conventions*.

However, determining that there was a sufficient link between the East Timorese resistance forces and Portugal is more difficult. Historical and political studies of the occupation show that Portugal never exercised 'effective control' or 'overall control' over the FALINTIL, or the political movement for an independent East Timor.<sup>142</sup> Like many guerilla movements, they did not, or did not always, meet the requirements in *Geneva Convention III* for a recognised resistance movement, namely:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognisable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting operations in accordance with the laws and customs of war.<sup>143</sup>

In the event that the provisions of *Additional Protocol I* concerning wars of national liberation have already crystallised into customary international law, they would encompass the events in East Timor, for it applies equally to 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination'<sup>144</sup> — there is no need for a link to a State Party. However, this does not appear to be the state of contemporary international law.

More guidance on what it takes to 'belong' to a state party to an international armed conflict can be derived from the *Tadic Appeal Judgment*:

States have in practice accepted that belligerents may use paramilitary units and other irregulars in the conduct of hostilities only on the condition that those belligerents are prepared to take responsibility for any infringements committed by such forces. In order for irregulars to qualify as lawful combatants, it appears that international rules and State practice therefore require control over them by a

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<sup>141</sup> KPP HAM, *Report on the Investigation of Human Rights Violations in East Timor* (2000) [31], [63]. An Executive Summary of the 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-1312000.htm>> at 24 August 2001 ('*Report of KPP HAM*'). The entire Report has not been officially released.

<sup>142</sup> See generally 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); Carmel Budiardjo and Liem Soei Liong, *The War Against East Timor* (1984).

<sup>143</sup> *Geneva Convention III*, above n 104, art 4(2). This should be read with art 43 of *Additional Protocol I*, under which the armed forces of a party to a conflict include militias and voluntary corps that have been integrated into those forces, provided they are under a command responsible to that party for the conduct of its subordinates and are subject to an internal disciplinary system which, inter alia, enforces compliance with the rules of international law applicable in armed conflict.

<sup>144</sup> *Additional Protocol I*, above n 105, art 1(4).

Party to an international armed conflict and, by the same token, a relationship of dependence and allegiance of these irregulars *vis-à-vis* that Party to the conflict. These then may be regarded as the ingredients of the term ‘belonging to a Party to the conflict’.<sup>145</sup>

According to this test, the FALINTIL did not ‘belong’ to a Party to the conflict.

Under article 4 of *Geneva Convention III*, those who fall into one of its identified categories are combatants; they are lawful participants in an armed conflict. If combatants are captured by the enemy, they become prisoners of war. Within the list of identified groups are members of militias or volunteer corps forming part of the armed forces of a party to a conflict, and other militias or volunteer corps belonging to a party to a conflict who meet the criteria listed above. This reflects the provisions of both *Hague Convention IV* (article 3) and *Additional Protocol I* (article 44(1)). The East Timorese militias were sufficiently linked to Indonesia to be considered part of its armed forces: they were combatants belonging to a High Contracting Party and were entitled to prisoner of war status if captured by the enemy. As already noted, the FALINTIL do not appear to have had such a link with Portugal and thus did not have the legal standing to hold prisoners of war under *Geneva Convention III*.

Article 12 of *Geneva Convention III* makes it clear that captured combatants are not legally in the hands of those individuals or military units that capture them, but of the enemy power.<sup>146</sup> It therefore follows that combatants can only fall into the hands of an adversary and become prisoners of war when their captors are sufficiently linked to a hostile state, for example, its armed forces. Implicit in this is the understanding that the detaining power must have the capacity to treat its prisoners of war in accordance with the provisions of *Geneva Convention III*. It is also clear from the wording and structure of *Geneva Convention III*, that despite the provision for occupied territories, it does not cater for a prolonged occupation where one party is a national liberation movement that has insufficient links to the relevant High Contracting Party, and that movement is holding prisoners belonging to the armed forces of its opponent, the occupying state. This is a problem of application that cannot be remedied by a flexible, nuanced interpretation of the convention in line with the approach being taken at the ICTY.<sup>147</sup>

This leads to the awkward conclusion that although the FALINTIL were engaged in an armed conflict, and clearly ‘combatants’ in the literal sense of the word, they were not ‘combatants’ by applicable legal standards. The tests of international law are strict and it would seem that the FALINTIL did not ‘belong’ to a party to the conflict, but were civilians who took up arms against an alien occupier. Furthermore, the FALINTIL, or its political wing, FRETILIN, are not known to have made a unilateral declaration under article 96(3) of *Additional*

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<sup>145</sup> *Tadic Appeal Judgment*, Case No IT-94-1-A (15 July 1999) [94].

