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Assessing the Record of Justice: A Comparison of Mixed International Tribunals versus Domestic Mechanisms for Human Rights Enforcement

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INTRODUCTION

The year 2000 marked a turning point in the development of human rights tribunals. Up to that point, so-called war crimes tribunals had been established by the international community, composed of international judges and located in international fora. The International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were established as auxiliary organs of the United Nations (UN) under Chapter VII authority to deal with a range of crimes committed under international law. The ICTY was established in 1993 as the conflict raged in the former Yugoslavia, whereas the ICTR was established in 1994 in a postconflict environment. Although there are important differences between these tribunals, they were both established as international institutions to try individuals in countries in which the legal system was unable or unwilling to cope with the legacy of human rights violations.

Because these tribunals were authorized under Chapter VII authority, financing was provided as an assessed share of the UN budget. Therefore, these tribunals were financed through required UN general budget contributions. By 2000, the ICTY yearly budget was approximately $90 million and the ICTR budget was $80 million.[1] In the case of the ICTY, this figure represented almost a 300% increase over 5 years (*ICTY Annual Report* 1996). Therefore, the financing of these tribunals became a concern for the international community. This concern coupled with the resistance of some states to relinquish sovereignty over individuals to an international process led to the innovation of mixed or so-called hybrid tribunals and even domestic legal institutions.

Within the span of eight months in 2000, four tribunals had either been established through a memorandum of understanding or had begun functioning. These tribunals included the Serious Crimes Panel for East Timor[2] (SCPET) in March, the Extraordinary Chambers for Cambodia (ECC) in July, the Special Court for

Sierra Leone (SCSL) in August, and the Indonesian Human Rights Court (IHRC) in November. Although these tribunals and courts vary considerably in their jurisdiction, composition, and financing, all are a movement away from an ICTY and ICTR international tribunal model to a mixed model involving both international and domestic components, with the IHRC representing a purely domestic response to human rights violations.

Although there may be compelling international and domestic political reasons for the creation of hybrid and purely domestic human rights tribunals, the question remains whether these alternatives to international tribunals are as effective in providing justice and reconciliation as purely international institutions. In all these cases, tribunals and courts have been established in a conflict or postconflict environment in which the countries have undergone civil war.[3] The question is whether these forms of hybrid and domestic institutions such as the SCPET and the IHRC, which are much less expensive than international tribunals, are as effective as international tribunals in providing reconciliation and in rendering justice either defined in terms of indictments, prosecutions, or sentences.

This article focuses on the SCPET and the IHRC as new tribunal models to redress human rights violations. This article is divided into four main sections. First, we analyze the nature of the conflict in East Timor as well as the types of crimes that were committed. Second, we examine the debate over the creation of a tribunal in East Timor and Indonesia and some of the limitations brought about by the negotiations. Third, we discuss the structure of both tribunals and finally conclude by examining issues of concern and the current status of each tribunal. Although it may not be unexpected that the government in Jakarta has not supported a robust investigation and prosecution of crimes committed in East Timor, it is surprising that the government of East Timor has been much less enthusiastic about the process in Dili as well as the process in Jakarta than the international community.

The SCPET and the IHRC are unique cases in that the same human rights violations are being tried by two countries, using two different legal processes and arriving at different verdicts. Although the cases presented to these tribunals are different, the violations stem from the same period and the same acts of violence. Therefore, these cases allow us to compare the verdicts and sentencing between these tribunals to assess their ability to provide justice and accountability. Ultimately, hybrid and domestic human rights courts exist within a larger domestic political environment in which economic and political concerns can often take priority over providing justice to victims.

THE NATURE OF THE CONFLICT IN EAST TIMOR

For a number of centuries, East Timor had been a colony of Portugal. Throughout this period, East Timor was exploited by the Portuguese first for sandalwood and later as an area for the cultivation of coffee and sugar cane (Pomeroy 2001). Although there were violent conflicts between the Portuguese and the native Timorese, particularly the 1912 Manufahi revolt, relations between the various ethnic

groups, including ethnic Chinese traders, were largely peaceful. Typical of a colonial power, profits from the agricultural products were exported back to Portugal so that by 1940, the capital of Dili had no running water or electricity.

In the 1960s, the Portuguese government attempted to develop the island through the introduction of three successive five-year plans. Also during this time, the UN recognized East Timor as a non–self-governing territory under Portuguese administration; however, Portugal governed East Timor with a combination of direct and indirect rule, managing the population as a whole through the traditional societal power structures. This situation on the island continued until the April 1974 coup in Portugal in which the military withdrew its support of the Caetano regime (Opello 1991). Within a short period of time, the country began a transition from authoritarianism that impacted not only the country's domestic politics but also foreign policies.

