



**INTENDED TO FAIL
The Trials Before the
Ad Hoc Human Rights Court in Jakarta**

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Edited by the International Center for Transitional Justice

INTRODUCTION

About the ICTJ

The International Center for Transitional Justice (ICTJ) assists countries pursuing accountability for mass atrocity or human rights abuse. The Center works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unresolved. It provides comparative information, legal and policy analysis, documentation, and strategic research to justice and truth-seeking institutions, nongovernmental organizations, governments, and others. The ICTJ assists in the development of strategies for transitional justice comprising five key elements: prosecuting perpetrators, documenting violations through nonjudicial means such as truth commissions, reforming abusive institutions, providing reparations to victims, and advancing reconciliation. The Center is committed to building local capacity and generally strengthening the emerging field of transitional justice, and works closely with organizations and experts around the world to do so.

The ICTJ in Timor-Leste

The ICTJ has been involved in helping Timor-Leste deal with the legacy of past human rights abuse since 2001. The Center has been closely involved in the creation of the Commission for Reception, Truth and Reconciliation and in providing technical advice and assistance as it has progressed. The ICTJ has also worked closely with the Serious Crimes Unit and the UN Missions in Timor-Leste to try to help ensure that their efforts were as effective as possible in bringing perpetrators to justice. Our report, “Crying Without Tears: In Pursuit of Justice and Reconciliation in Timor-Leste: Community Perspectives and Expectations,” profiles the attitudes of almost 100 citizens of Timor-Leste regarding the issues of truth, justice, and reconciliation.

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PREFACE

In 1999, the East Timorese voted to become citizens of an independent state. Independence, first claimed in 1975, came at a high price, exacted over 24 years of Indonesian occupation. Even after the Indonesian government decided in early 1999 to allow the East Timorese to choose between autonomy within Indonesia or independence, supporters of independence suffered systematic violence at the hands of militia groups created and directed by the Indonesian army. The violence intensified before and after the vote for independence on August 30, 1999, and then reached its climax once the outcome was announced. Thousands were killed or injured, hundreds of thousands were displaced, and the systematic and massive destruction of property caused immense damage to the living conditions of an already poor and vulnerable population. The attacks on United Nations personnel, including the killing of several East Timorese staff members, added a special aspect of international concern to what were already clearly crimes against humanity. The international community was outraged as the media reported the violence. There were calls for an international tribunal to be created to investigate and prosecute the crimes, foremost among them the recommendation of the International Commission of Inquiry mandated by the UN Commission on Human Rights. This was not done, as Indonesia committed itself to ensure full accountability.

The Indonesian Law 26/2000 instituted the Ad Hoc Human Rights Court. This report analyzes the trials held under that law in terms of the prosecution efforts and the quality of the judgments. However, it goes beyond this to assess the political and institutional context in which the trials took place. The inescapable conclusion of the report is that the trials as a whole must be regarded as a failure on every level, from technical competence to institutional integrity and political will. Some may point to the fact that six individuals, including high-ranking officials, have been convicted. However, the report shows that this is more due to the notable bravery of a few individual judges than to a credible system of justice.

The International Center for Transitional Justice has worked closely with the people and institutions of Timor-Leste as they try to deal with the legacy of violent abuse in a way that both respects the dignity of victims and survivors and strengthens the rule of law in a democratic society. Ending the impunity of the Indonesian army is just as important—perhaps even more important—for the democratic future of Indonesia than it is for Timor-Leste. Justice for the atrocities that occurred in 1999, however, is not only essential from these perspectives, but also for the integrity of the international community as a whole and the United Nations in particular. We believe that this report will help to focus attention on how Indonesia has failed to live up to its commitments both to the victims of the crimes committed and to the international community.

A second major respect in which this continues to be the case falls outside this report: Indonesia has failed to cooperate with the Serious Crimes Unit established by the UN Transitional Administration in East Timor. The senior Indonesian commanders responsible for operations in East Timor in 1999, as well other alleged Indonesian and East Timorese perpetrators now in Indonesia, have been indicted for crimes against

humanity after investigation by UN prosecutors and investigators. Indonesia continues to fail to cooperate with the efforts of the Special Panel for Serious Crimes in Timor-Leste to bring perpetrators to justice.

In February 2000 the United Nations Security Council encouraged Indonesia “to institute a swift, comprehensive, effective and transparent legal process, in conformity with international standards of justice and due process of law.” None of these criteria has been met. We trust that this report will be of some assistance to the UN and to others in forming an informed view about the trials and their context, and determining the appropriate course of action.

Ian Martin
Vice President
International Center for Transitional Justice
August 2003

ACRONYMS AND TERMS

Attorney General	AG
Commission of Inquiry on East Timor	KPP HAM
Final Report of the Audit of the Public Prosecution Service of the Republic of Indonesia	FRAPPS
Indonesian National Army	TNI
Indonesian Army Special Forces	Kopassus
Indonesian National Police	POLRI
International Commission of Inquiry on East Timor (UN)	CIET
International Humanitarian Law	IHL
National Human Rights Commission (Indonesia)	Komnas HAM
Pasukan Pejuang Integrasi (Pro-Integration Forces)	PPI
Public Prosecution Service	PPS
United Nations Transitional Administration in East Timor	UNTAET

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EXECUTIVE SUMMARY

This report focuses on the 12 trials that have taken place before the Indonesian Ad Hoc Human Rights Court since March 2002. Six of the 18 defendants have been convicted of crimes against humanity, receiving sentences ranging from 3 to 10 years. Those convicted include Indonesian National Army (TNI) officers, a militia leader, and police and civilian officials. All remain free pending appeal.

The prosecution of Major General Adam Damiri, who in 1999 was regional commander (Pangdam Udayana) of the military region of which East Timor was a part, is the single most important of these trials. Notwithstanding the extremely unusual conduct of the prosecutor, who sought an acquittal at the end of the case, Damiri was sentenced to three years in prison on August 5, 2003. The prosecutor's behavior foregrounds the deepest underlying problem in these cases: the lack of political will to prosecute and accept the outcome of the legal process. The fact that the judges convicted Damiri demonstrates the need for a detailed understanding of the trials' technical and political complexity: the convictions say more about the bravery of some judges than the efficacy of the legal system. The verbal abuse and intimidation the judges suffered from Damiri and members of the Special Forces of the Indonesian Army, after his conviction, demonstrated clearly the real difficulties these judges faced.

Apart from the Damiri case, the trials as a whole have been severely criticized from the onset, particularly since the first acquittals. The fact that only 6 out of 18 defendants have been convicted is one of the chief complaints of national and international critics. The moderation in sentencing, often below the legal minimum, and the fact that the convicted defendants remain free pending appeal are among the others. However, these factors are not sufficient for a fair evaluation of the court without careful analysis of the trials, the prosecution effort, and the larger context in which the trial process operated. This report provides such an evaluation of the credibility of this judicial process from investigation to final judgment.

The problem with the Jakarta trials is that the process has been fundamentally flawed from the moment the attorney general's office took over the investigation following its acceptance of the report of the Commission of Inquiry (KPP HAM) appointed by the National Human Rights Commission (Komnas HAM). These flaws have resulted in a series of failures that has prevented the trial process, as a whole, from providing the kind of accountability many Indonesian NGOs and the international community have demanded. These failures have occurred, moreover, despite some judges' strenuous efforts to ensure that the trials were fair and serious in their evaluation of the responsibility of the defendants. These efforts resulted in a number of significant convictions, but these convictions are not enough to redeem the failures of the process as a whole.

A balanced report on the trials must seek to analyze and explain these failures and point out when they were due to factors beyond the participants' control. Such reflections are necessary because the reasons for the failures are manifold and complex, and, as noted above, some of the individual trials are not without their positive features. Despite all of these complications, the report concludes that six central aspects stand out in the overall failure to provide credible accountability according to international standards:

1. The failure of the prosecution in almost all of the trials to press its case with professional commitment and to produce sufficient inculpatory testimony and documents, despite the ready availability of that evidence. This failure manifested itself in a variety of ways, encompassing the pre-investigative, investigative, and trial phases of the process. This failure of the prosecution is one of the clearest and most important ways in which the court did not meet international standards in establishing the identity of those most responsible for the violence in East Timor. The report demonstrates how the failure extends beyond evidentiary matters and encompasses the scope and strength of indictments, the competence and motivation of prosecutors, and the proper application of International Humanitarian Law.
2. The failure of the prosecution to present a coherent and credible account of the violence in East Timor sufficient to justify convictions in crimes against humanity cases. The failures in the production of inculpatory evidence resulted in indictments, prosecution cases, and judgments that typically do not go beyond the narrowest facts of particular cases or provide a broader and more comprehensive account of the widespread, systematic, and organized nature of the crimes against humanity, as is the common practice in cases before the International Criminal Tribunal for the former Yugoslavia and its Rwandan counterpart. Even in cases that were more vigorously prosecuted, the prosecution still operated within certain limits with regard to the role of the Indonesian military as defined by the dossiers and the indictments. The indictments and the prosecution case typically ignored the system and focused only on individual incidents. Moreover, in general, the prosecution's view of the overall context and pattern of the violence in East Timor did not differ significantly from that presented by the defense. Both sides typically represented the violence as arising from actions of pro-integration forces and resulting in a series of spontaneous "clashes," or acts of revenge, in a conflict between two opposing armed groups, without any organized support or participation by Indonesian military, police, or security units. Judges in many cases also shared this view, which was never tested by the exigencies of proof nor grounded in solid evidence. In these cases, the prosecution, defense counsel, accused, judges, and most witnesses shared a common view—widely held in Indonesia—concerning the nature of the violence in East Timor and the lack of responsibility of Indonesian institutions in its organization or perpetration.

This view differed fundamentally not only from international reports and the views of international experts, including the International Commission of Inquiry

on East Timor (CIET), established by the United Nations: it is also contradicted by the detailed investigations and indictments of the Serious Crimes Unit, established by the United Nations Transitional Administration in East Timor (UNTAET), and by several decisions of the Special Panels in Dili created to try the cases relating the atrocities of 1999. Most significant, it also departed almost completely from the KPP HAM report, which provided the legal foundation for the establishment of the Ad Hoc Human Rights Court in the first place. Indeed, the KPP HAM report concluded that the violence in East Timor was organized and systematic, and was financed, orchestrated, and encouraged by the Indonesian military up to the very highest levels. Despite the explicit recommendation of the KPP HAM report, these highest-command levels were never investigated or indicted. It is thus not the case that the KPP HAM view was examined and found wanting or lacking in evidentiary support.

3. These particular failures, and many others discussed in the report, are symptomatic of the central underlying failure that has crippled this process from beginning to end: The failure of political will in the attorney general's office and the highest levels of the Indonesian government to encourage or even permit a serious attempt to establish the identity and guilt of those most responsible for the crimes committed in East Timor. Those individual judges (and perhaps some prosecutors) who were committed to such an attempt were always struggling against the systemic and particular handicaps and obstacles generated by this lack of political will to enable a credible trial process. The nature of the Indonesian system for the administration of justice is such that the lack of political will at the highest levels is like a paralyzing narcotic that seeps downward through the whole system. Coupled, then, with the failure of political will is the critical systemic problem of the lack of prosecutorial independence. In regard to the equally vital factor of judicial independence, the court was intended as a mechanism to provide such independence. That it was partially successful in doing so is a tribute to the judges who withstood blatant intimidation, harassment, and serious pressures to return guilty verdicts. It is also clear, however, that although a strain of judicial independence has informed the trials, it was far from complete and needs to be supported, deepened, and encouraged through both local and international efforts.
4. The overarching objective of the trials was to establish clear command responsibility at the institutional level, not just individual culpability. This has clearly not succeeded, as some TNI officers have been acquitted and others convicted in a pattern that cannot be convincingly explained with reference solely to the merits of the individual cases. For this reason, the 12 trials have only succeeded in convicting a few individual perpetrators and have not demonstrated the responsibility of the institutions they represent. Thus, they have failed to establish accountability and undermine the culture of impunity that was responsible for the violence in the first place. This is only magnified by the concomitant failure to investigate and indict individuals at the high command level of the TNI, as recommended by KPP HAM.

5. The trials have failed fundamentally in fulfilling the “truth function,” a central part of the mandate of human rights and war crimes tribunals. Indeed, by clinging to a version of the violence in East Timor that is accepted nowhere outside of Indonesia (and rejected there by many), the trials have lost a unique opportunity to set the historical record straight, inform the Indonesian public of the accountability of their institutions for the gross human rights violations perpetrated in their name, and provide a basis for reconciliation and justice for the victims in East Timor.
6. Whatever the confluence of various factors that have produced results in particular cases, overall responsibility for the failure of the trial process before the Ad Hoc Human Rights Court lies with the attorney general’s office and the Government of the Republic of Indonesia. Because of the politicization of the prosecution, as well as a number of other factors, it is clear that without the political will at the highest levels of government to enable an independent prosecution of human rights cases, credible results and accountability will not be achieved.