<sup>146</sup> *Geneva Convention III*, above n 104, art 12.

<sup>147</sup> See below nn 153–155 and accompanying text.

*Protocol I* that they would apply the *Geneva Conventions* and *Additional Protocol I*.

5 *Crimes against Humanity — Was There a Widespread or Systematic Attack in East Timor in 1999?*

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.

Apart from the additional element that both the act in issue and the widespread and systematic attack must be directed against the civilian population, this replicates the definition of the offence contained in the *Rome Statute*.

From their investigations into the 1999 violence in East Timor, both the International Commission of Inquiry and KPP HAM were able to identify a clear pattern of a widespread, systematic attacks on the civilian population of East Timor coupled with state involvement — the key elements of crimes against humanity. The International Commission of Inquiry found that

[t]here is also evidence that the Indonesian Army and the civilian authorities in East Timor and some in Jakarta pursued a policy of engaging the militia to influence the outcome of the popular consultation. ... The intimidation, terror, destruction of property, displacement and evacuation of people would not have been possible without the active involvement of the Indonesian army, and the knowledge and approval of the top military command. ... The Commission is of the view that ultimately the Indonesian army was responsible for the intimidation, terror, killings and other acts of violence experienced by the people of East Timor before and after the popular consultation. ... There is no doubt that the evidence

gathered clearly demonstrates a pattern of serious violations of fundamental human rights and humanitarian law in East Timor.<sup>148</sup>

KPP HAM was even more explicit in naming 30 individuals responsible for the atrocities. According to this report:

22. Based on facts, documentation, information and witness testimony, KPP-HAM not only found actions that could be classified as gross human rights violations for which the state is responsible, but also found evidence of crimes that could be classified as crimes of universal jurisdiction. These crimes included systematic and mass murder; extensive destruction, enslavement, forced deportations and displacement and other inhumane acts committed against the civilian population.

...

60. KPP HAM was able to gather facts and evidence that strongly indicates a planned, systematic, wide-scale and gross violation of human rights, mass murders, torture and ill-treatment, disappearances, violence against women and children (including rape and sexual slavery), forced evacuation, property destruction and implementation of a scorched-earth campaign, all of which constitute crimes against humanity.<sup>149</sup>

Helpful as they are, fact-finding missions operate under a different burden of proof than that required by a legal process. It is a far more onerous task to prove to a panel of judges beyond reasonable doubt that international crimes such as crimes against humanity occurred, and that an accused person perpetrated such acts. Hard and reliable evidence is needed. This reality was considered by the Special Rapporteurs, who nevertheless found that

[e]ven applying the strict standards of the International Court of Justice to establish State responsibility for the acts of armed groups in a context of external intervention ... and the exercise of effective control of the group by the State ... there is already evidence that TNI was sufficiently involved in the operational activities of the militia, which for the most part were the direct perpetrators of the crimes, to incur the responsibility of the Government of Indonesia.<sup>150</sup>

## B *The Case of Joao Fernandes as a Crime against Humanity*

To proceed with a crimes against humanity charge, evidence is required that the accused was aware of a widespread or systematic attack on the civilian population, and that the killing took place within the context of this attack. As noted above, a high level of state involvement or acquiescence is a vital element of crimes against humanity. In this context, it must be demonstrated that the

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<sup>148</sup> *Report of the International Commission of Inquiry*, above n 1, [136]–[142].

<sup>149</sup> *Report of KPP HAM*, above n 141, [22], [60].

<sup>150</sup> *Special Rapporteurs' Reports*, above n 1, [72].

attacks on the civilian population were either part of Indonesian governmental policy, sponsored by it, or at least tolerated by it.<sup>151</sup>

As noted above, there is evidence of a widespread or systematic attack on the civilians of East Timor by the militia in 1999, during which Indonesian institutions were not just acquiescent, but actively involved. The attack on the Maliana Police Station was a major incident that took place within the context of this wider attack, and as part of it.