This rapid change in the Portuguese political system had a sudden impact on all its colonies. For the first time, the Timorese were given the freedom to form their own parties. After a series of alliances, the two main parties, the Timorese Democratic Union (UDT) and the *Frente Revolucionaria do Timor-Leste Independente* (Fretilin), formed a coalition. In August 1975 the UDT, supported by the Indonesian government, launched a coup in an attempt to seize power from the Portuguese and halt the ascendancy of Fretilin (which by then had become the most popular party) led by Xanana Gusmão.[4] The coup failed, and the UDT forces fled to West Timor, controlled by the Indonesians. Very quickly the Portuguese left East Timor, leaving Fretilin in *de facto* control of the island. In the power vacuum, Fretilin declared East Timor independent; however, the party did not have the economic policies, military resources, or political experience to administer the island during a period of ever increasing encroachment by the Indonesian military.

In December 1975, the Indonesian military launched a full-scale invasion of East Timor under the pretext of President Suharto's "New Order" administration that was designed to prevent islands in the eastern archipelago from declaring independence. The UN did not recognize the annexation of East Timor by Indonesia; however, due to Cold War politics, the Security Council failed to take any action (Jolliffe 1978). At this time, the United States was much more concerned with containing communism in South East Asia and assisting its key strategic ally, Indonesia, in combating communist insurgency. East Timor became the 27th province of Indonesia in July 1976.

Unlike the Portuguese, the Indonesians imposed direct and often brutal rule. During the early years of occupation, approximately 60,000 individuals were killed and many more were forced into resettlement villages. A small guerrilla army, the National Liberation Armed Forces of East Timor or Falintil, was formed by Xanana Gusmão to fight for independence. Coverage of events in East Timor, however, was extremely limited because the Indonesian government banned all media outlets. However, two events in the 1990s galvanized the demand for Timorese independence. In November 1991, thousands of individuals marched toward the Santa Cruz cemetery to mourn the death of Sebastião Gomes (a student protestor who

was killed by the military). As the Timorese entered the cemetery, the Indonesian military opened fire and killed more than 200. The "Santa Cruz Massacre" marked a turning point in the occupation of East Timor. For the first time, the images of the killings were made public.[5] The international public outcry over the treatment of the population and the bravery of the Timorese people and leadership led to Bishop Carlos Ximenes Belo and José Ramos-Horta being awarded the Nobel Peace Prize in 1996.

By 1998, there were increasing international calls for the removal of the Indonesian military from East Timor as well as the right of the indigenous people to self-determination. The Suharto regime resisted any attempt to provide autonomy let along outright independence to East Timor. However, the Asian financial crisis quickly undermined the public's confidence in the Suharto regime and led to widespread demands in Indonesia for a change in government. With the Cold War over, the US position on Suharto changed, and without domestic or international support, he was forced to resign. He was replaced by B. J. Habibie, who quickly offered a reform program that would allow the Timorese to decide between autonomy within Indonesia or outright independence.[6] Just as in 1974, the Timorese were quickly confronted with the prospect of self-government. Although many Timorese welcomed this possibility, there was a vocal minority that sided with the Indonesian government and did not want independence (Jones 2001). The military used this fact so that unlike the Portuguese, the Indonesians did not initially withdraw from East Timor.

Under the auspices of the UN, a referendum was scheduled for 30 August 1999 to decide whether East Timor would become autonomous or independent. During the pre-referendum period, armed groups representing both sides engaged in attacks.[7] The Indonesian military was not a passive bystander but actively assisted the pro-Indonesian militia.[8] In fact, Smith argues that the agreement between the UN and Indonesia which established the referendum was flawed because "it gave in to Jakarta's refusal to allow UN 'blue beret' force, and left security in Indonesian hands" (2004: 148). In the August referendum, 78.5 percent voted against autonomy (turnout was just under 99 percent). During the violence in East Timor, UN personnel withdrew to their compound in Dili and eventually evacuated (along with some Timorese civilians).

Shortly after the referendum, the violence in and around Dili dramatically increased to the point that the Security Council in September authorized an international force (INTERFET) to restore order (Linton 2001). Approximately 2,000 individuals were killed whereas 250,000 individuals fled to West Timor. During this period, approximately 70 percent of East Timor's buildings and infrastructure were destroyed (Smith 2004). In October 1999, the Indonesian parliament recognized the result of the referendum, and the Security Council passed Resolution 1272, which established the UN Transitional Administration in East Timor (UNTAET), which took over from the INTERFET the responsibility of administering East Timor during its transition to independence. At that point, even though the East Timorese had voted for independence, the new state was not ready to assume total political

control, so the UNTAET assumed many government powers until 2002.[9] Although the status of East Timor had been determined, it was unclear how individuals responsible for the human rights violations perpetrated during the referendum process would be brought to justice, including East Timorese and the Indonesian Military (TNI).

