

INDONESIA: IMPLICATIONS OF THE TIMOR TRIALS

OVERVIEW

As East Timor moves toward independence on 20 May 2002, trials are proceeding in Jakarta against Indonesian army and police officers and civilian officials accused of serious human rights violations in connection with the 1999 violence there. Within Indonesia, the trials have generated little interest, nothing approaching the attention given to the prosecution of Tommy Soeharto, the former president's son. Abroad, the delays in getting the trials underway, the high-ranking position of some defendants, the inexperience of the judges in trying human rights crimes, and the government's pointed lack of interest in addressing military impunity have raised doubts that any of the accused will be convicted.

The problem is not so much with the way the cases are being judicially conducted. Inexperienced as they are, the judges have thus far exceeded expectations, rejecting military arguments and demonstrating a willingness to use international human rights law in a way that defies a common perception of them as incompetents or political hacks. Rather the problem, as revealed in court documents obtained by ICG, is with the limited mandate of the ad hoc court and the very weak way in which the indictments have been drawn up and presented by the prosecution. In particular:

- ❑ the events of 1999 are portrayed as resulting from civil conflict between two violent East Timorese factions in which Indonesian security forces were essentially bystanders;
- ❑ there is a failure to address the way in which the military's creation and use of militia forces contributed to human rights violations: the military role is presented as failing to prevent violence rather than actively orchestrating it; and
- ❑ though purporting to identify crimes against humanity, the indictments as drafted suggest

little more than criminal negligence on the part of the accused.

In these circumstances, regardless of whether the defendants are ultimately convicted, these trials may well produce the following consequences in Indonesia:

- ❑ the near-universal image within Indonesia of the conflict as a civil war between two equally matched factions of East Timorese will be reinforced. With the prosecution failing to produce any evidence suggesting active involvement of high levels of the Indonesian government in the 1999 violence, the pro-independence victory is difficult to explain except in terms of ill will toward Indonesia on the part of the international community. Had the indictments been better prepared, they not only might have helped illuminate the political dynamics in East Timor in 1999, but might have led to more effective policies in Aceh and Papua;
- ❑ the United Nations in particular will continue to be seen as a biased and manipulative actor, further reducing the already slim chance that it could be an acceptable mediator or facilitator in future conflicts;
- ❑ the involvement of Indonesian military in creating, equipping, training, and funding the pro-integration militia forces in East Timor will remain unexamined, reducing the likelihood that there will be any deterrent to the continued or future use of such forces;
- ❑ efforts to curb human rights violations in areas of separatist conflict will have been portrayed as anti-nationalist, to the extent the role of the security forces is portrayed not just by the defence but more subtly by the prosecution as defenders of Indonesian unity. The linkage in these trials between pro-Indonesia violence and patriotism on the

one hand, and human rights campaigning and near-treason on the other may well bolster resistance to demands for accountability; and

- the concept of crimes against humanity in Indonesia will have been trivialised.

There are several policy implications for those inside and outside Indonesia interested in accountability, military reform, and democratisation.

At least for the moment, no amount of international or domestic pressure is going to produce justice for serious human rights crimes by military officers in East Timor. At the same time, it would send precisely the wrong signal to the Indonesian government and, for that matter, to supporters of military and judicial reform to ease existing restrictions on aid to the Indonesian military, as exemplified by the Leahy amendment in the United States.¹ To waive those restrictions

¹ Section 572 of the Foreign Operations Appropriations Act for fiscal year 2002 (HR 2506), otherwise known as the Leahy amendment, reads: (a) Funds appropriated by this Act under the headings "International Military Education and Training": and "Foreign Military Financing Program" may be made available for assistance for Indonesian military personnel only if the President determines and submits a report to the appropriate congressional committees that the Government of Indonesia and the Indonesian Armed Forces are:

1. taking effective measures to bring to justice members of the armed forces and militia groups against whom there is credible evidence of human rights violations in East Timor and Indonesia;
2. taking effective measures to bring to justice members of the armed forces against whom there is credible evidence of aiding or abetting illegal militia groups in East Timor and Indonesia;
3. allowing displaced persons and refugees to return home to East Timor, including providing safe passage for refugees returning from West Timor and demonstrating a commitment to preventing incursions into East Timor by members of militia groups in West Timor;
4. demonstrating a commitment to accountability by cooperating with investigations and prosecutions of members of the armed forces and militia groups responsible for human rights violations in East Timor and Indonesia;
5. demonstrating a commitment to civilian control of the armed forces by reporting to civilian authorities audits of receipts and expenditures of the armed forces;
6. allowing United Nations and other international humanitarian organizations and representatives of recognized human rights organizations access to West Timor, Aceh, West Papua, and Maluku; and

would be to reward an incompetent or obstructionist prosecution and a dissembling officer corps; it would also undermine those within Indonesia's political elite and civil society who have been pressing for accountability as an essential aspect of military reform.²

Because the truth of what happened in East Timor in 1999 is so critical to Indonesian perceptions of conflict more generally, however, every attempt should be made to ensure that the kind of information the prosecution should have collected, but did not, is made available to the Indonesian public.

At one level, this means heightened pressure on governments whose intelligence agencies were actively monitoring events in East Timor in 1999 to release information they have on the role of Indonesian government agencies and individual officials in the violence. Information leaked to Australian journalists from Australian government intercepts and published on 14 March 2002, the opening day of the Timor trials, give some indication of the extent of Indonesian state involvement, but a more systematic release of information from the Australian, U.S., and other governments is needed.³

At another level, this means that funds should be made available from foundations or donor governments to ensure that Indonesian journalists and legal analysts have access to publicly available court documents from the crimes against humanity trials taking place in Dili, East Timor, although there have been serious shortcomings there as well. (Among other things, the early trials did not have a court recorder present.) There may be more information from Dili than from Jakarta about the extent to which militia commanders operated on the basis of orders from Indonesian officers.