There is no escaping the fact that Joao Fernandes participated in the massacre, which the *Report of the International Commission of Inquiry* showed had the hallmarks of a crime against humanity.<sup>152</sup> He is now convicted of the ‘ordinary’ crime of murder because UNTAET’s investigative and prosecutorial organs were not provided with the means to prove that he participated in a crime against humanity.

### C *The Case of Julio Fernandes as a War Crime*

#### 1 *The Killing of Americo de Jesus Martens as a Grave Breach of the Geneva Conventions*

Americo de Jesus Martens was a militiaman. He fell into the hands of supporters of the FALINTIL, against whom the Indonesian authorities had been in conflict. He was seriously wounded by his captors and eventually killed by a member of the FALINTIL. As such, he was a victim of war, rendered *hors de combat* through captivity and wounds. As discussed above, East Timor’s pro-Jakarta militias had sufficient links to Indonesia to qualify as its combatants under *Geneva Convention III*. As a combatant, he would at first sight appear also to be a prisoner of war, having fallen into the hands of the ‘enemy’. However, following on from the earlier discussion, the correct legal analysis would seem to be that the FALINTIL did not have a sufficient link to a State Party to the *Geneva Conventions* to be bound by the provisions of *Geneva Convention III*. The grave breaches provisions are predicated on the assumption that the holding party, having a sufficient link to a State Party, is in fact able to abide by its provisions on the treatment of prisoners of war. Americo de Jesus Martens was certainly unlawfully killed. It seems that this was not a grave breach of *Geneva Convention III*, but murder in violation of the *Indonesian Penal Code*.

*Geneva Convention IV* is aimed at the protection of civilians in time of armed conflict; it regulates the relationship between occupier and occupied, and aims to control the excesses of the occupier, not civilians who are engaged in resistance. Crimes perpetrated by such civilians would ordinarily be governed by domestic law, in this case, the *Indonesian Penal Code*.

Under article 4 of *Geneva Convention IV*, protected persons are those who find themselves, as a result of conflict or occupation, in the hands of a party to

<sup>151</sup> See *Prosecutor v Kupreskic*, Case No IT-95-16-T (14 January 2000) [552] (‘*Kupreskic*’); *Tadic Trial Judgment*, Case No IT-94-1-T (7 May 1997) [649].

<sup>152</sup> *Report of the International Commission of Inquiry*, above n 1, [88]–[89].

the conflict or in the hands of the occupying power of which they are not nationals. This raises many difficulties, as is illustrated by the *Tadic Trial Judgment*.<sup>153</sup> As a result of that case, the predominant approach is now to take a nuanced interpretation of article 4 that examines the Convention in light of its humanitarian object and purpose. In *Celebici*, the Trial Chamber employed a broad and principled approach to the application of the basic norms of international humanitarian law, norms which are enunciated in the *Geneva Conventions*.<sup>154</sup> That Trial Chamber stressed that those who take no active part in hostilities, and are yet to find themselves engulfed in the horror and violence of war should not be denied the protection of the *Geneva Conventions*. This interpretation has been upheld 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>155</sup> Its applicability does not depend on formal bonds and purely legal relations.

Nevertheless this does not apply to the killing of Americo de Jesus Martens, as the victim was not a civilian. He and other pro-Jakarta militiamen were sufficiently linked to the Indonesian state apparatus to belong to it, whether or not they took an ‘active part in hostilities’. *Geneva Convention IV* is not designed to protect members of the armed forces or associated groups belonging to the occupying power. This remains the case even though article 147, in setting out the grave breaches regime, does not expressly exclude civilians in an occupied territory who commit grave breaches from its ambit.

The above discussion reveals the considerable difficulties involved in arguing this case as a grave breach of international humanitarian law. While both *Geneva Convention III* and *Geneva Convention IV* applied to the situation of East Timor, they did not govern the murder of a captured member of the occupying power’s armed forces by a civilian with inadequate links to a High Contracting Party.