The culpability of Indonesian military officers must be placed within the larger context of Indonesian civil-military relations. Suharto seized power in 1965 while a general in the Indonesian military. Not surprisingly, Suharto's regime politicized the military. Several key cabinet posts were assigned to the military (including historically the post of attorney general and minister of defense) as well as a number of legislative seats allotted to the military and police forces. Suharto's party, Golkar, was composed of senior military officers and therefore, like any authoritarian regime, military support was paramount to maintaining political power. Although Suharto's immediate successor, Habibie, instituted reforms designed to reduce the influence of the military, these reforms were piecemeal and did not change the fundamental power of the military.[10]

NEGOTIATING THE SPECIAL CRIMES PANEL FOR EAST TIMOR

After the violence in East Timor, there was an outcry by the international community to bring to justice those responsible for human rights violations. The UN Commission on Human Rights (UNCHR) met at a special session in September 1999 and called upon the Secretary-General to establish an International Commission of Inquiry (ICI) and discuss the possibility of an international tribunal. The ICI in collaboration with three *rapporteurs* compiled information on possible violations of human rights and acts that may have constituted breaches of international humanitarian law committed in East Timor after January 1999.[11] The ICI visited East Timor and Indonesia from November to December and delivered a report to the Secretary-General in January 2000. Even though the Indonesian government denied the Commission access to military files, the ICI report concluded that the incidents of widespread and systematic attacks on the civilian population supported charges of crimes against humanity.[12] The three *rapporteurs* determined that there was enough evidence to assign responsibility to the Indonesian government and called for action by the government.[13] However, based on the investigation, it was also recommended that an international tribunal be set up to try those involved in the 1999 violence (Rudolph 2001).

For economic and political reasons, the Security Council did not respond to the report's call to create of an international tribunal based on an ICTY and ICTR model. Instead, the UNTAET took the lead in designing the structure and the procedures that would guide the work of what would become a hybrid tribunal to prosecute those responsible for the violence (Cohen 2002).[14] As part of the effort to begin the process of handing over power to the Timorese, the UNTAET established the National Consultative Council (NCC), a political body consisting of 11 Timorese and 4

UNTAET members to oversee the decision-making process during the transition period. Decisions related to the creation of the hybrid tribunal were to involve the NCC (and therefore ostensibly Timorese). However, the UNTAET has been criticized for not carrying out enough consultations related to the establishment of the tribunal, which provoked the anger of judges, prosecutors, and public defenders in the Dili District Court (Linton 2002). In the end, there was very little consultation and negotiation between the Timorese and the UNTAET. Most of the negotiation concerning the establishment of the SCPET occurred either within the Security Council or within the UNTAET. Whereas, the SCPET appeared to be the appropriate mechanism to address the violence in East Timor, there was little discussion with the Timorese as to the structure of the tribunal.

NEGOTIATING THE INDONESIAN HUMAN RIGHTS COURT

As previously mentioned in the wake of the post-referendum violence, a special session of the UNCHR was convened in Geneva to discuss the possibility of the creation of international tribunal similar to the ICTY and the ICTR. Although the UNCHR also favored some action by the Indonesian government, the government was reluctant to support the idea of the establishment of an international tribunal, arguing that it would violate its sovereignty because the crimes were committed on what was still part of Indonesian soil. Moreover, the government maintained that the Indonesian legal system was capable of conducting trials and that national remedies had to be explored before an international process could even be considered (Rae 2003). With the assistance of Asian bloc countries, Indonesia was able to convince the members of the Commission that the country was capable of prosecuting those accused of the pre- and post-referendum violence (ICG 2002).

From the beginning, the creation of the IHRC was stymied by the government and especially the attorney general's office. In September 1999, as the UNHRC discussed the situation in East Timor, the National Human Rights Commission (KOMAS HAM) appointed a Commission of Inquiry (KPP HAM) to investigate human rights violations in East Timor. The mandate of the KPP HAM was to gather evidence of human rights abuses since January 1999, investigate whether the state and national agencies were responsible for crimes, and compile evidence to be used by a future human rights court (Cohen 2003). In January 2000 as the ICI report was presented to the UN, the KPP HAM produced its own detailed report that recommended that more than 100 individuals be further investigated by the attorney general, including the four highest ranking members of the military. The report also listed 13 primary cases in which substantial evidence indicated a close relationship between Indonesian military leaders and Timorese militias.

Attorney General Marzuki Darusman argued that he could not proceed with prosecutions because existing Indonesian law contained no provisions for crimes against humanity (one of the important charges made in the report and by the ICI). Instead, he appointed an investigative team that took most of the year to examine the KPP HAM report. Rather than investigate all the evidence cited by the report,

Attorney General Darusman announced that his office was giving priority to the investigation of only four of the primary cases listed in the report and significantly excluding from investigation the highest ranking military officers. His decision had another important impact as the investigation into only four cases "immediately reduced the prospects for any systematic examination of the more general pattern of violence during 1999. In particular, it meant that there would be little investigation into the role of state policy that is critical to establishing a case for crimes against humanity, as opposed to an ordinary criminal case of murder" (ICG 2002: 4).