The failure of the Timor trials in Jakarta to constitute a genuine domestic remedy for the 1999 crimes will inevitably generate new calls for an international tribunal on East Timor, similar to those in place for the former Yugoslavia and Rwanda. Establishing such a tribunal would be both desirable and appropriate but with no known support for such an option from members of the

7. releasing political detainees.

² See ICG Asia Report No. 24, *Indonesia: Next Steps in Military Reform*. 11 October 2001, Jakarta/Brussels

³ "Silence Over a Crime Against Humanity," Sydney Morning Herald, 14 March 2002.

UN Security Council, or even from the political leadership of East Timor, the chances of a tribunal being created are close to nil. The slim prospects for justice make it more important to ensure that all available facts come to light while the memory of the 1999 destruction is still fresh, and before the efforts of senior army officers to change the historical record succeed.

I. BACKGROUND

On 27 January 1999, Indonesian President B.J. Habibie startled the world by announcing that he would allow the people of East Timor to choose between autonomy under Indonesian sovereignty and separation from Indonesia. It was a radical change in policy toward the former Portuguese colony that Indonesia invaded in 1975, after the left-leaning Revolutionary Front for the Independence of East Timor (Fretilin) declared independence.⁴

The Soeharto government annexed East Timor a year later as Indonesia's 27th province, after a vote by the hastily-created local parliament in favour of integration. Indonesian officials repeatedly maintained, and many Indonesians to this day accept, that the vote represented the genuine aspirations of most East Timorese; virtually all independent observers agree that under the circumstances of military occupation, with parliamentarians chosen for their acceptability to Indonesia, the vote was neither free nor fair.

For the next 22 years, a small guerrilla army led an independence movement whose popular support grew as Indonesian misrule continued. The United Nations never recognised Indonesia's annexation. The Security Council called for the withdrawal of Indonesian troops and continued to view East Timor as a "non-self-governing territory" under Chapter XI of the UN Charter. A General Assembly resolution in 1982 gave the Secretary-General's office the mandate to hold talks between Portugal and Indonesia about East Timor's future political status. The talks produced few

breakthroughs as long as Soeharto was in power.⁵

Within months after his resignation in May 1998, however, the Indonesian foreign ministry produced a new set of proposals that seemed to indicate a much more flexible negotiating position, and a possibility of limited devolution of authority from Jakarta. Indonesia continued to reject any discussion of independence. A still-murky combination of factors, including the post-Cold War environment, the situation after the Asian economic crisis, and the hubris of President Habibie himself, led to the 27 January announcement.⁶

Under a tripartite agreement signed on 5 May 1999 by Indonesia, Portugal, and the UN, the latter was tasked with organising and supervising a "popular consultation," effectively a referendum on independence, while Indonesia retained responsibility for ensuring security before and during the ballot. The UN Mission in East Timor, known as UNAMET, arrived in early June. Its work was plagued from the beginning by violence by pro-autonomy militias determined to intimidate East Timorese from voting for independence. Nevertheless, on 30 August 1999 nearly 80 per cent of the voters chose independence. When UNAMET announced the results on 4 September, the militias and their Indonesian army backers proceeded to burn and destroy much of the country's infrastructure and forcibly expel a third of the population to West Timor.⁷

A. THE GENESIS AND MANDATE OF THE AD HOC COURT

The ad hoc human rights court on East Timor, in which the trials of Indonesian officers are now taking place, was long in gestation. On 27 September 1999, in the immediate aftermath of the post-referendum violence, a special session of the UN Commission on Human Rights was convened in Geneva. Many expected that it would lead to a resolution in support of an international tribunal on

⁴ The best study in English of events leading up to the declaration of independence remains Jill Jolliffe, *East Timor: Nationalism and Colonialism*, University of Queensland Press, 1978. An eyewitness account from the then Indonesian consul in Dili is E.M. Tomodok, *Hari-hari Akhir Timor Portugis* [The Last Days of Portuguese Timor], Pustaka Jaya, Jakarta, 1994.

⁵ See "The United Nations and East Timor: A Chronology," www.un.org/peace/etimor99/chrono/chrono_frame.html.

⁶ The most detailed analysis thus far is Ian Martin, *Self-Determination in East Timor*, International Peace Academy Occasional Papers, Lynne Reiner Publishers, New York, 2001.

⁷ For a sober assessment of the destruction, see the World Bank's Joint Assessment Mission Report on East Timor, October 1999.

East Timor, similar to those established for the former Yugoslavia and Rwanda. But resistance from the Asian bloc in the Commission, as well as insistence from Indonesia that it could prosecute offenders itself, led to support for an Indonesian solution.⁸

As a result, the Indonesian National Human Rights Commission (Komnas HAM) appointed a commission of inquiry (KPP-HAM), composed of five of its own commissioners and four non-governmental human rights activists. On 31 January 2000, the KPP-HAM produced a detailed report naming 32 officials and militia leaders as responsible for grave human rights violations amounting to crimes against humanity.

For months, nothing happened. Attorney-General Marzuki Darusman maintained that he could not proceed with prosecutions until there was a legal basis, citing that existing Indonesian law had no provisions for crimes against humanity. In the meantime, however, he announced that his office was giving priority to the investigation of five incidents in East Timor, out of many more named in the KPP-HAM report:⁹ the massacre of civilians in a church in the town of Liquisa on 6 April 1999; the attack on pro-independence leader Manuel Carrascalao's house in Dili on 17 April 1999; the post-referendum massacre of civilians who had sought refuge in a church in Suai on 6 September; an attack on Bishop Belo's residence the same day; and the killing of Dutch journalist Sander Thoenes on 23 September 1999.

Marzuki's decision to investigate only five 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.

In November 2000, the Indonesian parliament passed Law No. 26 which incorporated the Rome Statute of the International Criminal Court, so that the legal basis for trying serious human rights violation of a widespread or systematic nature was

in place. It also gave the president the authority to set up ad hoc courts to try grave human rights violations that occurred before the law came into effect. Before the ad hoc court on East Timor could be set up, the Indonesian parliament had to make a formal request to the president to establish it, the president had to issue a decision (*keputusan presiden* or *keppres*), and the Supreme Court had to appoint a combination of career and non-career judges.¹⁰ All of this took time.