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Overview¹

On May 5, 1999, Indonesia, Portugal, and the United Nations concluded a protracted negotiation that would allow the people of East Timor to determine whether it would become an independent state or an autonomous province of Indonesia. Significant violence in East Timor had begun in the early months of the year and continued after the agreement was concluded. That violence escalated immediately before and for several weeks after the ballot of August 30, when the people of East Timor voted to become independent. The United Nations estimates that more than 1300 people were killed throughout the violence, and that serious incidents occurred involving rape, torture, assault, and massive destruction of property. The international media closely covered the violence, which provoked widespread outrage. The UN appointed an International Commission of Inquiry on East Timor (CIET) to investigate the events that had taken place, and pressure increased in the demands for accountability. The CIET, as well as many others, called for the creation of an international court to investigate and prosecute the events that had occurred. Instead, it was decided that Indonesia ought to be allowed to demonstrate its commitment to the rule of law and to conduct appropriate investigations and prosecutions. At the same time, the United Nations Transitional Administration in East Timor (UNTAET) established mechanisms for the investigation and prosecution of the violence of 1999 with the creation of the Serious Crimes Unit under the Office of the General Prosecutor and the Special Panel for Serious Crimes in Dili District Court. While a matter for separate analysis, it should also be noted that the Serious Crimes Unit, created by UNTAET, has investigated and presented indictments in relation to individuals significantly higher up the command chain than those affected by the Jakarta prosecutions. These indictments often focus on personal responsibility for participation in planning, ordering, or executing the crimes in question, and not merely the failure to prevent such actions from occurring.²

This report describes the work of the judicial institution established by Indonesia to try those responsible for the violence of 1999: the Ad Hoc Human Rights Court. It focuses on the 12 trials, which have taken place since March 2002, of military, police, and civilian officials for their role in the violence of 1999 in East Timor. Six of the 18 defendants have been convicted of crimes against humanity, receiving sentences ranging from 3 to 10 years. Those convicted include high-ranking Indonesian Army (TNI) officers, a militia leader, and police and civilian officials. While all those convicted have the right to appeal and remain free pending such an appeal, it appears that only Abilio Soares, former civilian governor of East Timor at the time of the 1999 crimes, has done so.

¹ Preparation of this report benefited from the collaboration of Asmara Nababan, who produced the contents of Section I. The full text of his report on The KPP HAM Commission of Inquiry is contained in Annex 1, available at www.ictj.org.

² For more details on those charged and the indictments presented, see, e.g., the indictment at <http://www.jsmp.minihub.org/indictmentspdf/wirantoindictenghs4mar03.pdf>, which relates to Wiranto and Zacky Anwar Makarim (among others), who were not indicted by the Indonesian AG. General Wiranto was minister of defense and commander of the Indonesian Armed Forces. Major General Zacky Anwar Makarim was the most senior military officer based in East Timor in the period leading up to the ballot, although not in the formal chain of command. On February 24, 2003, both were charged *in absentia* with crimes against humanity before the Dili Special Panel, along with other senior military officers, including Damiri, Suratman, and Muis.

The report is based on an ongoing study of the trial process over a period of 15 months. During this period, observations were conducted of all 12 trials, and in-depth interviews were conducted with judges, prosecutors, defense counsel, members of NGOs, the Jakarta legal and diplomatic communities, and Indonesian and international observers and experts. These interviews took place during four trips to Jakarta between May 2002 and February 2003, each of which lasted from 10 days to 3 weeks.³ In addition, the report draws extensively on the indictments and judgments from the trials (except for that of Adam Damiri, which was not available at the time of this writing).⁴ Interviews were undertaken in Dili, East Timor, in January 2001, with prosecutors in the Serious Crimes Unit, judges, defense counsel, district and regional human rights officers, members of NGOs, and senior members of the UNTAET political and legal staffs.

This report's overarching goal is to evaluate the credibility of this judicial process from investigation to final judgment. If the process was independent and impartial, if the investigation was thorough, if the prosecution was competent and committed to establishing the guilt of those indicted, and if the available evidence was brought to bear and fairly and scrupulously assessed by the judges, then we must accept the final verdicts, however much they may differ from our preconceptions and our desire for justice for the victims in East Timor.

The problem with the Jakarta trials is that most of these conditions have not been obtained. Indeed, the process has been fundamentally flawed from the moment that the attorney general's (AGs) office took over the investigation following its acceptance of the report of the Commission of Inquiry (KPP HAM) appointed by the National Human Rights Commission (Komnas HAM). These flaws have resulted in a series of failures that has prevented the trial process, viewed as a whole, from providing the kind of accountability that many Indonesian NGOs and the international community have demanded. The trials were explicitly designed to achieve this accountability, according to the official notes relating to their creation that were published in the State Gazette of the Republic of Indonesia.⁵ Moreover, these failures have occurred despite some of the judges' strenuous efforts to ensure that the trials were fair and serious in their evaluation of the defendants' responsibility, and these efforts resulted in a number of significant convictions, which, however, are not enough to redeem the failures of the process as a whole.

The prosecution of Adam Damiri, who in 1999 was regional commander (Pangdam Udayana) of the military region of which East Timor was a part, is the single most important case in the Indonesian trials. The court convicted Damiri on August 5, 2003, and sentenced him to three years' imprisonment. While the sentence is, like several others, below the minimum required by law, the

³ Important support and assistance, including documents and unofficial trial transcripts, was provided by ELSAM, an Indonesian NGO that monitored and reported on the trials from beginning to end. ELSAM has produced a series of important reports on the trials. English translations of these reports are available at <http://warcrimescenter.berkeley.edu>.

⁴ Translations of the indictments and judgments are available at the website of the UC Berkeley War Crimes Studies Center at <http://warcrimescenter.berkeley.edu>.

⁵ "Establishment of this Act constitutes the realization of the Indonesian nation's responsibility as a member of the United Nations. In addition, establishment of the Act concerning human rights involves a mission to execute a moral and legal responsibility to hold in the highest esteem and implement the Universal Declaration of Human Rights drawn up by the United Nations as well as provisions set forth in several other legal instruments pertaining to human rights which have been ratified and/or approved by the state of the Republic of Indonesia," Notes to Act Number 26 of 2000 of the Republic of Indonesia Concerning Human Rights, State Gazette of the Republic of Indonesia, 2000.

truly exceptional aspect of the case lies in the prosecutor's conduct. In June 2003, the prosecution demanded an acquittal on the grounds that it had not proved *any* of the charges on which the defendant had been indicted. The prosecution's failure to press its case in this crucial trial, together with the judges' decision to convict despite this failure, provides an appropriate coda to the Jakarta trials. The prosecution's conduct clearly indicates the deepest underlying problem in these cases: the lack of political will to prosecute and to accept the outcome of the legal process; i.e., the lack of a political context in which the administration of justice can function with legitimacy and independence. At the same time, the judges' determination to convict—despite intimidation, harassment, and possible danger to themselves in doing so (see below)—demonstrates that a potential, albeit repressed and limited, for judicial independence and accountability in the Ad Hoc Human Rights Court remains intact. In contrast to many of the international reports of the Damiri conviction, many Indonesian journalists and experts have emphasized the significance that a civilian human rights court has convicted a major general at Adam Damiri's level of seniority.

The Ad Hoc Human Rights Court was intended to provide independence and legitimacy. As explained below, the prosecutor's conduct in the Damiri case leaves only one possible conclusion: that, when necessary, direct pressure will prevail to prevent the independent and legitimate exercise of the functions of the prosecutor. Faced with a panel of judges who, based on past performance in three previous trials, would be likely to convict (and able to resist pressure and harassment to do otherwise), some form of political intervention appears to have motivated prosecutors to attempt to argue for an acquittal when they were on the verge of what would have been, by normal standards, their most important victory.

Apart from the Damiri case, the trials as a whole have been severely criticized since they began, particularly after the first acquittals. The fact that only 6 of 18 defendants have been convicted thus far is one of the chief complaints of national and international critics. The moderation in sentencing, including several that fall below the established legal minimum, and the fact that the convicted defendants remain free pending appeal are among the others. But if we are committed to the international standards of justice by which we measure the Indonesian trials, the statistics about convictions versus acquittals are not enough. It is not the number of acquittals that matters, for a study like this one must presume the defendants to be legally innocent until proven guilty. What does matter is the *process* by which judgments about their innocence or guilt were made. Indeed, we must be just as prepared to criticize a guilty verdict not founded upon the evidence as an unfounded acquittal. This kind of impartiality has been lacking in some reports, which appear simply to assume the legal guilt of all of the defendants and regard any conviction as *ipso facto* due to corruption. Based on observations of the trials, although political influence and intimidation have without a doubt played a role, the issues are more complex than that.

A balanced report on the trials must seek to analyze and explain these failures and point out where they arose from factors beyond the participants' control. Such details are necessary in even an abbreviated account of the trials such as this, because the reasons for the failures are manifold and complex and, as noted above, some of the individual trials are not without their positive features. Despite all of these complications (which are elaborated in some detail below), we can, without qualification, preliminarily identify three central aspects of this overall failure of the Jakarta trials to provide credible accountability according to international standards.

1. *Failures of evidence: the failure of the prosecution in almost all of the trials to press its case with professional commitment and to produce sufficient inculpatory testimony and documents, despite the ready availability of that evidence.* This failure manifested itself in several ways:

- Failure to use the KPP HAM investigative report and database.
- Failure to use evidence offered or available from UNTAET or in East Timor.
- Failure to conduct sufficient independent investigation and to use the evidence that was gathered during the investigative phase.
- Failure to resolve at an early stage the problems related to witness protection, or to secure other technical solutions to the problem of obtaining testimony from witnesses in East Timor, such as teleconferencing, so as to ensure the timely and adequate production of victim-witness testimony.
- Failure to exercise a reasonable degree of professional initiative in using the information developed in previous trials to strengthen prosecution cases.
- Failure to produce testimony from international observers who were in East Timor during the violence.
- Failure to enforce the rules regarding the presence of witnesses in the courtroom when they are not testifying and regarding their conversing with parties or other witnesses.
- Failure to prevent witness intimidation.

Despite the explicit recommendation of the KPP HAM report, the highest command levels were never investigated or indicted.⁶ The KPP HAM view was not examined and found wanting or lacking in evidentiary support; rather, it was never examined at all. In this way, the court's truth and accountability functions failed fundamentally.

This failure is one of the clearest and most important ways in which the court did not meet international standards in establishing the identity of those most responsible for the violence in East Timor. As seen below, it extends beyond evidentiary matters and encompasses the scope and strength of indictments, the competence and motivation of prosecutors, and the proper application of International Humanitarian Law (IHL).

The failure to produce inculpatory evidence resulted in indictments, prosecution cases, and judgments that typically do not go beyond the narrowest facts of particular cases or provide a broader and more comprehensive account of the widespread, systematic, and organized nature of the crimes against humanity, as is the common practice in cases before the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY). Even in cases that were more vigorously prosecuted, the prosecution still operated within certain limits regarding the role of the TNI as defined by the dossiers and the indictments.

2. *Flawed prosecutorial strategies: the failure of the prosecution to present a coherent and credible account of the violence in East Timor sufficient to justify convictions in crimes against humanity cases.* The indictments and the prosecution case typically ignore the

⁶ See pp. 8–9 for more information.

system and focus only on individual incidents. Moreover, in general, the prosecution's view of the overall context and pattern of the violence in East Timor as a whole did not differ significantly from that presented by the defense. Both sides typically represented the violence as arising from actions of pro-integration forces and resulting in a series of spontaneous "clashes" or acts of revenge in a conflict between two opposing armed groups, without any organized support or participation by TNI, police, or security units. In many cases, judges also shared this view, which was never tested by the exigencies of proof or grounded in solid evidence. In these cases, the prosecution, defense counsel, accused, judges, and most witnesses shared a common view that was one widely held in Indonesia.

This view differed fundamentally from that of international reports, international experts, the evidence collected by prosecutors in the Serious Crimes Unit, and the findings of the Serious Crimes Panel tribunals. Most significant, it also departed almost completely from the KPP HAM report, which provided the legal foundation for the establishment of the Ad Hoc Human Rights Court in the first place. As shown below, the KPP HAM report concluded that the violence in East Timor was organized and systematic, and was financed, orchestrated, and encouraged by the Indonesian military up to the very highest levels.

3. *Insufficient political will to prosecute: the failure of political will in the AG's office and the highest levels of the Indonesian government to encourage or even permit a serious attempt to establish the identity and guilt of those most responsible for the crimes committed in East Timor.* Those individual judges (and perhaps some prosecutors) who were committed to such an attempt had to struggle against the systemic and particular handicaps and obstacles generated by this lack of political will to enable a credible trial process. This lack is manifested in the government's slow attempts to transform the militarized public prosecution service into a professional civil service body. In addition, the nature of the Indonesian administration of the justice system is centralized and hierarchical, such that the lack of political will at the highest levels is like a paralyzing narcotic that seeps downward through the whole system. For the most part, cases were apparently tried by prosecutors who were unable to secure better assignments because of systemic incentives discouraging active prosecution. Prosecutors were not provided with the necessary resources, independence, or decision-making power to efficiently argue these cases.