In November 2000, the Indonesian legislature passed Law 26, which incorporated the Rome Statute of the International Criminal Court (ICC) to provide a legal basis for trying human rights violations in a domestic process. The legislation also allowed the president to appoint by decree an *ad-hoc* human rights court (based on a request of the legislature with appointment by the Supreme Court). In March 2001, President Abdurrahman Wahid issued a presidential decree (Decision 53) that authorized the creation of an *ad-hoc* human rights court with jurisdiction over human rights violations committed only *after* the August referendum. In addition, the decree listed general human rights violations but did not list specific crimes, including war crimes, genocide, or crimes against humanity.[15] In August 2001, President Megawati Sukarnoputri signed Decision 96, which extended the mandate of the *ad-hoc* court to April 1999. However, it was left to new Attorney General, M. A. Rahman, to draft the indictments based on the decree.

The indictments were issued by the Ministry of Justice, based on a narrow reading of Decision 96. Moreover, the presidential decree was considered by many human rights groups to be far too general and not incorporating specific elements of human rights violations. For example, the decree mandated an investigation of "gross human rights violations" without any specific mention of criminal elements, including crimes against humanity, genocide, or war crimes.[16] Much of the KPP HAM report never found its way into the decree, and as a consequence, several important issues and cases that the KPP HAM noted in its report were unable to be investigated because of the restrictive and general nature of the decree and ultimately the law that established the IHRC's jurisdiction.

Why did the international community opt for the establishment of the SCPET and the IHRC rather than an international tribunal process? As noted above, donor fatigue could be one reason; however, the situation in Indonesia was distinct from the former Yugoslavia and Rwanda. Although the Asian financial crisis brought political turmoil and furthered the cause of separatism in provinces such as Aceh, Indonesia had escaped the ravages of civil war and was able to resist calls for an international process. In other words, Indonesia was in a much better position to assert its sovereignty than the former Yugoslavia or Rwanda. Second, as the establishment of the SCSL and the ECC demonstrate, the international community was weary of creating another purely international tribunal (for largely financial reasons). Finally, Asian countries have generally been much less supportive of international tribunals and differed judicial matters to domestic legal processes. However, it is highly questionable whether the members of the UNHRC were

swayed by Indonesia's position that it was prepared to hold the military accountable for human rights violations or whether donor fatigue was the major reason an international process was not mandated.

THE STRUCTURE AND JURISDICTION OF THE SCPET

This hybrid tribunal was established through UNTAET Regulations 2000/11 (6 March 2000) and 2000/15 (6 June 2000), which contained the enabling legislation for investigation, prosecution, and sentencing. The organization and jurisdiction of the SCPET was outlined in Regulation 2000/15. The SCPET was given exclusive jurisdiction over genocide, war crimes, and crimes against humanity as well as murder, sexual offenses, and torture as defined by the Indonesian penal code (at this time, East Timor was using the inherited penal code). The law for the SCPET trials was derived from the ICC's Rome Statute, which provided one of the first tests of the various definitions contained within the statute.

As part of the structure of the legal process in East Timor, a Serious Crimes Unit (SCU) was established under regulation 2000/16 (6 June 2000). The SCU is responsible for conducting investigations and preparing indictments to bring to justice those responsible for crimes against humanity and other serious crimes. The SCU is divided into four regional teams comprised of UN prosecutors, legal officers, investigators, and trainee staff with separate forensic investigation, evidence management, and witness support teams. The regional investigation and prosecution teams cover all thirteen districts of East Timor. Since the independence of East Timor in 2002, the SCU has worked under the legal authority of the Timorese prosecutor-general. The SCU has seventy-four staff members, including thirty-four UN international civilian staff comprised of prosecutors, investigators, forensic specialists, and translators as well as six UN police technical assistants. The mandate of the SCU ended in May 2005. All investigations were completed on 30 November 2004, and therefore no more indictments were filed. The SCU has handed over procedures to local authorities.

Even though there had been numerous incidents of violence since Indonesia annexed East Timor in 1975, the SCPET and the SCU temporal authority is limited to the period of 1 January 1999 through 25 October 1999. This has brought about claims that "narrowing the time frame suppressed or ignored a broader truth" (Rae 2003: 173). The UN's budget provided for two chambers, each composed of two international judges and one Timorese judge. They operate as part of the Dili court system. Therefore, the SCPET has been established within the Timorese legal system. The Court of Appeal is also composed of two international judges and one Timorese. These judges are appointed by the Timorese Supreme Council of the Judiciary (de Bertodano 2003). The SCPET is scheduled to cease operations on 20 May 2005.