In March 2001, President Abdurrahman Wahid issued Decision 53, authorising the establishment of an ad hoc court to try cases of serious human rights violations committed after the August referendum. There was an immediate outcry from Indonesian human rights activists, including members of the National Commission on Human Rights (Komnas-HAM), that Decision 53 would prevent the court from prosecuting two notorious incidents that had occurred in East Timor before the referendum – the Liquisa massacre of 6 April and the attack on the Carrascalao house on 17 April. As a result, the Ministry of Justice agreed to prepare a revised draft.

On 1 August 2001, in her first major ruling as president, Megawati Sukarnoputri signed Decision No. 96, which extended the mandate of the ad hoc court to cover not only crimes that occurred after the referendum, but also crimes committed in East Timor in April 1999. That action drew praise as evidence of the new administration's commitment to accountability, but the praise was misplaced.

The Attorney General's office, which had responsibility for preparing the indictments, interpreted the revised mandate as simply covering the five cases originally designated by Marzuki Darusman. (It was no coincidence: Megawati's Attorney General, MA Rahman, had been Marzuki's deputy, responsible for human rights cases.) The narrow focus avoided broader issues such as how the militias in East Timor were organised and funded in 1999; communication channels and command relationships between the army and the militias; and the degree to which the

⁸ For more on justice issues in Indonesia see ICG Asia Report No. 12, *Indonesia: Impunity versus Accountability for Gross Human Rights Violations*. Jakarta/Brussels, 2 February 2001.

⁹ "East Timor investigators to be named shortly", Jakarta Post, 22 March 2000.

¹⁰ Some of the lawyers who took part in drafting the law intended that the possibility of appointing non-career judges would lead to human rights lawyers serving on the court. Instead, an obscure regulation was unearthed, requiring that any non-career judges serving in an Indonesian court be drawn from university law faculties. Many of the judges appointed were little-known academics with no known human rights experience.

Indonesian government knew about, encouraged, or actively took part in planning attacks on pro-independence supporters during the year. Under the limited mandate, these issues were virtually off limits.

II. THE INDICTMENTS OF TIMBUL SILAEN AND ABILIO SOARES

Eighteen military and police officers, civilian officials, and militia members were indicted in January 2002, and the initial three trials began on 14 March 2002. The first involved the former provincial police commander of East Timor, Timbul Silaen, an Indonesian. The second involved the former governor, Abilio Osorio Soares, an East Timorese. The third involved five Indonesian army and police officers assigned to Covalima district, accused of involvement in the Suai church massacre.

A. TIMBUL SILAEN

The indictment of Timbul Silaen is so weak that one wonders why the prosecutors chose to make it the lead-off case. The basic charge is that Silaen, as provincial police commander and commander of security operations under the 5 May 1999 agreement, failed to control his subordinates on four days: 6 April, 17 April, 5 September, and 6 September 1999.

[Silaen] is criminally responsible for serious human rights violations, namely crimes against humanity, including murder, carried out in a widespread or systematic manner, because it was known to the accused that attacks aimed directly at the civilian population were being carried out by subordinates under his control, because the accused had authority for the district police commands of Dili, Liquisa, and Covalima [where the town of Suai is located] as well as for the militias including Aitarak, Besi Merah Putih, as well as the civil guard (Pam Swakarsa). In this capacity, the accused did not exert appropriate control over his subordinates in the sense that he knew of or deliberately ignored information that clearly showed that his subordinates were committing grave human rights violations but took no appropriate action when it was his

responsibility to prevent or stop these actions or to surrender the offenders to the appropriate authorities for investigation and prosecution.¹¹

The indictment describes the Liquisa massacre as originating with the murder of two pro-integration supporters and the taking hostage of two other pro-integration supporters by a pro-independence group led by Jacinto Da Costa Pereira. As a result of threats by Pereira to murder the hostages, a pro-integration mob under the leadership of Eurico Guterres and Manuel Sousa decided on revenge, and armed with firearms and knives, began to hunt down its opponents.¹²

The actions of both sides, the indictment continues, were reported to the Liquisa district police commander, who in turn contacted the deputy provincial commander in Dili because Timbul Silaen himself was in Jakarta. The deputy commander ordered the Liquisa police to support the pro-integration operation and about 100 police and soldiers joined ranks with the pro-integration forces, the indictment says.¹³

When the pro-integration supporters found their pro-independence opponents, the indictment notes, they opened fire, causing about 200 [The correct figure is closer to 2,000] people to seek refuge inside the Liquisa church compound. The pro-integration “mob” demanded that Jacinto da Costa Pereira be handed over, together with his two hostages, but the pro-independence “mob” refused. Instead, it opened fire, which led the pro-integrationists to enter the compound and attack the people inside. The Liquisa police, the indictment states, made no effort to intervene and did not try to disarm *either side*. This led to a clash between the two sides which resulted in the deaths of civilians inside the compound. The indictment names eighteen of the victims.¹⁴

At 8:00 p.m., according to the indictment, the deputy commander contacted Silaen in Jakarta to tell him of the incident, and he instructed the

¹¹ *Kejaksaan Agung Republik Indonesia, Penuntut Umum Ad Hoc, Perkara Pelanggaran HAM Berat di Timor Timur, “Surat Dakwaan, Nomor 01/HAM/TIM-TIM/02/2002 A.n. Terdakwa Drs. G.M. Timbul Silaen, Jakarta, 19 February 2002 (unpaginated).*

¹² *Ibid.*

¹³ *Ibid.* Six soldiers and police are named, all East Timorese.