Coupled, then, with the failure of political will, is the equally critical systemic problem of the lack of prosecutorial independence. The Ad Hoc Human Rights Court was intended to provide such independence. That it was partially successful is a tribute to the judges who withstood blatant intimidation, harassment, and serious pressures to return guilty verdicts. It is also clear, however, that although a strain of judicial independence informed the trials, it was far from complete, and needs to be supported, deepened, and encouraged through both local and international efforts.⁷

⁷ Dato' Param Cumaraswamy, Report on the Mission to Indonesia, July 15–24, 2002: As the Special Rapporteur on the Independence of Judges and Lawyers concluded, "The several acquittals before the Ad Hoc Human Rights Court for East Timor is [sic] not surprising. The insufficient investigations and the failure to produce material evidence contributed to such acquittals. The judges who had to base their decisions on the evidence before the court may not be faulted" (20).

The remainder of this report is divided into three parts. The first provides a background account of the report of the independent investigative committee, KPP HAM, under the auspices of the National Human Rights Commission, Komnas HAM. It also examines the nature of KPP HAM's findings and explains how they were not carried over into the investigation and prosecution aspects of the process. Section II examines the trials and judgments in seven individual cases so as to provide a detailed analysis of the trials' strengths and weaknesses. The third section builds on this analysis in examining the systemic and trial-specific weaknesses in the prosecution and court.

I. COMMISSION OF INQUIRY (KPP HAM) FINDINGS AND RESULTS

A. Inquiries Into Gross Violations of Human Rights in East Timor From the Investigation by KPP HAM to Prosecution by the Attorney General⁸

KPP HAM was established by Komnas HAM's plenary session on September 23, 1999, and set forth in the Decree of the Chair of Komnas HAM No. 770/TUA/IX/99. It was established as an independent Commission of Inquiry and, to ensure its objectivity, aside from five members from Komnas HAM, four others were appointed from civil society. KPP HAM was mandated to:

- Gather facts, data, and information on violations of human rights in East Timor since January 1999, focusing particularly on gross violations of human rights, including genocide, massacre, torture, forced displacement, crimes against women and children, and systematic destruction of property;
- Investigate the degree of involvement of the state apparatus and or other national and international agencies in human rights violations; and
- Compile the findings of the inquiry as the preliminary evidence for the investigation and prosecution in a Human Rights Court.

In executing its work, KPP HAM encountered serious obstacles in executing its tasks, including, among others, insufficient time and resources, a lack of cooperation from essential parties, and intimidation and harassment.

B. The Findings and Recommendations of KPP HAM⁹

In its final report, KPP HAM concentrated on a number of primary cases during the period from January 1999 to September 1999,¹⁰ although the occurrence of violence in the region was by no means limited to then. The primary cases were:

- The Liquisa Church massacre, April 6, 1999
- Arbitrary arrests and torture in Kailako, April 12, 1999
- The ambush of Manual Gamma groups, April 12, 1999

⁸ This section is an edited excerpt/summary from a report by Asmara Nababan, former member of the Commission of Inquiry for Human Rights Violation in East Timor (KPP HAM). Asmara Nababan collaborated in the research for this report, and an extended version of his contribution, summarized here, appears in Annex 1, available at www.ictj.org.

⁹ Generally adapted from The Report of KPP HAM, which was given to the attorney general on January 31, 2000.

¹⁰ This period started from the announcement of BJ Habibie's "two options" in January until Indonesia withdrew its military and police forces from East Timor in September 1999.

- Summary executions in Bobonaro, April 13, 1999
- The attack on Manuel Carrascalao's house, April 17, 1999
- The riots in Dili, August 26, 1999
- The attack on the Dili Diocese, September 5, 1999
- The attack on Bishop Belo's house, September 6, 1999
- The burning down of houses (scorched-earth operation) in Maliana, September 4, 1999
- The attack on the Suai Church Complex, September 6, 1999
- The murder of Sander Thoenes, September 21, 1999
- The massacre in Los Palos, September 25, 1999
- Acts of gender-based violence, including rape

The AG's office took up only four of these primary cases for investigation. By analyzing these cases and the evidence it had obtained, as well as the historical background and political situation of East Timor leading up to the events of 1999, KPP HAM also found that there was a close relation between Indonesian civilians and military officials and the armed Timorese militias/civilians.

Prior to the government's announcement of the popular consultation in January 1999, armed civilian groups (militias), obtaining support from the civilian and military apparatus, had already executed various violent actions against civilian groups they perceived as pro-independence. Soon after the announcement, various existing or newly formed militia organizations were consolidated into one, Pasukan Pejuang Integrasi (Pro Integration Forces, or PPI). Meanwhile, Governor Abilio Soares testified to KPP HAM that he had ordered all the district regents in East Timor to establish Pam Swakarsa¹¹ in every village under the leadership of the village head for the purpose of ensuring the victory of autonomy. The provincial governor and the district regents had direct administrative authority over the Pam Swakarsa, while the police forces played the role of supervisor and the TNI provided support. The financing of Pam Swakarsa came from the state annual regional budget. The Pam Swakarsa, if not only just another umbrella term for militia groups, at the very least overlapped significantly with them.

KPP HAM found that the Government of Indonesia and the Indonesian military supported the militias by providing facilities, weapons, and financial support, as well as by engaging in joint patrols and operations. Based on the facts and evidence as described above, there was a strong indication that planned, widespread, and systematic gross violations of human rights had occurred in East Timor, with the support and participation of the Indonesian military. Based on these findings, the report recommended to the AG that more than 100 individuals be investigated as suspects. These included four of the highest-ranking members of the Indonesian Armed Forces:

- General Wiranto, former Minister of Defense/Commander of Armed Forces
- Lieutenant General Johny Lumintang, Deputy Commander of Armed Forces
- Mayor General Zacky Anwar, member of P4OKT¹² and security adviser to Task Force P3TT¹³

¹¹ Abbreviation from the name in Bahasa: Pengamanan Swa Karsa (Self-Reliance Security).

¹² Team Pengamanan Pelaksanaan Penentuan Pendapat Mengenai Otonomi Khusus Timor-Timur: Team for the Security of the Implementation of the Popular Consultation on the Special Autonomy in East Timor.

¹³ Satgas Pelaksanaan Penentuan Pendapat di Timor Timur: The Task Force for the Popular Consultation in East Timor.

- Major General (retired) H.R. Garnadi, Vice Chairman of Task Force P3TT

None of these individuals were indicted or, according to KPP HAM, ever investigated by the AG's office.

C. CIET and KPP HAM

The International Committee of Inquiry on East Timor (CIET) was established pursuant to the resolution adopted by the UN Commission on Human Rights on October 15, 1999. It was mandated to gather and compile information on possible violations of human rights in East Timor and to provide the Secretary-General with the basis for recommendations on future actions regarding this matter.

KPP HAM and CIET maintained little practical cooperation. KPP HAM also experienced a lack of support from CIET. Even though KPP HAM held three meetings with the CIET, information, documents, and evidence were not exchanged, as they never reached an agreement concerning the protocol of cooperation. KPP HAM was aware that CIET was able to question 170 witnesses in East Timor and gather more information and evidence, such as documents, some of which were inaccessible to KPP HAM. An exchange of documents and evidence would have helped KPP HAM to work effectively in the minimum time (four months) provided for it to complete its tasks, so this lack of cooperation was unfortunate. Despite this fact, however, it is striking that two independent commissions came to very similar conclusions regarding what happened in East Timor before and after the referendum in 1999. Both commissions determined that there were patterns of gross violations of human rights and breaches of IHL, which varied over time but took the form of systematic and widespread attacks against the civilian population. Both commissions also established the involvement of the Indonesia Armed Forces and the East Timorese militias in these violations. One difference is that CIET did not name persons allegedly responsible for the crimes, while KPP HAM did.

D. The Implementation of KPP HAM's Recommendations

The AG's office, after receiving the KPP HAM report, appointed an investigative team comprising career attorneys and military and police officers. The AG also appointed a 15-member team of experts to act as consultants. The AG's investigative team completed the investigation on September 1, 2000. On November 23, 2000, the Indonesian Parliament passed the Human Rights Court Act No. 26/2000 (to replace the PERPU No.1/1999), and the President signed it into law. The Act stipulated the establishment of the Ad Hoc Human Right Court for past crimes. Even though the explanatory section of the Act noted that the definition of crimes was derived from the Rome Statutes of International Criminal Court, there are several important differences that have hampered the full prosecution of these cases. It has been suggested that the failure to include a provision similar to that found in Article 7(k) of the Rome Statute¹⁴ in relation to "other inhuman acts" meant the destruction of property in the form of the scorched-earth operation could not be included in the prosecution. Article 7(k) is included in the Rome Statute precisely because it is recognized as impossible to anticipate every form of human cruelty and to allow the possibility of prosecution for

¹⁴ Article 7(k): Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

acts, so long as they otherwise fit with the requirements of crimes against humanity, even if they are not specifically mentioned in the Statute. It is, at the very least, a serious oversight in the drafting competence of those responsible for Law 26 of 2000 to have failed to include something similar. However, the suggestion that the failure to include such a provision meant that the massive destruction of property could not be included in terms of the systematic scorched-earth operation seems misplaced. Article 9(h) of Law 26 defining crimes against humanity includes the following: terrorization of a particular group or association based on political views, race, nationality, ethnic origin, culture, religion, sex, or any other basis, regarded universally as contravening international law.

This article reflects the provision found in Article 7(h) of the Rome Statute on the issue of persecution. There is absolutely no difficulty in a prosecutor arguing that the policy of massive destruction of property responded to a pattern of persecution based entirely on the political views (real or perceived) of the victims of the attacks. The fact that no such crime was ever charged in any of the indictments demonstrates either a lack of understanding of the law itself or a deeper failure of will to use it to its fullest extent.

A further limitation found in Law 26 of 2000 was that the Ad Hoc Human Rights Court was limited to the consideration of events of April and September of 1999 in only three of East Timor's 13 regencies.

To facilitate the investigation of the crimes committed in East Timor, on April 5, 2000, the AG and UNTAET signed a Memorandum of Understanding (MOU) on Cooperation in Legal, Judicial and Human Rights Related Matters. The MOU afforded each party the widest possible measure of mutual assistance in investigations or court proceedings in respect of offenses, the prosecution of which (at the time of a request for assistance) falls within the jurisdiction of the judicial authorities of the requested party. In implementing the MOU, UNTAET facilitated the investigation by the AG's investigative team in East Timor in questioning witnesses and observing the crime scenes.¹⁵ However, when the Special Crimes Unit from UNTAET attempted to do the same thing in Indonesia, it was not able to question a single witness. This point should not be underestimated. It is a key element in demonstrating that while the Indonesian government wanted to look as if it was prepared to cooperate in the quest for accountability, when the time came to act on such commitments, there was no political will to do so.

E. The KPP HAM Inquiry vs. the Attorney General's Investigation: Differences in Conclusions

After the submission of the final report, there was almost no consultation or discussion between KPP HAM and the AG concerning the findings. The AG invited KPP HAM only once for a discussion, and that was merely to explain how to operate the JURIDOC database system that it had employed to catalogue and make accessible the large body of evidence appended to its report. It was thus surprising that when the indictments were made public, it clearly appeared that the AG had constructed a case that differed in fundamental ways from KPP HAM's findings and recommendations. The following table summarizes the most important of these differences.

¹⁵ Defense counsel interviewed in Jakarta denied that there was effective cooperation and maintained that their efforts were hindered by various actions of UNTAET and the Serious Crimes Unit.

	AG'S CASE	KPP HAM'S REPORT
Patterns of crimes	<ul style="list-style-type: none"> • Murder • Persecution 	<ul style="list-style-type: none"> • Mass murder • Torture and persecution • Forced disappearance • Sexual enslavement and rape • Scorched-earth operation • Forced displacement and deportation • Destruction and loss of evidence
Occurrences of crime	Four incidents: <ul style="list-style-type: none"> • The Liquisa massacre • The attack on Suai Church • The attack on Manuel Carrascalao's house • The attack on Bishop Belo's house 	Sixteen primary cases, although not limited to them (as explained above)
Crime scene	Three locations/regencies: <ul style="list-style-type: none"> • Suai (Kovalima) • Dili • Liquisa 	All the 13 regencies of East Timor
Alleged perpetrators	Sixteen individuals	More than 100 individuals, including those that allegedly executed the crimes directly, as well as the Indonesian High Command
Time frame	April 1999 and September 1999	January to September 1999

Unfortunately, it is hard to escape the conclusion that the underlying reason for these serious differences is political.¹⁶ The reason for this major reduction in the scope of the investigation and prosecution in regard to the patterns, scope, and geographical range of crimes ultimately resides in the shift in the Government of Indonesia's political commitment to resolve the gross human rights violations in East Timor fairly and impartially, demonstrated most clearly in the creation of a mandate that was excessively narrow and arbitrary in terms of jurisdiction *ratione materiae* and *ratione temporis*. Nonetheless, nothing in the mandate itself would have prevented the AG's office from providing evidence about the widespread and systematic context of the events in April and

¹⁶ One of the most curious differences is the exclusion of more than 84 alleged perpetrators in the case the attorney general composed, especially those who allegedly directly executed the crimes. The logical initial step would have been to prosecute the field perpetrators first, before bringing to court individuals who allegedly ordered the crimes or neglected to take all necessary and reasonable measures within their power to prevent or repress their commission.