Ten priority cases were identified as part of the work of the SCPET and the SCU. These included the Liquiça church attack, the Suai church massacre, the September attack, on the compound of Bishop Belo, the Maliana police station

attack, and the TNI 745 Battalion killings. Within the ten priority cases, a total of 202 accused persons was charged with crimes against humanity (183 remain at large in Indonesia). A national indictment issued on 24 February 2003 charged the former Indonesian minister of defense and commander of the armed forces, six high-ranking Indonesian military commanders, and the former governor of East Timor with crimes against humanity for murder, deportation, and persecution during 1999.

THE STRUCTURE AND JURISDICTION OF THE IHRC

Under Law 26, the IHRC was created as a special chamber within the Indonesian domestic legal system. The Supreme Court established a Special Committee that was in charge of selecting candidates to be proposed to the legislature as judges for the IHRC. The candidates that were selected were a combination of career and noncareer (*ad-hoc*) judges. Some of the drafters of the law intended that noncareer judges come from the ranks of human rights attorneys with experience in this specific issue. This was seen as vital as no career judges had experience trying human rights cases. However, "instead, an obscure regulation was unearthed, requiring that any non-career judges serving in an Indonesian court be drawn from university law faculties" (ICG 2002: 4). These academics not only were often not as versed in human rights law, they also had no training as a judge. Also, the academics had to be nominated by their respective universities, and often the most qualified individual from a law faculty was not nominated by the university rector.[17] However, Cohen (2003) argues that some of these *ad-hoc* judges did have training or experience in international human rights law and therefore played an important role in the most prominent convictions of the IHRC. On the other hand, others have argued that the lack of actual judicial administration and experience as a judge made the *ad-hoc* judges "more afraid of the officers in the gallery."[18] Because many of the judges were inexperienced in the courtroom as well as inexperienced in international human rights law, the UN provided materials and training seminars, including a visit to the ICTY.[19]

Approximately thirty-two candidates were put forward to the legislature. In an open session, the legislature debated the list of proposed candidates. The chief judge of the IHRC was authorized to appoint a five-judge panel drawn from a combination of twelve career and thirteen noncareer or *ad-hoc* judges. Each panel consisted of three *ad-hoc* and two career judges with a presiding career judge (Cohen 2003). The appeals process included two panels of three judges.[20] The Central Jakarta District Court served as the home of the IHRC within the Indonesian legal system.

The temporal jurisdiction allowed the prosecutor to bring indictments only in cases occurring between April and September 1999. Article 5 of Law 26 provides that the IHRC has the authority to hear and rule on cases of gross violations of human rights perpetrated by an Indonesian citizen outside the territorial boundaries Indonesia. Article 7 of the law states that the definitions of the crime of genocide and of crimes against humanity are in accordance with the ICC's Rome Statute. Law

26 lays out a very rigid and relatively quick process for the disposing of cases. The law states that the investigator has thirty days to complete the preliminary inquiry and a total of 240 days for the investigation. The law also specified a time limit of 180 days for cases of gross human rights violations to be heard and ruled on by the IHRC and for appeals in both the Appeals Court and Supreme Court to be heard and ruled on within a period of ninety days. An Amnesty International report argued that "such time limits are useful as benchmarks, but they should not be mandatory" (*AI* 2001: 6). The law also established sentencing guidelines in which the minimum sentence that could be imposed was ten years. This created a problem for some of the judges, as they wanted sentencing discretion to impose terms of less than ten years.[21]

ISSUES OF CONCERN AND THE CURRENT STATUS OF THE SCPET

From the beginning, observers have identified several shortcomings with the Timorese tribunal. Before the end of its mandate, the SCU indicted a total of 391 individuals for crimes against humanity committed during and after the 1999 referendum; however, 290 of these individuals remain at large in Indonesia with little chance of being prosecuted. The Indonesian government has refused to act on several arrest warrants issued for Indonesian and Timorese citizens. These arrest warrants include thirty-seven Indonesian TNI military commanders and officers, four Indonesian chiefs of police, sixty Timorese TNI officers and soldiers, the former governor of East Timor, and five former district administrators. Former Minister of Defense General Wiranto (at one time a leading presidential candidate) is among the senior officers enjoying apparent immunity from prosecution. The Timorese government has been criticized for initially endorsing and then disavowing the controversial indictment against General Wiranto.