## 2 *The Killing of Americo de Jesus Martens as a Serious Violation of the Laws and Customs of War*

It has already been noted that under s 6.1(b) of *Regulation 2000/15*, the laws and customs of war in an international armed conflict may be prosecuted in East Timor as war crimes, but without resort to the grave breaches regime or

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<sup>153</sup> *Tadic Trial Judgment*, Case No IT-94-1-T (7 May 1997). The majority of the Trial Chamber acquitted Tadic of the charges of grave breaches of the *Geneva Conventions* because it was found that the requirements of art 2 of *Geneva Convention IV* had not been met. In particular it found that both victim and perpetrator had the same nationality and that the Bosnian Serb Army was not sufficiently linked to the Federal Republic of Yugoslavia’s armed forces. The case went on appeal and the dissenting opinion of McDonald J in the Trial Chamber, which took a more flexible and teleological approach to interpreting art 2, was upheld by the Appeals Chamber: see *Tadic Appeal Judgment* Case No IT-94-1-A (15 July 1999).

<sup>154</sup> *Celebici Trial Judgment*, Case No IT-96-21-T (16 November 1998) [275].

<sup>155</sup> *Tadic Appeal Judgment*, Case No IT-94-1-A (15 July 1999) [168], confirmed in *Prosecutor v Delalic*, Case No IT-96-21-A (20 February 2001) [57] (*‘Celebici Appeal Judgment’*).

Common Article 3.<sup>156</sup> With the caveat that the *Rome Statute* was drafted for a radically different institution from the Special Panel of the District Court of Dili, the fact that s 6.1(b) of *Regulation 2000/15* is taken directly from article 8(2)(b) of the *Rome Statute* makes it relevant to examine the elements of crimes that will apply to war crimes when prosecuted under that article at the International Criminal Court.<sup>157</sup> The killing of the captured and wounded Americo de Jesus Martens would most closely fit the categorisation of ‘killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion’.<sup>158</sup> The elements of this offence (‘Elements of Crimes’) are listed as follows:

- 1 The perpetrator killed or injured one or more persons.
- 2 Such person or persons were *hors de combat*.
- 3 The perpetrator was aware of the factual circumstances that established this status.
- 4 The conduct took place in the context of and was associated with an international armed conflict. [There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international. In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international].
- 5 The perpetrator was aware of factual circumstances that established the existence of an armed conflict. [There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms ‘took place in the context of and was associated with’].<sup>159</sup>

It should be stressed that because the specific provision in both the *Rome Statute* and *Regulation 2000/15* speaks of the ‘laws and customs applicable in international armed conflict, within the established framework of international law’,<sup>160</sup> these elements are not exhaustive and recourse may also be had to other provisions of customary international law.

A key requirement for the commission of war crimes is that there must be a nexus between the acts of the accused and the armed conflict.<sup>161</sup> The Appeals

<sup>156</sup> *Regulation 2000/15*, above n 9. Section 6.1(b) regulates international armed conflict and s 6.1(e) regulates non-international armed conflict.

<sup>157</sup> *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>158</sup> *Rome Statute*, above n 10, art 8(2)(b)(vi); *Regulation 2000/15*, above n 9, s 6.1(b)(vi).

<sup>159</sup> *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), art 8(2)(b)(vi). Items in square brackets have been added by the author and are derived from art 8, ‘War Crimes: Introduction’.

<sup>160</sup> *Rome Statute*, above n 10, art 8(2)(b); *Regulation 2000/15*, above n 9, s 6.1(b).

<sup>161</sup> See the jurisprudence of the ICTY, as illustrated by *Celebici Trial Judgment*, Case No IT-96-21-T (16 November 1998) [182]–[185], [193]–[195]; *Prosecutor v. Anto Furundzija*, IT-95-17/1-T (10 December 1998) [60]–[64], [162]; *Prosecutor v. Tihomir Blaskic*, IT-95-14-T (3 March 2000) [65], [69]–[72].

Chamber in the *Tadic Appeal on Jurisdiction* has confirmed that it is sufficient that the alleged crime be 'closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict'.<sup>162</sup> This is in fact preserved by the Elements of Crimes, which require that the conduct took place in the context of, and was associated with, an international armed conflict. Clearly, in this case, even if there were no direct clashes, the killing of a militiaman aligned with the occupying power and suspected of involvement in atrocities by a member of the resistance forces had a direct relation to the conflict.