September (in addition to the specific acts that formed the core of particular indictments). The failure to do this in the majority of the cases rests directly with the AG's office.¹⁷

F. The Creation of the Ad Hoc Court, Law 26/2000, and the Constitution of the Panels

The Indonesian legislature passed Law 26/2000 in November 2000, establishing the Human Rights Court as a special chamber within the existing legal system. This report does not intend to explore the strengths and weaknesses of the law itself, partly because the focus here is on the trials and partly because others have covered this in detail elsewhere.¹⁸ The main concerns can be briefly summarized in that the temporal jurisdiction allowed the courts only to consider events occurring in April and September of 1999, thus excluding some significant aspects reported on by KPP HAM. This weakness demonstrates the legislature's excessively restrictive approach. However, this temporal limitation also might have impeded the prosecution of crimes against humanity. The logic seems to be that because crimes against humanity require proof that the defendant acted in the knowledge that his acts took place in the context of a widespread and systematic attack on the civilian population, restricting matters to two specific and distant months would make this more difficult to prove. Regrettable as the limitation was, it did not impede the prosecution from leading evidence of facts and circumstances outside the time periods in question that would have demonstrated the nature of the attacks. Any failure to introduce such evidence is entirely the prosecutor's failing and cannot be blamed on the narrowness of the legislation. Analysis of the judgments in individual cases (see Section II) supports this conclusion and demonstrates that when they wished to do so, judges and prosecutors were perfectly capable of referring to the broader temporal context in which the crimes were committed.

The judges comprise both career judges and ad hoc appointees. They were apparently selected during the course of secret hearings by a closed session of Indonesia's Supreme Court. The judges were drawn almost entirely from university law faculties, after an initial process in which the deans asked for volunteers and then forwarded lists of names. Information is not available about the process by which the names of career judges were put forward. A panel of five judges was assigned to each case, in an apparently random process that the judges cannot understand or explain. Some judges found themselves on as many as four panels, others on far fewer. Each panel consists of three ad hoc and two career judges, with a career judge presiding. Most of the career judges had no (or very little) training in, or experience with, international law or human rights. The same applies to the ad hoc judges, except for those few whose area of specialization is international criminal law and human rights law. In part because of their expertise in these areas, a few of the ad hoc judges were able to play a very important role in the deliberations of the panels to which they were assigned. Indeed, four of the six convictions can be attributed to some combination of the judges from the panel that heard the Damiri case.

¹⁷See Section F for a fuller explanation of this point.

¹⁸<http://web.amnesty.org/library/Index/engASA210052001?OpenDocument&of=COUNTRIES%5CINDONESIA?OpenDocument&of=COUNTRIES%5CINDONESIA>.

II. ANALYSIS OF THE TRIALS AND JUDGMENTS

This part of the report analyses 7 of the 12 trials brought before the Ad Hoc Human Rights Court, including the Damiri case.¹⁹ This case is analyzed on the basis of the Prosecution's Summation of Charges Proved and press reports of the conviction. Unlike the other cases analyzed, there has not been the opportunity to consider the judgment in detail. This report thus examines all of the trials of the three generals who held the highest command positions of those indicted. This report does not discuss the first three trials (Abilio Soares, Timbul Silaen, and Herman Sedyono, et al.) because they were decided almost a year ago and have received intense international scrutiny.²⁰ The seven cases selected include military, police, and civilians, as well as the highest-ranking Timorese militia leader indicted, and represent three convictions and four acquittals. Most of the cases focus on the responsibility of the TNI. This selection enables us to evaluate the prosecution of officers at three command levels: military district (Dili or Liquisa), overall command of East Timor (Nuer Muis and Tono Suratman), and the regional commander (Adam Damiri). These analyses are based on observations of these trials (as well as the others not included among the seven), interviews with participants and observers, and analysis of the judgments. Section III draws on this analysis of the individual cases to develop a more general argument about the problems that had a negative impact on the trial process as a whole.²¹

A. Trial of Nuer Muis

Key Points:

- Defendant found guilty of crimes against humanity as a result of direct participation and on the basis of command responsibility regarding failure to prevent TNI involvement in abuses. He was found not to have effective control of the militia groups.
- Findings on crimes against humanity go much further than the judgments in almost all of the other 11 trials in their portrayal of the widespread and systematic qualities of the violence in East Timor, as well as in indicating the important role of the TNI in its perpetration.
- Sentenced to five years in prison but remains free pending appeal. No appeal has yet been lodged.

Indictment: Brigadier General Nuer Muis was the overall TNI commander (Danrem, at that time a colonel) in East Timor during the attacks that occurred on September 5–6, 1999, having replaced Tono Suratman in mid-July. He reported to General Adam Damiri (Pangdam Udayana), the regional commander. He was charged with murder and persecution as crimes against humanity in

¹⁹ For a summary of the outcome of all 12 trials in relation to the 18 defendants, please see Annex 1, available at www.ictj.org.

²⁰ See, e.g., the ELSAM Reports on these trials, available in English at the website of the UC Berkeley War Crimes Studies Center, <http://warcrimescenter.berkeley.edu>.

²¹ The UC Berkeley War Crimes Studies Center has commissioned translations of all of the judgments. The translation effort proceeded under the oversight of Aviva Nababan, and was facilitated by ELSAM. Nine of these judgments, as well as many of the indictments, are currently available on the website cited in the preceding footnote. This analysis is based on ELSAM's transcript of the judgment as no official version was available at the time of writing.

regard to the attacks at the Diocese Complex in Dili, at the residence of Bishop Belo in Dili, and the Ave Maria Church complex in Suai. He was convicted and sentenced to five years' imprisonment.²²

Judgment: There are two preliminary points to be emphasized in evaluating the judgment in this case. The first involves the nature of the court's findings regarding the crimes against humanity charges. These findings go much further than the judgments in almost all of the other 11 trials in their portrayal of the widespread and systematic qualities of the violence in East Timor, as well as in indicating the important role of the TNI in its perpetration.²³ (They could, however, have gone still further.) Second, the findings are utterly inconsistent with the statements the prosecution made in the Damiri case in explaining why it had not proved any of the charges. This inconsistency is particularly noteworthy because Damiri was charged under command responsibility, and Muis was his direct subordinate and kept him well informed of the security situation. The evidence that supported Muis' guilt bears directly upon Damiri, as well.

At trial, 21 witnesses testified in court (two via teleconferencing from East Timor). Sixteen of these witnesses were TNI (10), police (4), government officials, or militia members. Three were expert witnesses, and only two victim-witnesses testified by means of teleconferencing. In addition, the sworn pretrial statements of four victim-witnesses were read in court.²⁴ As in other trials, in order to convict, the judges had to disregard the vast bulk of the testimony produced by prosecution witnesses largely on the basis of a lack of credibility and reliability. Without the expedient of teleconferencing, implemented only in the very final stages of the trial, no victim-witnesses would have testified at all.

The judges found that, at the relevant times in East Timor, crimes against humanity were committed as a part of a widespread or systematic attack, known by the TNI to be directly targeted upon civilian residents for murder. Significantly, they based this conclusion on their findings that such violence—including murder, a scorched-earth operation, and the destruction of civilians' houses—occurred in almost all parts of East Timor. None of the indictments and very few judgments describe this larger context of organized criminality. They find that such attacks occurred often and repeatedly, followed a similar pattern, began before the referendum, and were well known to the TNI. The TNI, they find, must also have known that such attacks were likely to occur with even greater violence after the referendum. Further, the fact that the jurisdiction of the commanders of Suai and Dili (Dandim Suai and Dandim Dili) consisted of small towns and cities would have made it easy for them to detect and track mass movements of persons. These commanders should have been able to predict the attacks on the Dili Diocese and the Suai Church complexes because of the concentration of pro-independence masses at these locations.²⁵

The judges found that the TNI had not attempted to assess properly the security situation of the refugees in Dili or Suai or to disperse the armed masses that had gathered there. The security

²² Because the text of the judgment is not yet available, this discussion is based on a summary of the ELSAM transcript of the judgment as read in court.

²³ Nonetheless, the judges, in sentencing Nuer Muis, seemed to undercut much of what they had established on the evidence by finding a number of mitigating factors that diluted the strength of their analysis on general TNI responsibility (see note 28).

²⁴ The prosecution dossier included pretrial statements by 23 witnesses.

²⁵ It should be noted, however, that Nuer Muis' subordinate who was commander (Dandim) of the Suai area was acquitted by the court, again indicating irreconcilable inconsistencies in the court's approaches.

apparatus that was responsible for preventing or stopping these attacks was present at the scene, but did nothing. The defendant, despite his authority and duty to do so, did not issue orders to take decisive action to stop such attacks. Moreover, his subordinates (Dandim Suai and Dandim Dili) intentionally provided support and opportunity for the attacks by supplying firearms to the pro-integration group preparing to attack the weak, frightened, and hungry refugees. These two officers should be legally accountable for not making the maximum effort to prevent these attacks. The court found that it had been proven that the defendant participated in and supported these crimes against humanity exerted by the pro-independence mob together with TNI troops under his effective command and control. The pro-integration militia groups, however, were not proven to be under his effective command and control.

The defendant, according to the judges, also committed crimes against humanity through his neglect to prevent the attacks. The defendant should have instituted 24-hour monitoring to ensure that his subordinates, especially Dandim Dili and Dandim Suai, carried out his orders. By neglecting to monitor or supervise the execution of his orders, the defendant can be regarded as neglecting the execution of his duties as a military commander, and thus he must be held accountable. Failing to take proper preventive measures or allowing his subordinates to engage in criminal acts, the court concludes, constitutes participation.

The defendant, the judgment holds, by virtue of his position authorizing him to maintain regional security, should have had knowledge about the potential conflicts in East Timor, especially because this conflict had existed since 1976. Moreover, the violence prior to the referendum had followed a pattern in regard to the pro-integration groups' attacks on pro-independence groups. The defendant failed to anticipate these occurrences of violence. Further, he did not take proper steps to arrest the perpetrators or investigate and prosecute those responsible. Thus, in not acting against his subordinates (Dandim Dili and Suai) when attacks by pro-integration groups, assisted by TNI troops, occurred in territory under his command, he failed to take necessary and proper action to detain them and hand them over for investigation.²⁶

The judgments against Nuer Muis and Eurico Guterres (discussed below) go the furthest in their analysis of the TNI's involvement in the violence in East Timor. Their discussion is the closest to the findings of KPP HAM and the CIET. Any suggestion that they might have gone still further runs up against the limitations of the evidence introduced by the prosecution, particularly the lack of victim-witnesses. In the cases below we will see many examples of instances where judges, whether through conviction or convenience, were not willing to go as far in basing their decision on a small minority of the witnesses' testimony. In these cases resulting in acquittals, as will be seen,

²⁶ In regard to the five-year sentence, the judges enumerate a series of factors they considered, including the difficulty of law enforcement forces operating under the prevailing conditions, the fact that both parties initiated violence, the fact that unfairness in the referendum process by United Nations Mission in East Timor (UNAMET) angered the pro-integration groups and, finally, that "other parties" were also responsible for the violence. As in several other cases where there were convictions, the judges justified going under the minimum by reference to their "sense of justice." They employ the same kind of logic as when they deviate from standard evidentiary rules and practices: when the letter of the law conflicts with justice, the judges must create a "breakthrough" to give primacy to justice. There are probably a number of reasons for the relatively light sentence, in particular the conviction that soldiers at the defendant's level are only partly responsible for the policies they carry out and sentencing practices in Indonesia (see below).

the description of the scope, nature, and responsibility for the violence in East Timor is also radically different from the findings in the Muis judgment.

B. Trial of Adam Damiri

Key Points:

- Sentenced to three years in prison on the basis of his failure to prevent certain crimes occurring, despite the prosecutor's request to acquit him. He is entitled to appeal and remains at liberty pending its outcome.
- The prosecution, in its *requisitor* (final summation of charges and evidence), claimed that it had not proven the charges, setting the stage for an acquittal.
- Their statements explaining why they had not proved any of the charges are entirely inconsistent with the findings in the Muis case, summarized above.
- The prosecutors were largely perceived as incompetent (failure to introduce evidence or properly question witnesses).
- Significant atmosphere of intimidation prevailed.
- The case is the clearest demonstration of the lack of political will to allow an effective and impartial process to take place.