By early 2005, the SCPET had handed down seventy-six convictions, two acquittals, and two dismissals. Nine indictments involving twenty defendants and one appeal are still pending. However, most of those facing trials are lower level Timorese militia members. The judiciary's shortage of personnel, as well as bureaucratic and managerial inefficiency, has contributed to the inability to provide for expeditious trials. From the beginning, UNTAET confronted a legal vacuum when it arrived in East Timor. Those with legal training working under the Indonesian government had fled after the violence fearing retaliation (Katzenstein 2003). None of the Timorese judges had any courtroom experience when they were appointed in 1999, and the fledgling judicial process has been plagued by delays. In addition, most trial judges and prosecutors were trained only in Indonesian law and received their legal education in the Indonesian language, whereas most appellate judges and many senior government officials were trained elsewhere and spoke little or no Indonesian. These problems have continued to plague the tribunal as all twenty-two Timorese judges, some of whom have been presiding over prosecutions for crimes against humanity in the SCPET, failed their probationary evaluation in February

2005 and are no longer qualified to hear cases.[22] There were only four international judges hearing cases in the two chambers throughout the court system.

Laws enacted by the Timorese parliament are intended to gradually replace the Indonesian penal code and UNTAET regulations. The problem is that the new laws are published only in Portuguese, and many litigants, witnesses, and criminal defendants are unable to read the laws. In addition, as of 1 October 2004, a decision by the Superior Council of Magistrates required that trials be conducted solely in Portuguese and Tetum. The Judicial System Monitoring Program (a Timorese-coordinated NGO) has issued several reports regarding the functioning of the tribunals, questioning the impartiality of the SCPET, the competence of the defense counsel, the lack of transparency and information about the proceedings, as well as the delays and interruptions in the trials. The various defense counsels have been criticized on several fronts. For some, the high conviction rates indicate that the defense might not be zealously advocating for defendants. In addition, whereas plea bargaining has been used to expedite the legal process, there are indications that defendants do not understand that this entails an admission of guilt. Public information about the trials and the process seem lacking, and travel by the judges to the different locations of the court has meant that cases have not been heard in a timely manner, creating uncertainty for both defendants and witnesses.

ISSUES OF CONCERN AND THE CURRENT STATUS OF THE IHRC

Aside from the criticisms of the IHRC in terms of its temporal and criminal jurisdiction, the major criticisms of the IHRC process have been in regards to a lack of convictions, unprofessional conduct of the judiciary and the prosecutorial teams, and a flawed appeals process. For example, recently the IHRC Appeals Court overturned the conviction of four high-ranking Indonesian security officials and cut in half the 10-year sentence of Eurico Guterres, Vice Commander of the *Pasukan Pejuang Integrasi* (Pro-Integration Troop) and former leader of the Aitarak militia in East Timor.[23] To date, only two of the eighteen who were originally tried by the ICHR will serve prison time.[24]

In our interviews with NGO leaders and members of the judiciary, they argued that the problems with the IHRC process were not specific to this institution or human rights issues in general but involved more systemic problems associated with the Indonesian judiciary and the need to reform civil-military relations. Because the attorney general had historically been a member of the military, it was difficult for the Department of Justice to conduct trials of military personnel. The NGOs hoped that the acquittals and reversals would lead to international involvement in further human rights trials. They believed that there needed to be an international judicial procedure put into place. They also believed that a UN-appointed panel of experts would assist in creating a record of past abuses that could be the basis of further international action. The problem, however, is that Indonesian society is very much against an international process. Polling data indicate that seventy percent of Indonesians are opposed to an international process to try the military.[25]

One of the criticisms that has been made of the process involves the lack of professionalism of the judges. The judges that we spoke to were very candid about their lack of expertise in international human rights law. In this regard, they explained that the additional training received via the UN (including a visit to The Hague) was very important in their professionalization. The problem was that most of the career judges had no training in international law and that the *ad-hoc* judges, whereas sometimes academic experts in international law, had never presided in a courtroom The judges explained that as a judge, they relied on the prosecutors to provide sound indictments and indicated that because of political interference, prosecutors did not present strong cases. Under the constitution, the prosecutors are part of the executive branch, and for approximately thirty-two years, the attorney general was drawn from the military.[26] The judges indicated that although there was pressure from the military during the actual court proceedings, they did not encounter any political interference during their deliberations. When asked about the reversals, the judges indicated that they disagreed with many of the decisions but that it was ultimately up to the appeals judges to decide matters.

Most of the criticisms of the process have been leveled at the incompetence of the prosecutors and their lack of concern in acquiring convictions. Several of the NGOs we spoke to made this criticism; however, they also pointed out that some of the prosecutors worked very hard under difficult circumstances. One of the concerns in establishing the IHRC was witness protection. Given that testimony was crucial to establishing a chain of events and that witnesses would be providing testimony against military officers as well as high-ranking civilians, there was a concern for witness safety. The law was largely silent on the issue of witness protection and the use of testimony. The law relied on Indonesian domestic law to establish the code of conduct related to evidence.[27] Indonesian law does not allow video testimony, and thus there was the problem of bringing witnesses to Jakarta who were often scared and reluctant to leave East Timor. This was especially a concern given that seventy-five percent of the court gallery consisted of the military, which often brought guns and knives to the courtroom.