It is well-established that customary international law affords protection to combatants such as Americo de Jesus Martens who are rendered *hors de combat* through sickness, wounds, captivity or otherwise; the sick, wounded, shipwrecked and captured adversary must be humanely treated and cared for. This is evidenced by the Martens Clause, *Hague Convention IV*, the *Geneva Conventions* (even outside Common Article 3 and the grave breaches regime) and those provisions of *Additional Protocol I* which are now part of customary international law. The customary elements of the grave breaches regime and Common Article 3, which would otherwise provide the bulk of the protection in such a situation, do not apply as part of the laws and customs of war in an international armed conflict under *Regulation 2000/15*. Nevertheless the laws and customs of war outside these provisions make it clear that a captured and wounded adversary is to be humanely treated.<sup>163</sup> The Martens Clause is fundamental in this context, for it was drafted to ensure that some protection was afforded resistance fighters in occupied territories who would otherwise fall outside the ambit of the *Hague Convention IV*.

The stumbling block to a prosecution of this case as a violation of the laws and customs of war turns on the status of Julio Fernandes as a FALINTIL member. The laws and customs of war aim to regulate the conduct of hostilities between combatants, and in the process to extend protection to non-combatants. In East Timor, the adversaries were the armed forces of Indonesia supported by militia groups, and the resistance forces fighting for the liberation of East Timor, FALINTIL. Despite its status as the de jure administering power of East Timor and de jure High Contracting Party to a conflict under the *Geneva Conventions*, Portugal played no role in the armed conflict and did not exercise control, whether 'effective' or 'overall' over FALINTIL.

The victim was a combatant who had been rendered *hors de combat* through captivity and wounds. Julio Fernandes, who killed the victim, was a member of the enemy resistance movement. What is not clear is whether outside Common Article 3 and the grave breaches regime, customary international law governing an international armed conflict requires that adversaries 'belong' to a state in the way that is otherwise necessary. It does not seem that those once controversial provisions of *Additional Protocol I* on the status of national liberation

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<sup>162</sup> *Tadic Appeal on Jurisdiction*, Case No IT-94-1-AR72 (2 October 1995) [70].

<sup>163</sup> See, eg, *Hague Convention IV*, above n 101, art 4.

movements are now sufficiently accepted to form part of customary international law. In addition, the FALINTIL does not seem to have had a sufficient link to a State Party to trigger the applicability of the *Geneva Conventions*. The second and third Elements of Crimes listed above, which only require that the victim be *hors de combat* and that the perpetrator be aware of the factual circumstances that established this status, support a view that the demands of customary international law in this regard are less rigorous. Certainly, article 1 of *Hague Convention IV*, drafted by states with a view to regulating state conduct in international armed conflict rather than the conduct of resistance fighters, defines a lawful combatant in customary international law without requiring a formal or factual link with the state. It simply states that:

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

- 1 To be commanded by a person responsible for his subordinates;
- 2 To have a fixed distinctive emblem recognizable at a distance;
- 3 To carry arms openly;
- 4 To conduct their operations in accordance with the laws and customs of war.<sup>164</sup>

Certain indications suggest this should be a situation covered by the laws and customs of war. First, the struggle for the liberation of East Timor would seem to meet the criteria for an armed conflict. Second, the incident in issue took place within the context of a belligerent occupation with the victim being a combatant rendered *hors de combat* through captivity and wounds, and killed by an adversary. Finally, the killing of Americo de Jesus Martens undoubtedly had a direct connection to the international armed conflict. However, the stumbling block remains the legal status of the FALINTIL. It is also arguable whether, outside Common Article 3 and the grave breaches regime, members of a resistance movement without sufficient links to a state could commit violations of the laws and customs of war.

What is clear from the uncertain legal position that emerges through this discussion is that it was not inappropriate to have charged Julio Fernandes with murder in violation of the *Indonesian Penal Code*. Certainly, a more confident prosecution, wishing to test the issues before the Special Panel, could have charged this as 'killing or wounding a combatant who, having laid down his arms or having no longer a means of defence, has surrendered at discretion', a violation of the laws and customs of war applicable in an international armed conflict. In light of the legal uncertainty, prudence would have cautioned an alternate charge of murder in violation of the *Indonesian Penal Code*.