Indictment: Damiri was charged with murder and persecution as crimes against humanity because he “knew or should have known that troops under his effective command and control” had committed or were committing these crimes as part of a widespread or systematic attack. The specific incidents for which Damiri was indicted included the April 6, 1999, attack on Pastor Rafael dos Santos’ residence in Liquisa, the April 17 attack on Manuel Carrascalao’s house in Dili, the September 5–6 attacks on the Dili Diocese and Bishop Belo’s residence, and the attack on the Suai Church compound on September 6. The indictment alleges that TNI members directly participated in all of these attacks and names specific individuals, including a number of officers.

Prosecution: Despite being unable to analyze the judgment in this case, one can still usefully compare the findings of the Muis judgment with the prosecution’s summation of its case against his superior, Adam Damiri. This summation comes at the stage of the trial where the prosecution advises the court of the charges it claims to have proved and demands a verdict (*requisitor*).

The prosecution argues that the following legal facts were established at the trial:

- The violence at Pastor Rafael dos Santos’ residence on April 6, 1999, was a “spontaneous clash between pro-integration and pro-independence forces.”
- There was no proof of any involvement of TNI or other troops under the defendant’s effective command and control. Six other witnesses (all of whom are TNI, including two defendants in other trials) contradicted Pastor Rafael’s testimony to the contrary.
- The defendant took appropriate steps to prevent and investigate. The same conclusion holds true for the attack on Manuel Carrascalao’s house (e.g., “purely a clash of the pro-independence and pro-integration masses”).

This account of the three incidents directly contradicts the findings of the Muis case, where the violence was not portrayed as a “clash,” but an attack with TNI involvement. Further, the defendant’s testimony was found to be more credible than that of victim-witness Bishop Belo. Despite the judges’ finding in the Muis case that these facts were proven beyond a reasonable doubt, the prosecutors felt that the evidence they introduced did not substantiate the charges and, hence, they could not submit the case for judgment. In a conclusion that sounds curiously like a defense, the prosecutors argued that on the basis of the defendant’s testimony, it had been proven that the TNI took “immediate, responsive, and professional actions” in stopping and preventing the riot.

On January 23, 2003, Pastor Rafael dos Santos in Dili finally testified via teleconferencing about the Liquisa massacre at his church. His account flatly contradicted that of the previous TNI and police witnesses. He testified that he saw TNI personnel actively participating in the attack. TNI and police witnesses testified that they had tried to prevent violence, but Pastor Rafael stated that he saw TNI attacking and identified several of them by name. He also testified that the police fired tear gas *into* the church.

The prosecution, when asking for an acquittal in its summation (*requisitor*), did not justify why it chose to ignore such evidence and instead gave credence to the blatantly self-serving testimony of the accused and other TNI personnel.

In its “judicial analysis,” the prosecution emphasized the following manifestly erroneous points:

- Expert testimony that a commander is morally responsible for the conduct of his subordinates, but that legal accountability rests with the perpetrator himself.
- The opinion of an expert witness that, “The defendant should not be held criminally accountable based on command responsibility for clashes between nonmilitary civilian masses that did not have any structural, organizational, or effective command and control relation with the defendant or the commanders who were subordinates of the defendant.”
- That to establish the crimes against humanity charge, it must be proven that the attacks were a result of a policy of the state, acting through the TNI. This, they conclude, was not proven, so the other elements of the charges in the indictment did not need to be discussed.

From an IHL standpoint, the proposition about moral versus legal responsibility is simply untenable since the Nuremberg Judgment. As to the second point, the key term here is “civilian masses.” This is consistent with the prosecution’s refusal to acknowledge the very existence of militias, let alone the support of these militias through the TNI and other organs of the Indonesian state (as had been established in the Muis judgment). Finally, on the policy element for crimes against humanity, the prosecution is making arguments for the defense. Because there is a split of opinion on this issue in the case law of the ICTR and ICTY, one would expect the prosecution to rely on cases holding that there is no formal policy requirement so as to counter the *defense* claim that there was. As it did so often in the trial, in its *requisitor* the prosecution appears to be acting as “crypto-defense” counsel.

It is plain enough that this prosecutorial strategy aimed at preventing the judges from convicting Damiri. The *requisitor* also whitewashes the involvement of the TNI and the Indonesian government in the perpetration of crimes against humanity in East Timor. The points listed above, which the prosecution emphasized, are coincidentally the same crucial points of contention between the Government of Indonesia's denial of responsibility and the KPP HAM and international reports to the contrary. In other words, the prosecution is using the case of the highest-ranking indicted TNI commander to defend the role of the TNI and the Indonesian government in the face of international expert opinion and of Indonesia's own official investigation.

The lack of credibility in the prosecution's argument in the *requisitor* is borne out by its generally weak performance at the trial. The prosecution did not introduce evidence included in the case dossier, often relied on witnesses blatantly predisposed to the defense, and was generally ill prepared to prosecute this case. For example, in the Damiri trial on December 8, 2002, the prosecutor introduced firearms into evidence. The dossier indicates that more than 26 military assault rifles were taken into custody, but he had only five antiquated weapons jumbled together in a box. He laid no foundation for the introduction of these weapons. He did not state whether the weapons were in the possession of pro-integration or pro-independence groups. The guns were not properly labeled or identified. The dossier (BAP) indicates that the weapons available to the prosecution to introduce as evidence included M16s, which would have established the TNI as a probable source of these militia weapons.²⁷

Soedjarwo (a defendant in another case) then appeared as a witness. Shortly before the session began, two international observers asked the prosecutor which witness he had called that day. He said he did not know who was coming. The prosecutor then asked Soedjarwo some questions, but none of them related to proving the prosecution case. He asked about the weapons, and the witness replied that the five rifles were not TNI issue, but rather old Portuguese period pieces. This confirmed the defense argument that the pro-integration forces had received no TNI weapons. The prosecution made no further attempt to document the source of the weapons or who had used them. The implication, of course, is that they were militia weapons and thus could not have come from the TNI. When the judges and defense counsel took over the questioning, the prosecutor appeared not to take a single note. He seemed inattentive, bored, and occasionally appeared to doze off. In the opinion of the international observers present, his performance in questioning was fully incompetent. The judges, on the other hand, pursued their questioning vigorously. They were, of course, faced with the structural problem of all of these trials—not only were the bulk of witnesses TNI, but all the defendants testified in each other's trials. The continuing presence of TNI witnesses created an atmosphere of intimidation in the courtroom, as well. For example, on January 21, 2003, during the testimony by another TNI defendant, Yayat Sudrajat, the full courtroom included 24 uniformed TNI sitting together, one of whom wore a side arm. The prosecutor asked Yayat Sudrajat why one of his soldiers was shot in the leg. The witness responded, "We TNI are prepared to die for the cause." There was loud applause in the courtroom, and one man in civilian dress shouted, "Long live Indonesia." The judges silenced the courtroom. After the session, the witness huddled in the corridor with the defendant and other TNI officers.

While the prosecution's conduct in this case was entirely unacceptable, it should be noted that even within the AG's office, some individuals were unhappy about the approach taken. One prosecutor

²⁷ See Table 1 in Annex 3, available at www.ictj.org.

(from a different case) said the prosecution lacked commitment, knowledge, and a coherent strategy. He noted that one of the lead prosecutors in the case lives and works in East Kalimantan and often did not appear at the trial. He also said that he had recommended to his superiors that the Damiri prosecution team be replaced. These statements are significant in that they demonstrate awareness of the weaknesses of both the process and the personnel assigned to particular cases. This only confirms the lack of political will at higher levels to take steps to address such problems.

Judgment: The judgment in the Damiri case will not be available for analysis for some time. As noted above, it is significant that the judges of this panel did not avail themselves of the easy excuse for an acquittal that the prosecution's conduct afforded them. In defiance of domestic and international expectations, they convicted Damiri, and it will be important to analyze the grounds they advance for doing so in a situation where the prosecution asked for an acquittal because of its failure to prove any of the offenses charged in the indictment.

Apart from other indications of the intimidation that the judges faced in this case, the events that transpired in the courtroom after the judges delivered the verdict testify to the threat implicit in the politically charged atmosphere in which the trial was conducted. According to observers, when the verdict was announced, the defendant rose and began screaming abuse at the judges. Pandemonium broke out in the courtroom, and members of Kopassus (Special Forces) stood on the benches and also began yelling. One of them reportedly shouted, "Rudi Rizki, you are dead!" In this threat, he identified the judge who is widely seen as a key factor in four of the six guilty verdicts. The judges, in fear for their well-being, fled the courtroom and the courthouse. While it is obvious that Damiri's three-year sentence is manifestly inadequate, it is important to bear in mind the circumstances in which the court was working. The reaction in the courtroom made explicit the pressures and intimidation that had otherwise been implicit through much of the process. Although the sentence is inadequate, some in Indonesia are viewing the judges' bravery as a potentially significant moment in the attempts to restore credibility to the justice system in the face of military impunity.

C. Trial of Tono Suratman

Key Points:

- Defendant acquitted.
- The selection of witness by officials other than the trial prosecutors fundamentally weakened the prosecution's case.
- Although the judges treated the violence as "spontaneous clashes," they found that murder as a crime against humanity did occur, but that the persons involved in the acts were not under the defendant's command.
- A disturbing lack of any corresponding skepticism about the testimony of witnesses favoring the defense, whose credibility is at least as much in doubt because of their TNI affiliation or their status as defendants in other trials.

Indictment: Brigadier General Tono Suratman, commander of the TNI forces in East Timor during the violence in April 1999 (Danrem, at the time in question he held the rank of colonel), was charged with crimes against humanity for failure to control troops under his command and to prevent the murders and assaults that occurred at the Liquisa Church and the house of Manuel Carrascalao. The indictment alleges that approximately 100 TNI and police participated in the attack on April 6 at the Liquisa Church compound and that the defendant, as the responsible commander, ordered some of his subordinates (including Yayat Sudrajat) to go to Liquisa to manage the situation there.²⁸

The indictment's charge regarding the attack in Dili on April 17 against Manuel Carrascalao's house is very similar to the account in the Endar Priyanto case (see below). It alleges that the attack followed the inaugural rally (Appel) for the government- financed Pam Swakarsa umbrella organization of militia groups, which was attended by pro-integration militias from all over East Timor. Further, at the rally, Eurico Gutteres, deputy commander of the PPI and commander of the Aitarak militia group, called for the extermination of pro-independence leaders and specifically named Manuel Carrascalao and his family. Immediately after the rally, the militia started a procession around Dili and attacked and burned one house before coming to the home of Manuel Carrascalao. They attacked the house, which contained 136 refugees, 12 of whom they killed. TNI personnel, six of whom are named in the indictment, supported the attack.

The court heard 26 witnesses, which include only three victim-witnesses and 18 TNI, militia members, or officials. Of the 18 TNI or government witnesses, 6 were defendants before this court. Three pretrial statements were read. The overwhelming bulk of the testimony by prosecution witnesses, as in most of the trials, supported the defense case and undermined crucial elements of the indictment, especially concerning the participation of the TNI and the alleged failure of the defendant to take proper preventive measures.

Prosecution: The flawed selection of witnesses weakened the prosecutorial case, even when the judges and prosecutor were willing to pursue it. On August 12, 2002, two TNI officers were called as *prosecution* witnesses. Essentially, they testified that Suratman was not present at Liquisa and was doing his utmost to prevent any violence. The questions the defense counsel asked Suratman's deputy commander (Budyono) sounded like direct examination of a fully cooperative defense witness:

Q: Were the attacks criminal and was there government participation? A: No.

Q: Were arrests made? A: Yes.

Q: Were there orders from Suratman to side with one party? A: We were neutral, we only had a security function.

Q: Did you hear or see Suratman send troops to be involved in riots? A: Only to provide security and prevent further harm.

Q: Did you ever get orders to help pro-integration groups? A: No, only to prevent violence.

Q: Did you see Suratman's involvement 4–7 April? A: He was not present.

²⁸ It would appear significant that precisely the same information that was clearly available to the AG's office at the relevant time was never used in the prosecutions of Yayat Sudrajat and Asep Kuswani in relation to the Liquisa Church. The latter's case is studied in detail below.

Q: Did he order the violence? A: No.

Q: Did he allow his troops to be involved? A: Never.

Q: Did you hear that he let violence happen and then sent help afterward? A: No.

Q: Did police and TNI do their best? A: Yes, we separated the parties. We did our duty. We couldn't prevent these five deaths but we prevented more from occurring.

Q: Did the gunshots from outside or inside the church? A: Inside.