CONCLUSIONS

The request that the SCU terminate its indictments in November 2004 led to increased Timorese public support for an international tribunal or some other mechanism to bring to justice those indictees who remained at large in Indonesia. At the same time, the government in Dili has indicated that it does not support an international process and wants to further its relations with Indonesia. For its part, the international community is not convinced that the hybrid process in East Timor and especially the domestic process in Indonesia have resulted in justice for victims. Therefore, the UN recently approved the creation of a Commission of Experts to evaluate the SCPET and the IHRC and to recommend further steps for achieving accountability.

Whatever standard used to assess the Jakarta and the Dili trials, it is clear that they have failed to meet the UN demands made in Security Council Resolution 1272 that "all those responsible for such violence be brought to justice." The leaders of Indonesia and East Timor, Susilo Bambang Yudhoyono and Xanana Gusmão, agreed in January 2005 to work toward a bilateral Truth and Friendship Commission to provide justice without a legal mechanism. The leader of Dili's Catholic Church, Bishop Alberto Ricardo da Silva, has stated his opposition to the Commission on the grounds that it leaves the quest for justice behind. However, East Timorese officials, such as Minister of Foreign Affairs Jose Ramos Horta, have stated that independence itself was enough justice. Minister Horta has stated that the government of East Timor is moving forward with the Commission even in the absence of a social consensus.

The conflicts in 1999 and anti-independence militia activity in 2000 and 2001 resulted in over 250,000 Timorese fleeing their homes. As a sign of the relative success of the new government by 2003, approximately 225,000 returned home. However, the end of the trials in East Timor means that the most high-profile person to be indicted, General Wiranto, will never be prosecuted in East Timor.

If the IHRC process had led to prosecutions and sentences for those that were not extradited to Dili, then many might believe that justice had been rendered. Instead, the IHRC has been viewed by the Security Council, states, and many Indonesian NGOs as a failure. However, the IHRC must be placed within the broader political environment in Indonesia. The country is in a transition to democracy and rule of law after three decades of authoritarian rule. The problems of the IHRC are not unique but represent systemic problems of the Indonesian judiciary. As one individual from an Indonesian NGO argued, "there can be no reconciliation without Indonesians going on trial."[28] The irony is that while the IHRC and the SCU were investigating the same crimes committed in East Timor, there was virtually no coordination between the organizations. In April 2000, a memorandum of understanding was signed between the Indonesian attorney general's office and the UNTAET to facilitate cooperation related to human rights matters. Although the UNTAET assisted the prosecution in providing witness testimony, the attorney general's office did not allow UNTAET to interview witness in Indonesia. Perhaps the lack of coordination is not surprising given the lack of political will not only in Jakarta but also Dili. This is a problem because many NGOs believed that the process in Dili needed to actually be strengthened to counteract the flawed process in Indonesia.[29]

Would an international process have resulted in the prosecution of those most responsible for human rights violations in East Timor as well as ensured that the appeals process would not be subverted? Based on the history of the ICTY and the ICTR, the answer most likely would be yes. Both international tribunals have proven to be successful in bringing to justice those most responsible for war crimes and crimes against humanity (although the failure to apprehend Radovan Karadzic stands as a notable exception). However, in the case of the ICTY, most of the high-level apprehensions took almost a decade to secure. Moreover, although the ICTY

has brought perpetrators to justice, it has largely failed to provide reconciliation and is viewed in Serbia and Montenegro and among Serbs in Bosnia with a great deal of distrust. If an international tribunal had been established for East Timor, the situation would resemble the complexity and difficulties of the ICTY rather than the ICTR. Ultimately, prosecuting high-level officials for human rights violations requires the cooperation of nation-states, and it is difficult to imagine a scenario in which the Indonesian government would have either extradited military officials or allowed an international process to occur within the country. So if one is to evaluate these tribunals based on the ability to deliver justice to victims, than the SCPET and the IHRC are inferior to international tribunals.

However, in some important ways both tribunals have served a broader purpose. The SCPET and the SCU have provided judicial training for a legal profession just emerging in East Timor, whereas the IHRC has assisted in codifying into Indonesian law important human rights principles. Moreover, the failures of both tribunals have focused important scrutiny on the legal processes in these countries as well as assisted NGOs in their calls for legal reforms. These tribunals and all legal processes are embedded within the larger society. The IHRC is a reflection of the limitations of justice in a postauthoritarian society, whereas the problems of the SCPET reflect the pains of nation- and state-building in East Timor.