¹⁴ *Ibid.*

Liquisa police to investigate the actions of *both* sides.¹⁵

Thus, in the prosecution's description of the Liquisa massacre, the two sides are portrayed as equally responsible for the violence. It mentions that 100 police and soldiers were involved on the pro-integration side without suggesting that this was in any way wrong, or a factor in the deaths. (By naming six East Timorese soldiers and police and no Indonesians as among those who joined the attackers, it seems to suggest that East Timorese are more prone to violence.) It raises no questions about where the firearms used by the pro-integration side came from. The word used in the indictment to describe both sides throughout is *massa* (mob) or *kelompok* (group); the word "militia" never appears, nor is there any suggestion of difference in organisation between the armed men on the pro-integration side and the civilian men, women, and children inside the church compound.

Moreover, the indictment's emphasis on Timbul Silaen's absence from East Timor at the time and his order to subordinates to investigate when he learned of developments suggests that the prosecution was not seriously seeking a conviction.

The indictment then proceeds to events on 17 April, and the pro-autonomy rally in the courtyard of the governor's office in Dili that resulted in the militia attack on Manuel Carrascalao's house. It notes that in the course of the rally, Eurico Guterres urged that all members of the National Council of Timorese Resistance (CNRT, the pro-independence coalition) be "finished off," particularly the Manuel Carrascalao family; that CNRT leaders be killed; and that all pro-independence leaders be killed.¹⁶

Members of the security forces, the indictment notes, did not attempt to prevent this kind of incitement, with the result that Eurico Guterres's followers, "consisting of the Aitarak group and the BMP group, both of which were equipped with firearms and sharp weapons", attacked the Carrascalao residence where over 100 independence supporters had taken refuge.

Manuel Carrascalao, the indictment says, had gone to a security post of the Dili police to report the

actions of the pro-integration mob and demand protection. The police at the post forwarded Carrascalao's report to the deputy provincial police commander, because once again Silaen himself was in Jakarta. The deputy gave orders to prevent violence, but the Dili police ignored his order.

When the pro-integration group reached Carrascalao's house and saw the pro-independence supporters there, the two sides clashed, according to the indictment, and police made no effort to prevent the violence or disarm either side, as if those seeking refuge were armed, which was not the case. As a result, the home was burned and twelve people were killed, including Manuel Carrascalao's son.¹⁷

When Silaen returned to Dili later that afternoon, the deputy governor reported the attack, and Silaen ordered an investigation of both sides. The prosecution makes no effort to determine whether the investigation was carried out or what its findings were.¹⁸

The final incidents cited in the indictment took place on 5 and 6 September, after the results of the 30 August referendum were announced. The indictment states:

On 5 September 1999, after the implementation of the consultation, the pro-integration/autonomy group that had experienced defeat in the counting of the votes suspected that UNAMET and the pro-independence group had been responsible for irregularities in the counting of the votes, and that UNAMET did not act as a neutral body. UNAMET paid no attention to the objections of the pro-integration/autonomy group, and this generated discontent. The discontent manifested itself in the pro-integration/autonomy group's taking up arms and attacking a pro-independence group consisting of civilians who had taken refuge in the Dili diocesan compound.¹⁹

The Dili district police command and other Indonesian police stationed nearby reported the attack to Silaen by walkie-talkie, the indictment says. Silaen gave orders to "localise" the conflict – keep it confined – but the Dili police took no action. The compound's courtyard was burned,

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

and two civilians were killed.²⁰

On the following day, 6 September, around 10:00 a.m., an armed pro-integration/autonomy crowd massed to march on the residence of Bishop Belo where many civilians had taken refuge. It attacked the civilians, again without any police intervention. The attack was reported to Silaen by walkie-talkie, who ordered his men to stop the attack and protect the bishop by bringing him to the police command. But before they could do so, the bishop's residence was burned and eighteen people killed.

The indictment describes the Suai massacre of 6 September as an attack by an armed pro-integration/autonomy group led by Olivio Mendoza on pro-independence people sheltering in the Suai church, with the Covalima district police command making no effort to stop them. Secondary charges of torture against Silaen go through the same incidents in the same terms, but citing those wounded instead of killed. One additional incident noted on 4 September is the attack on the UNAMET office in Liquisa, in which the office was burned and one man wounded. The indictment says the incident was reported to Silaen, who immediately gave orders to arrest and prosecute the perpetrators, to increase security measures, and to act firmly against disturbers of public order.

The main problems with this indictment is the fact that police inaction in the face of militia attacks, a constant throughout East Timor in 1999, is not portrayed as a pattern of behaviour, but as a response to four separate and unrelated incidents. To those whose idea of crimes against humanity is rooted in images of Bosnia or Rwanda, the charges in this case would seem grossly out of proportion, but the problem lies with the mandate of the court and the approach of the prosecutors, not with the facts of the case.

B. ABILIO JOSE OSORIO SOARES

The charges against Abilio Soares, former governor of East Timor, are very similar. He is not accused of direct personal involvement in any crime, but only with failing to take appropriate measures to control the behaviour of his subordinates. These included the *bupati* (district head) of Liquisa, Leonito [sic] Martins; the *bupati*

of Suai, Col. Herman Sedyono; and the deputy commander of the Pro-Integration Forces, Eurico Guterres.

Abilio Soares, the indictment states, knew about or deliberately ignored information that Martins and Sedyono were committing or had just committed serious human rights abuse in the form of murder, committed in a widespread or systematic fashion, and directed against pro-independence civilians.²¹ It notes the governor's responsibilities, under Law No.5/1974 on local government, for all aspects of social, political, economic, and cultural life as well as for upholding law and maintaining order. It then charges that the governor "did not take appropriate steps such as coordinating with security forces to prevent or stop" the actions of his subordinates, nor did he turn the latter over to appropriate authorities for guidance. The consequences were the Liquisa church attack, with 22 killed and 21 wounded; the attack on the Carrascalao house, with twelve killed and four wounded; the attack on the Dili diocesan compound, in which 46 people died; the attack on Bishop Belo's residence, in which ten died and one was wounded; and the attack on the Suai church, in which 27 people died. (Different indictments give different casualty figures, another indication of how sloppily they were prepared.)