In response to this testimony, which completely contradicts the indictment, the prosecution re-examined its own witness as if it were conducting cross-examination. For example, it attempted to impeach the witness by pointing out a contradiction in his testimony concerning the origin of the gunshots, and forced him to admit that he had no direct knowledge himself. Both the judges and prosecutors subjected him to a forceful and prolonged examination, but when the vast majority of the prosecution witnesses are of this nature, little can be done. Because the selection of prosecution witnesses takes place prior to the trial beginning and is made by persons who do not necessarily present the case in court, it is often impossible to rectify the situation, even if the trial prosecutor is inclined to do so. The session concluded with the judges ordering the prosecutors to produce more victim-witnesses before calling any more TNI witnesses.

Judgment: Although the section on the judgment is extremely brief, in the portion devoted to legal analysis there is a lengthy treatment of the prosecution and defense versions of the TNI's involvement in the attacks. One crucially important finding adopts the same account of the attack on Manuel Carrascalao's house as was used in acquitting Endar Priyanto: "After the ceremony the participants went on rally around Dili, intending to go home afterwards. Those who were Maubara residents, when going past Manuel Carrascalao's house, heard a scream for help. They went to the house and the clash occurred." This testimony suggests that the attack was in reality a spontaneous clash in which the pro-independence "attackers" were responding to wrongdoing by a pro-integration group.

The legal analysis section demonstrates a sound familiarity with norms of IHL in its discussion of the elements of crimes against humanity and the like. It is also one of the few judgments to sketch the larger historical context in which the events described in the indictment occurred. The content of that discussion, however, leaves much to be desired and does not comport with either the reports of international experts or of KPP HAM. The court claims that the initiation of the referendum process "awakened the old conflict" in East Timor and gave rise to groups on both sides. Both of these groups used "political speeches, mass rallies, coercion and terror, in order to achieve their political ends. In such an emotionally over-charged condition, the smallest difference may trigger murder, persecution, destruction and arson." There is no mention of the role of the Indonesian government or the TNI. Instead, the situation is described as likely to lead to spontaneous violent exchanges between the two contesting groups. This description, in turn, sets the stage for the court's weighing of the conflicting evidence, where it finds the pro-integration groups staged a deliberate attack on civilians, but also describes them in such a way that they appear as responses to violent provocations by the pro-independence faction. Nonetheless, finding all of the elements of murder as a crime against humanity to be fulfilled, the court concluded that the crucial issue on which their decision turned is whether troops under the command of the defendant were involved in these crimes.

The court addressed this issue by weighing the relevant evidence, including a description of what it accepts as the “background” to the attacks. This “background,” of course, serves to exonerate the TNI of any responsibility for the attacks. Regarding Liquisa, for example, this includes General Wiranto’s testimony that the real cause of the “riot” was a statement by Xanana Gusmao that allegedly urged his followers to go to war against the TNI and the pro-integration groups. The section concludes with a finding that at 12 P.M. in Liquisa, “suddenly the [Besi Merah Putih] BMP²⁹ led by Manuel de Sausa, which was a Pro-Integration unit, attacked the house despite the efforts of the Police and TNI to prevent it and their plea to BMP not to take justice into their own hands.”

In their account of what happened at the rally (Appel) in Dili, the judges accept without discussion Eurico Guterres’ testimony that he made a speech that merely urged the Timorese to “stay with Indonesia.” After the rally, the participants paraded around Dili and happened to see “a woman lying in front of Carrascalao’s house. They helped her and at that time the clash spontaneously happened between the pro-integration and pro-independence group.” This story is implausible and fails to address a number of important questions involving the events leading up to the attack. It contradicts the findings of the Priyanto judgment and even appears to contradict the factual findings the Suratman court itself made earlier in the judgment.³⁰

Based on this analysis of the facts, the judgment reaches the following conclusions. As to the attack at Liquisa, they found that no TNI participated, that the TNI took extensive measures to prevent the violence, and that when it did occur, they rescued the refugees.

The discussion of the attack in Dili is far more extensive, and also more tortured in its reasoning. It begins by acknowledging the testimony of the victim-witnesses as to the presence of TNI in the attacking group. It questions the witnesses’ credibility, however, because one testified that some of the TNI were in uniform and that others were in civilian clothes (they might have been referring to different soldiers). They also opine that at this time in East Timor, it was common for both pro-integration and pro-independence forces to wear parts of TNI uniforms, making identification difficult. These considerations are legitimate exercises of the judges’ discretion in evaluating credibility and reliability. One must note, however, the disturbing lack of any corresponding skepticism about the testimony of witnesses favoring the defense whose credibility is at least as much in doubt because of their TNI affiliation or their status as defendants in other trials. Moreover, the judgment goes beyond this in its deliberations, arguing in the alternative about the issue of TNI presence in a tendentious form that sounds far more like the closing arguments of defense counsel than the careful and objective findings of a judicial opinion.

It makes four arguments on this central point of TNI participation:

1. From the accounts of the two witnesses, even if there were TNI troops around the walls of Carrascalao’s house mingled with the pro-integration group, it does not necessarily mean

²⁹ According to the Serious Crimes Unit’s indictments in East Timor between April and October of 1999, at least 26 different militia groups operated in the territory. The BMP operated in the Liquica District. See <http://www.jsmp.minihub.org/indictmentspdf/indictment%20Dili%20Rally%2017%20April%201999.pdf>, paragraphs seven and eight on pages 4 and 5 in the indictments of Guterres, Sousa, et al.

³⁰ See page 24, final paragraph.

- that TNI participated in the attack against the civilians in the house. The TNI troops may have been there to assist in preventing the rioters from attacking or maintaining the security.
2. Because the mass was of a large number, it would be very difficult to see which party was attacking, and whether it was the pro-integration, the pro-independence, or TNI/police.
 3. If TNI members participated in the attack, the casualties would have been greater. Police and TNI, in fact, stopped the violence and rescued the refugees from the crime scene.
 4. Even if there were TNI members who were natives of East Timor participating in the attack, the prosecutor could not legally prove which unit these members were from.

The first point is largely hypothetical because no witness testified to seeing TNI trying to prevent the attack. Raising this hypothetical possibility as a way of explaining away the testimony of the only eyewitnesses, who did claim to see TNI among the attackers, seems like defense advocacy rather than a weighing of the evidence at hand. The second point is strange because the court has already held that the attack was by a pro-integration group from outside the house. None of the evidence the eyewitnesses presented indicated any difficulty in distinguishing the attackers (outside the house) from the victims inside. Further, the witnesses testified to seeing particular TNI personnel, whom they identified by name, so the argument about the size of the attacking mob appears completely irrelevant. Third, the argument that if the TNI were among the attackers there would have been greater casualties seems absurdly speculative and without any foundation. Again, the court seems to be straining to produce arguments that discredit the victim-witnesses. Finally, the issue of proving which units the TNI attackers came from seems irrelevant, because the defendant was the commander of all TNI units in East Timor. This argument was used on behalf of Endar Priyanto, who was the commander in Dili, and whatever its merits there, it seems irrelevant for purposes of this present case. Why, on the other hand, is the court not equally creative in considering arguments that might establish the defendant's effective control over all of the attackers, whether TNI or militia? In light of such reasoning, one can hardly be surprised at the court's conclusion that, "since there is not enough proof that TNI troops were involved in the violence in Liquisa and Dili," the prosecution failed to establish the defendant's command responsibility.

What is striking about the court's performance is that this is the same panel of five judges that previously convicted Soedjarwo on a command responsibility charge for the attack on Bishop Belo's house and developed creative legal arguments to justify its decision (see below). Reading these two judgments and their respective evaluations of the evidence, it is hard to understand how they can be the work of the same panel. On the other hand, they do have an important underlying common theme. The Soedjarwo judgment bases its conviction on the TNI's passive role in failing to provide proper security at Bishop Belo's house when they withdrew. They do not base their decision on the presence of TNI among the attackers that some witnesses had alleged. Indeed, they carefully skirt this issue of a direct TNI role in the attack and, as noted below, further characterize the withdrawal of the TNI security forces from Bishop Belo's house at Soedjarwo's order, as a passive form of commission rather than as actively facilitating and encouraging the violence. While the panel was skeptical of self-serving TNI testimony in the Soedjarwo case in their consideration of the credibility of the defense's explanation for the withdrawal, in the Suratman case such skepticism was solely directed at the victim-witnesses and the prosecution's case. They accepted without question accounts of the attacks in Liquisa and Dili that seem implausible on their face and are supported only by the testimony of witnesses whose interest in supporting the defendant is

manifest. Both judgments agree in refusing to find that the TNI were involved in the perpetration of the offenses charged.

Because of the prosecution's failure to press its case properly, there is no question that, quantitatively, the weight of the evidence favored the defendant. The analysis of the quality of the evidence here, however, goes against not only the findings in the judgment of Suratman's counterpart, Nuer Muis, but also this very panel's own findings in the Soedjarwo case. Further, the arguments to undermine the credibility of the victim-witnesses' testimony are tendentious in the absence of similar scrutiny of the defense case. One explanation is, of course, that the judges were simply convinced that all of the victim-witnesses were lying and the TNI witnesses were telling the truth. It may also be that the explanation of the seeming discrepancy between this case and the Soedjarwo and Muis cases lies outside the courtroom and in the political arena. While the panel of judges that convicted Nuer Muis was prepared to resist considerable pressure and harassment, we cannot know if the same was true in all other cases, and there is little question, as seen by the prosecution's behavior in the Damiri case, that as the rank of the defendants increased, so did the political pressures on the trial process.

D. Trial of Eurico Gutteres

Key Points:

- Defendant sentenced to 10 years' imprisonment for crimes against humanity but remains at liberty pending outcome of appeal, although no appeal has yet been lodged.
- A total of 31 documents introduced into evidence, as compared to the one or two in most of the other trials.
- Unlike most other cases, the witnesses' pretrial statements were read into evidence.
- Findings directly contradict the Priyanto case.
- Case illustrates what judges in many other trials failed to do and what sort of evidence was available to those with the will to use it.

Indictment: Eurico Gutteres, deputy commander of the PPI and commander of the Aitarak militia group, was accused of murder and persecution as crimes against humanity for failing to control troops under his effective command and control when they carried out an attack on the house of Manuel Carrascalao on April 17, 1999. The indictment alleges that the defendant, at the official inaugural assembly and rally (Appel) of the umbrella organizations for the East Timorese pro-integration militias, Pam Swakarsa and PPI, gave a speech in which he told the crowd of his followers and subordinates that they should kill the pro-independence leadership, and specifically named both Manuel Carrascalao and his family. He was, however, charged only with command responsibility for his failure to prevent the attacks. The indictment does not charge him with ordering or inciting the attacks. The indictment also alleges that TNI troops participated in the attack. Gutteres was convicted and sentenced to 10 years' imprisonment.

Prosecution: The prosecutor presented 11 witnesses, 8 of whom were TNI, government officials, or militia members. Two were victim-witnesses. In addition, the court ordered, over the objection of defense counsel, seven pretrial statements to be read into evidence, six of which were from victim-witnesses.³¹ The victim-witnesses provided detailed accounts of the attack, and of the TNI's participation in the attack. The court, unlike almost all of the other panels, also provided a detailed summary of the testimony contained in the pretrial statements. These statements show how the failure to produce these witnesses cost the trials so much. Their testimony provides an extremely detailed and compelling account of the attack, the identities of many of the perpetrators, the speech of Eurico Guterres, etc.

On August 8, 2002, of nine witnesses summoned, only two appeared. Of these, only one was a victim-witness: Manuel Carrascalao, who had not been present at the attack but had heard Guterres' speech on the radio. The testimony also provided important details about the government financing of Pam Swakarsa and its overlapping relation with PPI and with local militia groups. Unlike the often vague testimony about the attack introduced by prosecutors in other cases (see, e.g., the sections on the Priyanto and Suratman cases), the evidence introduced here provided detailed accounts of the number and type of vehicles the attackers were driving, their uniforms and appearance, the chronology of the attack, etc. In addition, 31 official documents were introduced into evidence, whereas in many other cases, the prosecution brought forward only one or two.³² One may well wonder why the quality of the testimony and evidence was so much higher in this case, involving a Timorese defendant, as opposed to the cases against TNI officers arising out of the same incident. Further, the judgment directed that the evidence be made available for use in other cases, although it was not so used.