#### D *The Case of Julio Fernandes as a Crime against Humanity*

While there are many reports of widespread and systematic attacks on the civilian population in East Timor conducted by pro-Jakarta militias with the active involvement and support, or acquiescence of the Indonesian regime, there

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<sup>164</sup> Ibid art 1.

have been no indications that FALINTIL itself was involved in carrying out similar attacks on the civilian population. However, any atrocities committed by the FALINTIL and supporters of independence during this time would have taken place during attacks. It is crucial to note that even if Julio Fernandes knew, as he must have, about the attacks on the civilian population carried out by the pro-Jakarta forces, his killing of Americo de Jesus Martens did not take place 'as part of' that attack.

Furthermore, s 5 of *Regulation 2000/15* makes it clear that crimes against humanity can only be committed against civilians. It has previously been established that Americo de Jesus Martens was not a civilian, but was sufficiently linked to the armed forces of Indonesia to qualify as a combatant. It would therefore not have been possible to charge Julio Fernandes with crimes against humanity under s 5 of *Regulation 2000/15* for murdering Americo de Jesus Martens.

This, however, does not mean that the FALINTIL could not have committed crimes against humanity. If the elements set out in s 5 can be proven, then they could have committed crimes against humanity. There is in fact judicial support for the proposition that non-state entities holding de facto authority over a territory can commit crimes against humanity.<sup>165</sup>

## VI CONCLUSION

The cases examined in this paper demonstrate the dangers of devising an ambitious scheme for international justice without adequate material, human and logistical resources being provided to the bodies responsible for its implementation. Not only are the investigations complex, but the legal issues raised are often complicated and highly technical, requiring expertise in the fields of international humanitarian law and international criminal law.

It is clear that unless the investigative, prosecutorial and judicial organs are provided with sufficient and appropriate resources in order to perform their tasks, the East Timor enterprise, despite its potential, is doomed to be little more than a token gesture, and fundamental rights of due process and fair trial stand to be violated by the process. UNTAET's efforts to prosecute have to date only netted low-level perpetrators. Even then, there is much concern that those persons have been charged in an inadequate manner given the extent of the atrocities. The lack of international cooperation has not helped either — despite signing a memorandum of understanding with UNTAET,<sup>166</sup> Indonesia has not 'transferred' any of the suspects for whom the Special Panel has issued arrest warrants. Serious Crimes investigators have not been able to carry out interviews with key witnesses or conduct substantive investigations in Indonesia.

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<sup>165</sup> *Kupreskic*, Case No IT-95-16-T (14 January 2000) [552].

<sup>166</sup> *Memorandum of Understanding between the Republic of Indonesia and United Nations Transitional Administration in East Timor Regarding Cooperation in Legal, Judicial and Human Rights Related Matters*, 6 April 2000 <<http://www.deplu.go.id/policy/view/timor/jq01-29feb00.htm>> at 24 August 2001 (copy on file with author).

This paper has shown that the legal issues involved in pursuing these cases as international crimes are highly complex and controversial. Despite the public outcry, the use of the *Indonesian Penal Code* to charge Julio Fernandes and Joao Fernandes was not inappropriate in the circumstances. Ultimately, charging is a matter of prosecutorial discretion, and it is to be expected that an under-resourced prosecution opts to use the simplest method available. Proving murder under the *Indonesian Penal Code* is considerably easier than proceeding under the demanding international regime, particularly when grossly inadequate resources limit the options available to the prosecution.