The indictment then looks at the relationship between the governor and pro-integration groups but never addresses the issue of government funding for the militias and never challenges the latter's legitimacy.

Before the consultation, it says, the accused organised a meeting for district heads at the governor's office. In it, he stressed the need to form branches of the Forum Persatuan Demokrasi dan Keadilan [FPDK, United Front for Democracy and Justice] and the Barisan Rakyat Timor-Timur [BRTT, East Timor Popular Front] in each district "in order to serve the aspirations of pro-integration East Timorese" as the referendum approached. He also made the case for setting up civil security organisations [Pam Swakarsa] based on Law No.20/1982.²²

As a result of this meeting, the indictment says, two kinds of organisations were set up in each district and municipality. One was the official Pam

²⁰ *Ibid.*

²¹ *Kejaksaan Agung Republik Indonesia, Penuntut Umum Ad Hoc, Perkara Pelanggaran HAM Berat di Timor Timur, "Surat Dakwaan Nomor 02/HAM/Tim-Tim/02/2002," Jakarta, 19 February 2002.*

²² *Ibid.*

Swakarsa organisation, paid out of the district government budget. The other consisted of “grassroots organisations which grew spontaneously but whose existence was recognised by the accused.” The source of funding for the “grassroots organisations,” the indictment states, were pro-integration people themselves.²³ In Covalima district, it continues, the organisations, in addition to Pam Swakarsa, included FPDK, BRTT, Mahidi, and Laksaur. The indictment fails to mention that the last two were among East Timor’s most notorious militias.

The prosecution’s list of organisations in Dili, in addition to the Pam Swakarsa, includes a strange combination of known militias – Aitarak, Saka, Darah Merah Putih, and Mahidi – as well the pro-integration political fronts, FPDK and BRTT; the militia umbrella organisation, Pejuang Pro Integrasi (PPI, Pro-Integration Forces); and a few Timorese towns, listed as though they were militia groups (Liquisa, Ermera).

Because Guterres reported the establishment of these groups to the accused, the indictment says, Abilio had responsibility for supervising them.²⁴ There is no suggestion that he had any hand in their formation.

The indictment then recounts the Liquisa church massacre, the attack on Bishop Belo’s compound, and the Suai church massacre in detail; it says nothing about the attack on Manuel Carrascalao’s house, even though Abilio played a major role in the militia-led rally that preceded it.

Again, the focus is on the conflict as an equally matched struggle between two East Timorese factions. The governor’s crime is not that he actively aided and abetted armed attacks by militias on civilians, but that as information emerged about the irregularities at polling places and the “confusion, fighting, violence, murder, burnings, and destruction” by both sides, he did nothing to prevent it. There is far more information in Abilio Soares’s indictment than in Silaen’s about the direct involvement of police and soldiers in the BMP militia attack on the Liquisa church, but the prosecution appears to find nothing wrong with this per se. The police are also portrayed as doing everything they could to mediate between the pro-integration and pro-independence groups.

III. PETITIONS TO DISMISS: THE SILAEN AND ABILIO CASES

Timbul Silaen employed the high-powered defence team formed in early 2000 to defend former Indonesia military commander, General Wiranto, who escaped indictment. (Wiranto had been named in the original KPP-HAM report of 31 January 2000 as having overall responsibility for human rights offences because of his position as commander of the armed forces.) Governor Abilio was defended by the “Advocacy Team for Defenders of East Timorese Integration” [*Tim Advokasi Pejuang Integrasi Timor-Timor*], led by P. F. Taolin. Their petitions to dismiss have many common elements, including lengthy reiterations of the official Indonesian version of the history of East Timor.

Both question whether the right defendants are on trial, saying UNAMET should be the one accused. Silaen’s lawyers appeal to the self-esteem and nationalism of the judges, asking, “Are the people of Indonesia, and this court, capable enough, and courageous enough, to speak the truth, or will this court become a tool for satisfying international demands and demands of parties that wish to avoid responsibility [for their own role]?”²⁵

Both question the jurisdiction of the court and say that the very notion of an ad hoc court for crimes that occurred before the law setting up that court was passed violates the principle that laws should not be applied retroactively. They both question command responsibility as the sole basis of the charge of crimes against humanity, with Silaen’s lawyers arguing that command responsibility can only be charged if subordinates of the accused have been found guilty of human rights violations first.

Silaen’s lawyers note that other places in Indonesia, such as Ambon, Poso, and even Jakarta in May 1998, descended into violence such that security forces were unable to control the chaos, but “insufficient personnel in the face of widespread conflict should not be construed as a human rights violation.”²⁶ They quote the indictment back to the prosecutor, saying even if

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Tim Penasihat Huku Drs. G.M. Timbul Silaen, “Nota Keberatan Atas Surat Dakwaan Penuntut Umum Ad Hoc Nomor 01/HAM/Tim-Tim/02/02”, Jakarta, 14 March, 2002.*

²⁶ *Ibid.*

the prosecution admits that UNAMET did not act neutrally, it is clear that any human rights violations resulted from its attitude and not from actions of the accused.

They point out how well Silaen carried out his duties as the commander responsible for implementing the 5 May agreement because no foreigners were hurt and no ballot boxes or votes were lost. Jamsheed Marker, the U.N. Secretary-General's personal envoy, even met Silaen on 4 September 1999 to personally thank him for his role in the success of the consultation.²⁷

Governor Abilio's lawyer is far more vitriolic. Noting that the East Timor tragedy has to be viewed in its entirety since 1975, he says that the real perpetrators of genocide and crimes against humanity, "whom the United Nations then turned into heroes." These included the government of Portugal, which betrayed and abandoned the East Timorese people in 1975; the pro-independence party Fretilin, which used tens of thousands of weapons received from the departing Portuguese to kill more than 60,000 people between August 1975 and February 1976, according to "an official report of the United Nations"²⁸; the UN in general and UNAMET in particular, whose local staff consisted only of pro-independence supporters and whose own violations included the arbitrary banning of pro-integration election monitors and poll watchers; "certain non governmental organisations that claimed to support human rights and democracy" but whose real interest was in selling out their own country; and the central government of Indonesia whose then-president [Habibie] determined on his own to hold a referendum without consulting the parliament, people's consultative assembly, or the people of East Timor themselves.²⁹

The lawyer questions why responsibility for actions of district heads should rest with the

governor, since they are appointed by provincial parliaments, not by the governor. And not go further up to ministerial levels in the central government? He also asks why the provision of "incidental funding" from the provincial government to Pam Swakarsa, the civil guard, should create any legal responsibility on the part of the governor for the group's actions.