Judgment: On the basis of its review of this evidence, the judgment makes a lengthy series of factual findings. It is perhaps most important to note that they directly contradict many of the key findings in the Priyanto case. They show clearly what the judges in other trials failed to do and what sort of evidence was available. It especially demonstrates how easily the connection of the TNI to the militias, and to the specific acts of violence they perpetrated, might have been established. It also shows how the issues of whether there were pro-integration "militias" in East Timor, whether they had firearms, or what Guterres said in his speech at the rally might have been readily resolved if the prosecutors and judges had a modicum of initiative. Included here is a selection of the most essential points to make clear the contrast with the majority of cases that make minimal, and usually not very detailed, findings on the essential facts:

- On April 17, 1999, about 6000 people attended a rally (Appel) at the East Timor Governor's office courtyard. The participants came from all regencies in East Timor,

³¹ Because other panels refused to consider pretrial statements and because defense counsel objected so vigorously to its inclusion, it is worth quoting the judgment's justification for doing so: "Considering, the Criminal Code (KUHAP) allows the reading of investigation documents before the court, and one of the reasons for that is the distance of witness' residence, as stated in article 162 paragraph (1) Law No. 8/1981 (KUHAP) which declares that when, after the witness gave a testimony, the witness passes away or due to legal reasons can not appear in the court or is not summoned due to the distance of the witness' residence or due to other reasons related to the state's interest, then the given testimony is read. According to article 162 paragraph (2) KUHAP, whenever the testimony is given under oath, then the testimony should be treated equally with the one given by the witness under oath in the courtroom."

³² See Annex 2, available at www.ictj.org, for a list of these documents and material evidence.

and the officials who attended the event, among others, were East Timor Muspida, East Timor Governor Abilio Osorio Soares, Regent of Dili, Mayor of Dili City.

- The Regent of Dili, Dominggus M.D. Soares, suggested to the East Timor governor to hold the Inauguration Rally of Pam Swakarsa in Dili as the capital city of East Timor. Under the governor's guidance, a committee of the Pam Swakarsa Inauguration Rally was established.
- Militia groups were connected to the military, whose aim was to defend the integration. The military supported (e.g., with weapons) groups with whom it had a special relationship. The military organization that supported the militias was Kopassus (Special Forces).
- Kodim or the police trained Aitarak troops or PPI members who became Pam Swakarsa, Hansip,³³ or Kamra,³⁴ because many were jobless. The local government paid Pam Swakarsa members Rp. 150.000 and 10 kg rice per month.
- The defendant led the Aitarak troops in Dili. Among the participants at the rally were people carrying M16 weapons—these were the TNI members who joined the crowd.
- During the speeches the defendant and the PPI commander delivered, the crowd of participants yelled and shouted, “Exterminate them! Kill them!” and fired their weapons upward to greet the speeches.
- The event was covered by and broadcast on the RRI, TV, and mass media.
- During the rally, police and TNI personnel were on site to provide security, but they did not respond to participants carrying weapons or firing the weapons.
- The close link between the defendant and the police and TNI derived from the fact that these organizations often asked the defendant for information and help in settling conflicts and disputes.
- Regarding the incidents of extermination and arson after the announcement of the result of the popular consultation/ballot in all communities in Dili, the police and the Army had all been involved in committing such destruction and extermination.
- There was a telegram from Pangdam Udayana [Adam Damiri] about the incident in Ainaro, where the Aitarak group, after committing a sweeping mission, visited the Battalion Headquarters [TNI] to take a rest, then returned to the Aitarak headquarters in Hotel Tropikal in Dili.³⁵

³³ Civil Defense Force, which is under government control through the village, subdistricts, and counties.

³⁴ People's Security Force, which is closely linked to the handling of regional security.

³⁵ Omitted here are the findings pertaining to the attack itself, which are lengthy and very detailed, as the following short example shows: “On April 17, 1999 at 11:30 witness Leandro Isaac's house was attacked by approximately 40 Militias led by the Defendant Eurico Gutierrez. At that time, the Defendant rode on a motorcycle in the first row of the convoy and right away entered the back of the witness' house and committed the attack. One of the victim-witnesses, named Alfredo Sanches, who was taking shelter at the house, when he was at the back of the house, saw with his own eyes a car loaded with Militias and TNI bump into the front gate. Then after they were inside, they shot up Manuel Viegas Carrascalao's house which was full of many refugees.... Two TNI members named Yose Matheus and Theolifo Dasilva participated in the attack, using weapons commonly used by they TNI. They came from Maubara.... Witness Victor dos Santos, alias Apin, around 12 at noon on that day, saw Aitarak Militia and BMP riding on a truck, stop at Manuel Viegas Carrascalao's house. Among the militias, the witness recognized a TNI soldier who wore militia uniform. The witness recognized the soldier because he often saw him at Aitarak Headquarters in Tropikal Dili. Later, the militias left the place and returned around one hour later and committed an attack on Manuel Viegas Carrascalao's house.”

After making its factual findings, the court discussed at some length (and it is one of the only panels to do so) the law regarding the weighing of witness testimony. It provides a detailed analysis of why it found the testimony of specific witnesses, and particularly those whose statements were read out in court, credible. This kind of lengthy, detailed, and painstaking analysis of the reasons for finding some witnesses' testimony more credible than others is almost entirely lacking from the cases resulting in acquittals.

On the basis of such factual findings and its establishment of the credibility of the testimony and pretrial sworn statements of the victim-witnesses, the court had little difficulty in connecting the defendant to the crimes alleged in the indictment by means of the doctrine of civilian superior/command responsibility. It bases its finding on a very careful and nuanced analysis of the nature of the organizations of which he was a part, and his *de jure* and *de facto* roles and authority within them. It was also grounded upon a thorough analysis of the evidence that supported the finding that the defendant exercised effective control over the militia members who carried out the attack. The analysis is informed by a solid familiarity with the case law of the ICTR and ICTY, as well as major post-WWII trials and juristic literature in IHL.

One might well ask what factors distinguished this case from the poor performances in other cases. It has been suggested that the more vigorous prosecution of this case was because the defendant is Timorese, not Indonesian. There may well be some truth to this, but it should be noted that three of the judges on this panel were also members of the panels that convicted two of the other defendants. These judges enjoy the reputation of being among the most progressive and well versed in IHL. Both of these attributes are reflected in their willingness to deal effectively with the evidentiary issues that have plagued (or provided an excuse for) other panels and in the jurisprudential quality of the judgment when compared with many other cases. In addition, the prosecutor assigned to this case pursued it with some energy, as is reflected in the amount of documentary evidence introduced. Of course, one may well ask why such a prosecutor was assigned to this case and such weak ones prosecuted others, such as the Damiri case. The answer, in all likelihood, lies in the systemic problems discussed below.

Regarding the conduct of the trial, on the days of my observation, the judges took the lead role in examining witnesses, pursuing lines of questioning quite vigorously. Unlike some trials where, as international observers have reported, the judges allowed defense counsel to conduct inappropriately harsh cross-examination of victim-witnesses, the judges here did not permit such conduct. For example, on August 8, 2002, when defense counsel repeatedly asked questions emphasizing that Manuel Carrascalao's testimony about the attack on his house and the murder of his son was based on hearsay and was a "mere story," the judges sharply admonished them. Defense counsel tried to argue the point at length, but the judges told them that there was no need to ask questions over and over again about Carrascalao's whereabouts. They instructed defense counsel to "put it in your Pladoio [defense summation] and don't talk about it here again."

An interview with one of the prosecutors of this case provided important insights into the trial and investigation process. The prosecutor, who seemed quite proud of his victory, confirmed that he had received only the case dossier (BAP) from the investigators. None of the prosecutors who investigated the case were involved in the trial. Because their regulations provide that they cannot

bring in any evidence that is not in the dossier, the dossier determines the prosecution case. He added, however, that additional evidence can be produced when the judges ask for it. For example, he submitted into evidence letters that were not in the Gutteres dossier, but that he had obtained from the Damiri case. This shows, of course, how important such initiatives are as a way of moving beyond the narrow strictures of the regulations, but most prosecutors were not willing to take such actions. In addition, he confirmed that the decision as to which witnesses would be called was not under the control of the prosecutors trying the case.

He also stated that the prosecutor who tries the case writes the indictment on the basis of the dossier. The draft indictment is submitted to the senior prosecutor for discussion and approval. The basic principle in preparing the indictment is that it must be based on the dossier. He did not allege that Gutteres incited, organized, or directly participated in the attacks because the dossier had no information or evidence on these matters. This statement is somewhat disingenuous, however, because some of the pretrial statements contained in the dossier assert that Gutteres incited the crowd to murder Manuel Carrascalao and his family. Here one must suspect that this issue was perhaps determined in consultation with the senior prosecutor who approved the indictment.

On the crucial issue of obtaining a video or audio recording of Gutteres' speech, when asked if he had made a request to the UNTAET prosecutors in Dili, he replied that he had not, and said that he had had no contact with them. He seemed surprised at the suggestion that he might obtain evidence from them, which he seemed to regard as clearly out of the question. One sees here the consequences of the lack of communication and cooperation between the prosecutors and their counterparts in UNTAET. There has been no satisfactory explanation of the failure to request assistance in obtaining evidence from the Serious Crimes Unit, as envisioned by the MOU between the Indonesian AG and UNTAET.

This interview also revealed the difficulty that even younger and more energetic prosecutors face in adapting to the new context of human rights prosecutions. In comparison with the relative sophistication with which IHL issues were handled in the judgment, the prosecutor had only a rather vague and rudimentary grasp of central issues.

When asked if, on the basis of the case against Gutteres, he thought that the TNI should also be held accountable, he replied that he thought they should, but added that whether this happens will depend on how well the prosecutor manages the cases.

E. Trial of Endar Priyanto

Key Points:

- Defendant acquitted.
- Prosecutor did not produce crucial evidence, despite judges' requests.
- "Legal Facts" finding totally ignores the context of the violence, the testimony of the victim-witnesses, and much of the testimony of the TNI and governmental witnesses.
- The court adopts a highly formalistic (and highly questionable) definition of "command responsibility" that virtually renders impossible any such finding.

Indictment: Lt. Col. Endar Priyanto, TNI commander of the Dili District, was indicted for murder and assault as crimes against humanity in connection with the attack on the house of Manuel Carrascalao in Dili, where 136 refugees from other parts of East Timor had sought shelter. Priyanto was represented by 8 private counsel and another team of military TNI counsel numbering 18. He was indicted under a theory of command responsibility for crimes against humanity perpetrated by troops under his “effective command and control” and resulting from the lack of proper control over his troops. He was found not guilty of all charges.

The indictment alleges that the attack took place following the rally (Appel) of the umbrella organization for the East Timorese pro-integration militias, Pam Swakarsa. This rally was held on the grounds of the house of Abilio Soares, governor of East Timor, and was attended by Soares. As more fully described in the Gutierrez case summary, at the Roll Call, Eurico Gutierrez, as deputy commander of the PPI militia group (and commander of the Aitarak militia), made a speech, broadcast live over the radio, that called for the elimination of pro-independence leaders, some by name. PPI troops launched an attack against the refugees inside the house, of whom 12 were killed, including Carrascalao’s son. The attackers included TNI personnel, eight of whom the indictment names. Four witnesses are named who identified the TNI personnel. The indictment goes on to allege that Priyanto was aware, or under the circumstances should have been aware, that imminent violence was likely, but did not take sufficient preventive measures for security in the area on his jurisdiction as commander.

Prosecution: The panel heard contradictory evidence about the attack. Three victim-witnesses described the attack and the presence of TNI personnel. There were also pretrial statements that corroborated their testimony. The defense witnesses claimed that the militamen were driving peacefully around Dili in a procession after the rally (Appel) when they heard cries for help from Manuel Carrascalao’s house. They investigated and discovered that one of their members from Maubara was being held captive. In trying to free him, a clash resulted between the armed groups inside and outside the house. Other prosecution witnesses from the TNI and civilian administration (e.g., the Regent of Dili) denied that there was any connection between the Appel and the attack, which was merely a clash between the pro-independence and pro-integration groups.³⁶ Several of the prosecution witnesses testified that they were unfamiliar with the relevant events, and it is not clear why they were called or why the court considered their testimony to be among its selection of the most important witness statements.

Perhaps the most serious and disturbing question about evidentiary matters in the judgment is the judges’ statement that, although the dossier (BAP) refers to a list of evidence, the prosecutor did not produce this evidence, despite requests by the panel of judges. No explanation is given or is apparent for the failure of the prosecution to produce evidence that was collected as part of its own case despite repeated requests from the judges. Even more than the lack of a coherent prosecution strategy as manifested in the examination of its witnesses, this failure clearly indicates that the prosecution was not acting in good faith.

In explaining whether the difficulty in producing victim-witnesses was financial (as the AG’s office had stated), the prosecutor responded that it was not, and that he had no idea why the witnesses did

³⁶ The Regent, Domingus Soares, did confirm, however, the government’s financial support for the PAM Swakarsa.

not appear. This directly contradicted what he said in court that very day. When the judges told the prosecution that it should have brought more victim-witnesses, the prosecutors responded that they had tried to do so, but lacked sufficient funds. When pressed on this point of victim-witnesses, he said that the problem was a lack of cooperation from the East Timor side. He claimed that he never received a reply whenever he faxed a summons to the Serious Crimes Unit (which is contradicted by all other enquiries made in respect of cooperation from Dili). The judges from this panel confirmed that they had repeatedly requested that the prosecutor produce witnesses and evidence discovered by the Serious Crimes Unit, but had seen no results. They added that they did not understand the prosecution's failure to use such evidence.