On the broader issue of reconciliation and the establishment of a historical record of abuses, perhaps no tribunal model is totally effective. The ICTY has failed to serve as a vehicle for reconciliation among ethnic groups in the former Yugoslavia, and indeed some might argue that it has perpetuated ethnic resentment. At the same time, the purely domestic IHRC has failed to provide a clear historical record of the abuses in East Timor. Perhaps this is why the call for a truth and reconciliation commission (TRC) is important. As demonstrated in TRCs ranging from South Africa to Sierra Leone, a TRC can provide a necessary forum for addressing human rights violations that in some cases may be superior to a legal process. Although the governments of Indonesia and East Timor may want to put the past behind them and focus on economic cooperation, these states can only move forward when an agreed account of the history of human rights violations in East Timor is established. Unfortunately, for many of the victims in East Timor, the greatest justice that can be *individually* rendered is a broader *social* consensus in both countries regarding crimes and culpability. Although far from perfect, a TRC that promotes an account and examination of the events in 1999 would be far preferable to the *status quo*.

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NOTES

1. These figures do not include voluntary state contributions either in cash or in the form of services, personnel, or supplies. As of July 2000, the ICTY Voluntary Fund had received approximately $30 million in state contributions (*ICTY Annual Report* 2000).
2. Although the official name of the territory of East Timor changed in November 2002 to Timor Leste, we use the name East Timor throughout the article for purposes of consistency.
3. In the case of Cambodia, the civil war had concluded decades before the creation of the ECC, whereas in the case of Indonesia and East Timor, the court and tribunal have jurisdiction over crimes committed technically while East Timor was still a province of Indonesia, and thus the human rights violations can be characterized as intrastate and not interstate.
4. Fretilin and the UDT represented different social classes in Timor. Fretilin was a quasi-Marxist party inspired by independence movements in Africa, whereas the UDT represented landowners.
5. A British television crew happened to be in East Timor when the massacre occurred.
6. Although many politicians were willing to let the Timorese decide their own fate, most senior military officials denounced the idea of independence and some even rejected the idea of autonomy (Huxley 2002).
7. The violence occurred while the UN Assistance Mission for East Timor (UNAMET) organized the referendum.
8. The Indonesian army and the militia groups were assisted by West Timorese and Indonesian migrants.
9. East Timor became a fully independent nation-state in May 2002 after approximately two and a half years under the authority of UNTAET. Although the UNTAET's mandate ended with independence, a successor organization, the UN Mission of Support in East Timor (UNMISET), was immediately established.
10. The reforms instituted by President Habibie included the reduction in legislative seats assigned to the military from seventy-five to thirty-eight, the distancing of Golkar from the military, and the separation of the police force, Polri, from the military. Huxley (2002) argues that these reforms proved to be ineffective because of the all-pervasive structure of the armed forces, lack of political will to change civil-military relations, and the fact that several cabinet ministers, even under President Sukarnoputri, were former generals.
11. An investigation in Indonesia came to a similar conclusion.
12. The UNHRC also called for collaboration between the IHRC and the Indonesian National Commission on Human Rights (KOMAS HAM), which conducted its own investigation through a Commission of Inquiry (KPP HAM).
13. This provided the Indonesian government with the opportunity to initiate its own process.
14. UNTAET Resolution 2000/11 (6 March 2000) states that the creation of the SCPET does not preclude the establishment of an international tribunal.
15. Ifdhal Kasim, Executive Director of the Institute for Policy Research and Advocacy (ELSAM), interview with the authors, 23 November 2004.
16. Later, the crime of genocide and crimes against humanity were included in the subject matter jurisdiction. Significantly, war crimes were never included in the IHRC's jurisdiction.
17. Ifdhal Kasim, Executive Director of the Institute for Policy Research and Advocacy (ELSAM), interview with the authors, 23 November 2004.
18. Judge Roki Panjaitan, Former IHRC Judge, interview with the authors, Jakarta, 26 November 2004.
19. *Ibid.*
20. *Ibid.*
21. This became a basis for appeal. In one case, the five-judge panel sentenced a defendant to three years; however, because of the minimum sentencing guidelines, the defendant appealed the conviction arguing that an illegal sentence had been imposed (ironically, a sentence far less than the minimum). At the time of this writing, the case was still on appeal.
22. Six judges have been reappointed to finish their scheduled work on the SCPET, the Court of Appeal, and the National Commission for Elections.
23. The reduction in the minimum sentence of Guterres established his basis for appeal to the Supreme Court.

24. Those that have been found guilty at the trial level have been almost exclusively ethnic Timorese, not ethnic Indonesians.
25. Henry Simarmata, Indonesian Legal Aid and Human Rights Association, interview with the authors, Jakarta, 17 November 2004.
26. Ifdhal Kasim, Executive Director of the Institute for Policy Research and Advocacy (ELSAM), interview with the authors, 23 November 2004.
27. *Ibid.*
28. Henry Simarmata, Indonesian Legal Aid and Human Rights Association, interview with the authors, Jakarta, 17 November 2004.
29. *Ibid.*

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