The lawyer concludes by calling on the United Nations to compensate the thousands of Indonesians and thousands of Indonesian soldiers who died to defend human rights and the people of East Timor from 1975 to 1999.

In their responses, prosecutors disputed the retroactivity argument, and the judges agreed, allowing the trials to go forward. "According to the principles of justice," the prosecutor in Abilio's case notes, "impunity for perpetrators of serious human rights violations will be more unjust than failure to strictly apply the law." In any case, he went on, there was no legal problem with the retroactive application of the new law, because what in fact was being applied was customary international law which had been recognised since the war crimes trials in Nuremberg and Tokyo, and the tribunals on Rwanda and the former Yugoslavia.³⁰

Gross violations of human rights, he said, are extraordinary crimes that deeply shock the conscience of humanity and can threaten peace and international security. "If they are not handled in a serious and genuine way, we fear that the International Criminal Court (ICC) in the Hague will take them on, an eventuality that we must prevent. Heaven forbid that the Security Council of the United Nations should recommend the creation of an international ad hoc tribunal if it seems that these are only show trials."³¹

The prosecutor's warnings, however, ring hollow. The ICC, established only in April 2002, has no authority to prosecute earlier cases, and as of this writing, the likelihood of Security Council support for an international tribunal on East Timor seemed slim.

²⁷ *Ibid.*

²⁸ Tim Advokasi Pejuang Integrasi Timor-Timur, "Eksepsi dihadapan Pengadilan HAM Ad Hoc, mengenai Masalah HAM Timor Timur Di Pengadilan Negeri Jakarta Pusat, Perkara Terdakwa Abilio Jose Osorio Soares Nomor 01/Pid.HAM/Ad-Hoc/2002/PH.JKT.PST, 21 March 2002. According to the lawyers, the quote from an official UN report is mentioned in a book published in 1997 by Portuguese author Paradela de Abreu entitled *Timor: A Verdade Historika*, but they give no further details. A more widely accepted figure for deaths in the civil war is 1,500 on both sides.

²⁹ *Ibid.*

³⁰ *Kejaksaan Agung Republik Indonesia, Penuntut Ad Hoc, Perkara Pelanggaran HAM Berat di Timor-Timur, "Tanggapan/Pendapat Atas Nota Keberatan/Eksepsi Tim Penasihat Hukum A.n. Terdakwa Abilio Jose Osorio Soares," 28 March 2002, p.8.*

³¹ *Ibid.*, p.8

IV. THE INDICTMENT IN THE SUAI MASSACRE

The Suai indictment is different in that it involves five defendants rather than one, is the first to involve active duty army officers and links some TNI members directly to the militias. Even so, the indictment is extremely weak given the number of witnesses and the strength of available evidence that prosecutors had access to in Dili, East Timor.³² Again, it rests primarily on a command responsibility argument, although at least one of the five is accused of directly joining those who attacked the church.

The five defendants are Col. Herman Sedyono, an army officer who at the time of the massacre was *bupati* of Covalima district; Col. Liliek Koeshadianto, who was head of the Covalima district military command (KODIM); Gatot Subyaktoro, who was district police commander and the only non-army officer named in the indictment; Major Achmad Syamsudin, then chief of staff for the Covalima KODIM; and Captain Sugito, then head of the subdistrict military command for the town of Suai.

The five are accused of acting alone or together with sixteen “members of pro-integration groups” to commit serious human rights violations, but then says that the five as superiors or commanders, “failed to take effective steps to restrain forces under their authority or control and knew about or deliberately ignored information that their subordinates were committing or had just committed serious abuses.” The result was the attack on civilians who had sought refuge in the church, leading to the deaths of seventeen men, including three priests, and ten women.

The indictment charges that in May 1999, following the presidential decision (*Keppres* 3/1999) to hold the popular consultation, the provincial government organised pro-independence groups who merged with Pam

Swakarsa, and that these included Mahidi and Laksaur. Col. Sedyono as district head officially inaugurated the two militias (although once again, the word “militia” is never used).³³

Operational requirements of the Laksaur and Mahidi organisations, the indictment notes, including equipment and training, were provided by KODIM 1685, the district military command of Suai, while the salaries and honoraria of the members of these groups were provided by the district government.³⁴

Two points are noteworthy here. First, there is a direct contradiction with the Abilio Soares indictment, which claimed that all groups other than Pam Swakarsa emerged spontaneously, with private funding. Second, and more important, the prosecution uses the information of a direct government role in the formation and funding of the militias only to establish that the five accused had command responsibility for their subsequent actions. They appear to find nothing wrong per se with the creation of extra-legal irregular armed forces.

After the announcement of the results of the 30 August referendum, the indictment continues, the situation deteriorated as a result of clashes between pro-independence and pro-integration groups, to the point that the government was forced to declare a civil emergency. Again, the theme emerges of a civil war, even as FALINTIL, the pro-independence armed force, remained under cantonment.