Faced with a society thirsty for accountability after many years of impunity for gross violations of human rights, it is not unreasonable to proceed on the basis that a fundamental underpinning of the rule of law is that there is accountability for criminality, and that the categorisation of the offence is of less importance. The alternatives were to: (1) charge with international crimes and fail to satisfy the burden of proof; (2) charge with domestic crimes and secure a conviction; or (3) release the majority of the Serious Crimes detainees altogether. Large scale releases did in fact occur through much of the second half of 2000, when the Serious Crimes Unit's inability to investigate the charges against many Serious Crimes detainees became apparent.<sup>167</sup>

There is no doubt that in the face of great challenges, a criminal justice system has been created and cases of Serious Crimes are being processed at the District Court of Dili. This creates the appearance of the rule of law being established in East Timor. However, beyond the surface, the system is a deeply troubled one that few regard as bringing justice to the people of East Timor. Its state-of-the-art legal regime for the prosecution of atrocities has created very high expectations in a traumatised society that, faced with many years of impunity for massive violations of human rights and international humanitarian law, has reason to have little faith in the rule of law. Sadly, the weak and under-supported institutions are unable to meet such demands or guarantee the international standards that one would expect from a United Nations enterprise. Public reaction to the judgment of the Special Panel in the Joao Fernandes case was highly negative. Furthermore, many international and East Timorese commentators have been deeply concerned about the performance of the parties and the Special Panel, the standards of justice being set and the quality of the institutions established.<sup>168</sup> The decisions of the East Timor Court of Appeal and

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<sup>167</sup> *Report of the High Commissioner*, above n 14, [13].

<sup>168</sup> See above nn 13–15 and accompanying text for reports on the problems of the Serious Crimes venture. See also ETAN, *East Timor Still Awaits Justice*, above n 1:

UNTAET investigations and prosecutions are fraught with procedural and other problems, including a lack of competence and professionalism. Cultural insensitivity and arrogance on the part of international UNTAET personnel are ubiquitous.

the Special Panel examined in this paper confirm that the credibility of the Serious Crimes process continues to be a major problem, even when cases reach the court.

The much desired ad hoc international tribunal for East Timor is legally and morally justified, and necessary given the feebleness of the efforts to secure accountability in East Timor and Indonesia. An ad hoc tribunal would in itself be an acknowledgment of the scale and seriousness of atrocities committed against the East Timorese during the long and brutal occupation. Its creation would communicate the international community's condemnation of such criminality, and would in theory be a suitable vehicle for addressing criminal justice issues in accordance with international standards. It would undoubtedly send a powerful message to Indonesia, whose armed forces, having been evicted from East Timor, are now enthusiastically engaged in quelling separatist movements in Aceh and Irian Jaya, as well as in tackling civil disorder in the Molucca Islands and elsewhere across the archipelago. The message is that, as in the Balkans and Rwanda, individual perpetrators of atrocities and their military and civilian leaders can and will be held accountable before the bar of international justice. Nevertheless the enthusiasm for an ad hoc international tribunal must be tempered with reality, for at the state level there is little support or political will to establish such an institution for East Timor. And it should not be assumed that an ad hoc international tribunal will necessarily provide the justice that is due to the East Timorese, for there is no guarantee that it will receive the support denied the Serious Crimes venture or that its personnel will be able to do a better job of bringing justice to East Timor.

The stakes are very high in East Timor. A dissatisfied and disappointed society is more likely to turn to vengeance if the courts do not satisfy its need to see justice and accountability for gross violations of fundamental rights. A key question is whether a half-hearted effort at bringing justice will in the long term have a detrimental effect on the aims of peace and reconciliation. UNTAET's experiment in international justice at the District Court of Dili is a troubled enterprise that must be closely monitored. Looking beyond East Timor, it is not just a testing ground for many of the provisions of the *Rome Statute*, but is part of a movement towards 'internationalising' the prosecution and adjudication of international crimes in domestic courts. Similar schemes have been designed for Cambodia, Sierra Leone and Kosovo. Important things are happening in East Timor and lessons must be learnt in order for this and successor enterprises to realise the great potential that undoubtedly exists in internationalised prosecutions.

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See also ETAN, *Memo to UN Commission on Human Rights* (10 March 2001) <<http://www.etan.org/news/2001a/03hrmemo.htm>> at 24 August 2001. The most recent substantive examination of the problems of the criminal justice system, including the Serious Crimes project, was undertaken by Amnesty International, 'East Timor: Justice Past, Present and Future (Report No ASA 57/001/2001, 27 July 2001). See also Suzannah Linton, 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice' *Criminal Law Forum* (forthcoming).

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*Prosecuting Atrocities at the District Court of Dili*