On September 6, the indictment continues, attacks by the pro-integration forces became more widespread, and one such group decided to attack the church. The group, armed with automatic and home-made firearms, consisted of Olivio Mendoza Moruk of Laksaur, the leader; Izidio Manek; Sgt. Martinus Bere [a police officer]; Motornus [sic]; Vasco da Cruz; Martins Dongki Alfon, a member of Laksaur; Sgt. I Gede Santika; Sgt I Wayan Suka Antara; Sgt Sony Iskandar; Sgt Americo Serang; Sgt. Raul Hale; Sgt. Alarico Pereira; Private Alfredo Amaral, a member of the Covalima KODIM; Sgt. Budi; Sgt. Syamsuddin; Sgt. Made

³² Under the terms of the 6 April 2000 Memorandum of Understanding between the U.N. Transitional Authority in East Timor (UNTAET) and the Indonesian Attorney-General's office, each side can request evidentiary materials and interview witnesses in each other's jurisdiction. Prosecutors from the Attorney-General's office traveled to East Timor several times, including to Suai, and UNTAET investigators shared information on the Suai massacre with their Indonesian counterparts.

³³ *Kejaksaan Agung Republik Indonesia, Penuntut Umum Ad Hoc, Perkara Pelanggaran HAM Berat di Timor Timur, “Surat Dakwaan Nomor 03/HAM/Tim-Tim/02/2002”*, Jakarta, February 2002.

³⁴ *Ibid.*

Suarsa; and Sgt. Arnolus Naggalo [sic]. These men, both Indonesian and East Timorese, are scheduled to come to trial later in the ad hoc court.

When they heard shots coming from the church, the indictment says, Colonel. Sedyono, the *bupati*; Colonel Koeshadianto, the KODIM commander; and Gatot Subiyaktoro, the police commander assumed that a clash was underway between pro-independence and pro-integration forces. They went together to the Ave Maria church, where they saw Olivio Moruk of Laksaur leading the attack on civilians, but they failed to take any action to stop it, or try to find out if there was anyone who could be rescued or assisted. On the contrary, before the attack was over, Colonel Sedyono returned to his residence.³⁵

Colonel Koeshadianto ordered his chief of staff, Major Achmad Syamsuddin, to use all men at his disposal to handle the situation, but Syamsuddin instead joined the attackers. The indictment faults Koeshadianto for not anticipating the actions of the pro-integration forces, given the fact that Laksaur had just attacked 130 local staff of UNAMET who were in the process of being evacuated to Dili.³⁶

Gatot Subiyaktoro, “who as police commander had full responsibility for security operations in the district,” also failed to anticipate the attack and to carry out arrests and take other appropriate law enforcement actions.

The fifth man indicted, subdistrict military commander Captain. Sugito, went to the site after the attack, loaded the bodies of the victims onto a truck with the help of four local men, and secretly brought them to Betun, in West Timor, for burial, without informing their families.³⁷ This was a crime under the Indonesian Criminal Code, the indictment notes.

The mandate of the ad hoc court is particularly unfortunate in the Suai case. Suai, and Covalima district more generally, had been hard-hit by militia violence, in which the five defendants had been actively involved, according to East Timorese human rights organisations and local residents. The mandate of the court precluded the possibility of demonstrating a pattern of systematic violence against civilians, even if the prosecutors had been willing and able to do so. The failure of the

prosecutors to even try, however, to establish a direct link between the funding and training provided by the government and the actions of the Laksaur and Mahidi militias suggests that the will was lacking.

V. PETITION TO DISMISS: THE SUAI CASE

A legal team of ten, four civilians and six military officers, defended the four army officers accused in the Suai case. The petition to dismiss has a particularly bitter tone. It states that the November 2000 law establishing human rights courts was only passed as a result of international pressure, and constitutes an act of revenge against those who were part of the power structure of President Soeharto’s administration. The ad hoc court itself is a court for the defeated, carrying the stigma of having been created by powerful countries who conspired with Indonesians willing to let themselves be used for larger political purposes.³⁸

This defence team also gives the official version of East Timorese history. (It quotes the same book cited by the lawyer for Abilio Soares, but with more detail. Not only does it say that Fretilin was responsible for 60,000 deaths during the civil war, but it claims that most were women and children.) It describes the huge sacrifice Indonesia made in responding to the East Timorese request for help, saying that in liberating areas controlled by Fretilin in the early years, 3,500 soldiers fell and 2,000 more were wounded.³⁹

The petition notes how many East Timorese were willing to die for integration with Indonesia after plans for a referendum were announced in 1999, and states that it was precisely the freedom of association, assembly, and expression prevailing in East Timor that enabled pro-integration groups to emerge. It quotes an Indonesian commentator as observing how odd it was that the percentage of votes for independence announced on 4 September 1999 tallied exactly with predictions made much earlier by foreign journalists, suggesting the ballot was rigged, and how a succession of supposed human rights specialists, including the commission of inquiry appointed by Mary Robinson, were

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ Tim Advokasi HAM Perwira TNI, “Keberatan Atas Surat Dakwaan Penuntut Umum Ad Hoc Nomor 03/HAM/Tim-Tim/02/2002”, Jakarta, 25 March 2002, p.2.

³⁹ *Ibid.*, p.8.

willing to collect distorted facts and present them as truth. The Commission of Inquiry (KPP-HAM), set up by Indonesia's own National Commission on Human Rights "was left merely to underscore the findings of foreign investigators."⁴⁰

All these investigations, the defence team says, were blind to the endless conflict between the two sides in East Timor, and wanted to portray only the pro-independence side as having victims. None of the information provided by the police and army was reflected in their findings. This was not surprising, because some members of the KPP-HAM team made no secret of their longstanding hatred of the military.⁴¹

The defence team asserts that, in fact, the entire referendum process was designed from the outset to discredit the government, and particularly the army. Why else would foreigners be tasked with implementing it, or the army be asked to withdraw its troops?⁴² "In the end, the pro-independence forces were able to enjoy the fruits of victory, while the Indonesian nation, which had protected, nursed, and done so much for East Timor for decades, suffered a fatal defeat."⁴³

VI. THE IMPLICATIONS OF THE TRIALS

The Timor trials in the ad hoc court are likely to continue for months, and it is difficult at this stage to predict the verdicts. East Timor's independence on 20 May 2002 could be a political boost to the defendants, especially if it produces an upsurge in nationalism from the political right. (Many of Indonesia's more conservative Muslim groups believe that the international community has actively assisted Christian separatist movements in East Timor, Papua, and Maluku.)

But far more important than the verdicts is what the trials have to say about the nature of the conflict in East Timor, the role of the military, the role of unofficial armed forces, and the nature of crimes against humanity.

Both prosecution and defence portray the events of 1999 as resulting from a civil conflict involving

two violent East Timorese factions in which Indonesian security forces were concerned and sometimes helpless bystanders. The evidence that this was not the case is overwhelming, from reports by East Timorese human rights organisations and press accounts at the time, to the Australian military intercepts leaked to the *Sydney Morning Herald*.⁴⁴ To portray the violence as two-sided, however, dramatically weakens the case for a charge of crimes against humanity, in a situation where the ability to prove the charge was already undermined by the restricted mandate of the court. It also changes the nature of military involvement in the violence from active to passive, failing to prevent violence rather than actively orchestrating it.

The implications for Aceh and Papua, the two other areas of separatist violence, are also worth noting. In obscuring the true role of the military in East Timor, the prosecution is also obscuring some of the underlying causes of resentment against Jakarta and the Indonesian administration.⁴⁵ This is not to say that the trials should have been expected to reverse single-handedly two decades of misrepresentation by Jakarta of East Timorese political history. But a more accurate probing by the Attorney-General's office of what happened in 1999 might have led to some introspection in Indonesia about why support for independence was so strong and what Indonesia might have done differently in East Timor. That in turn might have generated debate about the root causes of conflict in Aceh and Papua.⁴⁶ Without that introspection, the view in Jakarta of the independence movements in both places being led by a radical fringe with no real support in the population as a whole is likely to continue.

The bitterness toward the United Nations in general and UNAMET in particular should not be underestimated. Both prosecution and defence clearly believe, as do many Indonesians, that the referendum was rigged, and it is not clear that anything can be done in the short term to change that perception. (Full disclosure of the military role in aiding the pro-integration side might have

⁴⁴ "Silence Over a Crime Against Humanity", *Sydney Morning Herald*, March 14, 2002.

⁴⁵ See ICG Report No. 17, *Aceh: Why Military Force Won't Bring Lasting Peace*. Jakarta/Brussels, 12 June 2001 and ICG Report No. 18, *Aceh: Can Autonomy Stem the Conflict*. Jakarta/Brussels, 27 June 2001.

⁴⁶ See ICG Report No.23, *Ending Repression in Irian Jaya*. Jakarta/Brussels, 20 September 2001.

⁴⁰ *Ibid.* p.9

⁴¹ *Ibid.* p.10

⁴² *Ibid.* p.11

⁴³ *Ibid.* p.12.

helped, but that option has been foreclosed.) The fallout of the UN's role in East Timor is evident in Aceh, where despite an active presence of the United Nations Development Programme (UNDP), the government continues to prohibit any display of the UN flag. It fears that the rebel movement there will interpret the flag as indicating that the UN's role might extend beyond a strictly humanitarian role to a more political one.

One of the most serious flaws in the indictments is the failure to address the way in which the military's creation and use of militia forces contributed to human rights violations. Militias were not a new phenomenon in East Timor, nor had the military only used them there: civilians had been trained, armed and organized into groups with names like *Bela Negara* (Defend the State) in Aceh in the early 1990s, for example. The level of organization and coordination of militias in East Timor in 1999, however, was unprecedented. Had the prosecution done its work properly, a public discussion of the need for control over use of lethal force might have emerged, in a way that might have led to greater pressure for the disarming and dissolution of *Laskar Jihad*, the Muslim militia operating since early 2000 in Maluku and since

2001 in central Sulawesi. The prosecutors in the East Timor trials never once question the legitimacy of the "pro-integration groups", in part because they never recognize the military's role in creating them.

Finally, whatever the outcome of the trials, both the mandate of the ad hoc court and the poor quality of the indictments will have cheapened the concept of crimes against humanity. In international law, this is one of the gravest of all charges, only topped by genocide. The Indonesian state's involvement in creating and controlling the militias, directing much of the 1999 violence, destroying the infrastructure, and expelling the population would certainly amount to crimes against humanity, if appropriate evidence could be amassed. As drafted, the indictments suggest little more than criminal negligence on the part of the accused. If the judges acquit the defendants, international outrage is a certainty. But even if they convict, the gravity of what occurred in East Timor will remain hidden, and the concept of crimes against humanity will be trivialised.

Jakarta/Brussels. 8 May 2002

APPENDIX A

ABOUT THE INTERNATIONAL CRISIS GROUP

The International Crisis Group (ICG) is a private, multinational organisation committed to strengthening the capacity of the international community to anticipate, understand and act to prevent and contain conflict.

ICG's approach is grounded in field research. Teams of political analysts are located within or close by countries at risk of outbreak, escalation or recurrence of violent conflict. Based on information and assessments from the field, ICG produces regular analytical reports containing practical recommendations targeted at key international decision-takers.

ICG's reports and briefing papers are distributed widely by email and printed copy to officials in foreign ministries and international organisations and made generally available at the same time via the organisation's Internet site, www.crisisweb.org. ICG works closely with governments and those who influence them, including the media, to highlight its crisis analyses and to generate support for its policy prescriptions.

The ICG Board – which includes prominent figures from the fields of politics, diplomacy, business and the media – is directly involved in helping to bring ICG reports and recommendations to the attention of senior policy-makers around the world. ICG is chaired by former Finnish President Martti Ahtisaari; and its President and Chief Executive since January 2000 has been former Australian Foreign Minister Gareth Evans.

ICG's international headquarters are at Brussels, with advocacy offices in Washington DC, New York and Paris and a media liaison office in London. The organisation currently operates eleven field offices with analysts working in nearly 30 crisis-affected countries and territories and across four continents.

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May 2002

APPENDIX B

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