When the prosecutor was asked about the weakness of the indictments and why he did not allege the direct participation of the TNI in the violence as opposed to a failure to prevent, he responded, "Because the TNI did not do anything or have a role in the violence. In our investigations we found no evidence of TNI involvement." When asked about the evidence of involvement in the KPP HAM Final Report and he answered, "What report is that? I don't know of any such report that has evidence of a TNI role."

Judgment: The argument of the judgment justifying an acquittal is striking with respect to the judges' findings as to which facts have been proven. Their list of "legal facts" is very short, and although it mentions the Appel, it makes no findings as to what that event was about. There is no mention of the Gutterses' speech, the substance of the meeting, or the manifest support for the event indicated by its location and the attendance of high-ranking officials. What they do find is that when returning to Maubara, the BMP militia group happened to pass by the house of Manuel Carrascalao. They heard cries for help from Maubara residents (with no mention of how they knew them to be such) and tried to free them. The result was a clash between the pro-independence group inside the house and the BMP outside, in which a number of persons were left dead or wounded.

This is an astonishing finding in that it totally ignores the context of the violence, the testimony of the victim-witnesses, and much of the testimony of the TNI and governmental witnesses. Leaving aside the questionable credibility of those witnesses who advanced this story, it is highly implausible on its face. There was much testimony from TNI and other non-victim-witnesses about the way in which the Appel ended in a procession around Dili. In the judges' version, the procession is not part of the continuation of the Appel as a kind of parade, but rather confined to a group of Maubara residents who just happened to drive by a house where Maubara residents were being held captive among a group of refugees seeking shelter. At that moment, these captives cried out from inside the house. The passengers in the four-wheel drive trucks heard and recognized the cries as those of their missing friends from Maubara. The judges made no mention of the preceding attack on another house or the speech of Eurico Gutterses, broadcast live over the radio, calling for an attack upon this house. While it is abundantly clear that the prosecution was more than inept in supporting its case, there was ample evidence that flatly and credibly contradicted the version of the facts the judges chose to privilege.

What also remains mysterious about the judgment is how, given these findings, the judges could go on to hold that a planned and organized attack sufficient to satisfy the requirements of a crimes against humanity charge nonetheless occurred. Indeed, they seem unaware of the contradiction between their factual findings as detailed above and their legal conclusion that:

The attack was carried out in a systematic manner, as visible in the organized structure of the attacking group and the Pro Integration/autonomy group's use of homemade firearms, machetes and bows and arrows to consciously commit murder and torture resulting in death and injury directed against the group of victims, and the ample time span for the group to assemble until they numbered in the hundreds.

Based on this holding, the judgment then goes on to state that the crucial issue is whether the subordinates of the defendant, who were under his effective control, carried out this attack. They argue that although some prosecution witnesses testified that TNI personnel were among the attackers (and named them), this testimony "was refuted by several other witnesses." There is no discussion of the relative credibility of these witnesses and their testimony, as one would expect on such a key issue. Having found that no TNI were proved to be involved, it follows that the defendant can be convicted only if he is shown to have been in a relationship of command authority to the BMP militia group that carried out the attack. Here the court adopts a highly formalistic (and highly questionable) definition of command responsibility that virtually renders impossible any such finding. It also relies on an essay on command responsibility by an Indonesian authority, which maintains that command responsibility is based on the "chain of command, which is the hierarchical channel from the highest command to the lowest." That, under the circumstances, an acquittal must result is clear.

What is not clear is why the judges, having cited (albeit without great precision) various international authorities on other issues (like the elements of crimes against humanity) here completely ignore the key issues of *de facto* authority and effective control, which could have grounded the theory of command responsibility. (Other references in the judgment reveal that they are well aware of the doctrinal importance of "effective control.") Reading this deeply flawed opinion, it is hard not to conclude that the result was predetermined and the judgment simply fashioned to justify a conclusion that bears little relation to the available evidence or, at the very least, fails to present a reasoned case for its conclusion in light of that evidence.

It is important to note that in this case, two judges dissented because they thought that the defendant's effective control of the perpetrators had been proved even though there was no *de jure* command authority. Even though the TNI who attacked Manuel Carrascalao's house were from another unit and not under formal authority, he was, in their opinion, responsible for not preventing the attack because of his effective control over these troops. They conveyed their dissent in a formal letter to the presiding judge. Indonesian regulations do not permit the inclusion of dissenting opinions as part of the judgment.

F. Trial of Soedjarwo

Key Points:

- Defendant sentenced to five years in prison. Remains at liberty pending appeal, although no appeal has yet been lodged.
- Lack of any witness testimony on the prosecutions central issue: the presence of TNI among the attackers.
- Lack of prosecutorial independence.
- Legal analysis in this case of a higher standard than other cases, demonstrated through detailed discussion of “widespread and systematic” and reference to ICTR and ICTY trials as well as international experts.
- Conviction not because he failed to control the attackers, but because he ordered his troops to adopt a passive stance and did not anticipate the attacks.

Indictment: The case brought against Lt. Col. Soedjarwo, the TNI commander in Dili (Dandim), grew out of the attacks on the Dili Diocese on September 5, 1999, and Bishop Belo’s residence on September 6, 1999, where thousands of refugees had been seeking shelter. Eleven private counsel and 21 TNI lawyers represented the defendant. The primary charge of the indictment, which was the basis of the court’s guilty verdict, was for murder as a crime against humanity, based on the defendant’s failure to prevent the attacks. The indictment specifically alleges that the crimes were committed by troops under his effective command and control and were a result of his lack of control and failure to take necessary actions to “prevent and halt such attacks” when he should have been aware that his troops were committing or had just committed gross violations of human rights. He was convicted on this charge and sentenced to five years’ imprisonment. He remains at liberty pending appeal.

One problem with the rather cursory indictment is that its factual allegations of murder as a crime against humanity do not allege that all of the crimes charged were, in fact, committed by troops under the defendant’s command as specified in its framing of the charges. In regard to the attack on September 4, for example, the indictment alleges that by that date approximately 5000 people were taking shelter there. An armed pro-integration group attacked the Diocese, resulting in five deaths and the destruction of the Diocese by arson. These facts, it appears, do not ground the charge of failing to control troops under his command, for it does not specify either that the pro-integration group was commanded by or under the effective control or *de facto* authority of the defendant, or that members of TNI units under his command also participated. In regard to the attack on September 6 against Bishop Belo’s house, however, the indictment does allege that the attackers included some TNI members wearing militia garb, but it does not allege their number, identity, or what unit they belonged to.³⁷ It concludes that the defendant should have prevented and halted the actions of the TNI members who participated in the attack and detained them for investigation. The prosecution also did not bring into court witnesses who could substantiate these claims. One explanation of this clearly inadequate indictment is that it was deliberately drafted on the basis of charges that the prosecution would not be prepared to prove.

³⁷ The second, subsidiary charge of the indictment alleges of the exact same attack that the attacking group included members of the police. There is no explanation for this discrepancy, other than careless drafting.

Prosecution: At the trial, 15 witnesses appeared, the written opinion of one expert witness was introduced into evidence, and 6 pretrial statements were read. Of the 15 witnesses, 14 were TNI, government officials, or members of Timorese militias. None of the witnesses who appeared testified that either TNI or police were among those perpetrating either of the attacks. One of the witnesses confirmed that he saw TNI near the Dili Diocese, but claimed that they were there for purposes of security.

The prosecution called the police commander of the operations control center in Dili and asked him no questions that might have proven the charges. They did ask him, however, about the fraud and wrongdoing of the United Nations Mission in East Timor (UNAMET) during the elections.³⁸ All of the witnesses who appeared and could testify about how the defendant ordered TNI security personnel from Bishop Belo's house a few hours before the attack on September 6 stated that Bishop Belo requested the withdrawal so that he could hold a service. It is the practice in Indonesian criminal cases to ask the defendant after the testimony of each witness whether he denies or accepts the testimony. Not surprisingly, Soedjarwo accepted the testimony of every single prosecution witness, because all testified in his favor. There could hardly be a clearer example of the prosecution's utter failure to press its case.

This lack of prosecutorial independence seems to have manifested itself clearly in the Soedjarwo trial. Indeed, the lack of *any* witness testimony on the issue most central to the indictment's strategy (namely, the presence of TNI among the attackers) seems to support the contention that the indictments were deliberately framed in such a way that the evidence produced would not support them. Equally unsurprising, the prosecution did not produce any of the six witnesses whose inculpatory pretrial statements were read in court to support its arguments. Over the defense's objections, the court decided to accept Bishop Belo's pretrial testimony denying that he had ever requested the withdrawal of the TNI troops. Among other things, the court relied on the fact that it was clear that Bishop Belo would be in great need of protection by security forces. It was the acceptance of this proposition, in the face of all the contrary evidence introduced by the prosecution and defense, that laid the cornerstone for the guilty finding.

Judgment: In general, the legal analysis in this judgment is of a far higher standard than, among others, that of the Priyanto case. For example, the discussion of the meaning of the "widespread or systematic" requirement is detailed, in-depth, and refers to and uses contemporary cases from the ICTR and ICTY, as well as the opinions of international expert jurists. In rejecting defense arguments that the number, identities, and manner of death of the individual victims must be proven in order to show that the attacks were widespread, the court held that, according to international practice before the ICTY and ICTR, in cases of gross human rights violations such details need not be specifically proven and it suffices that "the legal facts from the legal evidences revealed that the assault did result in a number of civilian casualties." These kinds of holdings reflect the judges'

³⁸ The quality of this "prosecution" witness is indicated by his implausible response (given his position as commander of the Dili police operations center) to the judges' question of why Bishop Belo's house was burned. He replied that he had no idea and didn't know how many people died. Any violence on April 5–6, he said, was the result of spontaneous clashes between pro-integration and pro-independence groups.

willingness to recognize that the special nature of human rights cases requires an adoption of international standards and practices, whether dealing with evidentiary and procedural matters or substantive legal issues. This kind of willingness and creativity distinguishes, for the most part, the panels that convicted defendants from those that acquitted. The difference appears clearly enough when comparing the Muis and Soedjarwo cases with those of Priyanto, Kuswani, and Sedyono (the latter two are considered below).

As intimated above, however, the crucial issue facing the judges was how to deal with the issue of command responsibility where the prosecution had done so little to establish the defendant's connection to the perpetrators. The court avoided relying on the presence of TNI personnel among the attackers and focused instead on the role of the TNI forces that the defendant assigned to deal with the security situation at the Diocese and Bishop Belo's house. They reasoned that, in regard to responsibility for crimes committed by troops under the defendant's command, it is not necessary that "committed" imply active participation, but that under international practice it may also take the form of a passive failure to act. Seen from this perspective, the defendant's decision to assign 60 TNI soldiers to guard Bishop Belo's house was a proper measure. However, when he decided to withdraw these troops, he erred in his duty to protect, regardless of whether he did so at Bishop Belo's request.³⁹

Arguing in the alternative, the court reasons that even if Bishop Belo did make such a request, the defendant should not, under the precarious circumstances, have agreed to it, and that the reasons he gives for allegedly doing so are not persuasive or credible (e.g., Bishop Belo was so charismatic and important a figure that no one would attack his house). They also find, however, that the defendant's account of Bishop Belo's request is not credible and that he likely never made such a request, in which case the defendant's order to withdraw his troops was also culpable. Further, the defendant should have known that such an attack was likely to occur after the attack on the Diocese the day before. Thus, they convicted Soedjarwo not because he failed to control the actual perpetrators, but because he failed to issue proper orders or anticipate the attacks, and he ordered or encouraged his troops to adopt a passive stance that enabled the attacks to occur "when in terms of a passive role the troops did not take the necessary action within their jurisdiction to prevent or stop a gross violation against Human Rights, the defendant can be held accountable for the crime itself." This holding certainly goes beyond certain contemporary cases (e.g., the Kunarac and Kvočka cases at the ICTY) in holding that a commander may be liable for a failure to prevent even where the perpetrators are not under his *de facto* authority or effective command and control. It is precisely such reasoning that the court in the Kuswani case did not engage in, even though it would have indicated the defendant's culpability.

³⁹ They were apparently driven to this argument by the failure to obtain Bishop Belo's testimony on this crucial point. In an interview with four of the five judges, they indicated that because this issue was so central to the trial they had decided, in the interests of "justice and material truth," to extend the 180-day time limit for completion of the trial. They said they regarded this as the final chance for the prosecution to prove its "seriousness" by producing victim-witnesses. It must be said, of course, that Bishop Belo's unexplained refusal to testify on repeated occasions via teleconferencing was not, to all appearances, the prosecution's fault. It is striking that when the judges announced on December 3, 2002, that they were extending the 180-day limit so as to permit further testimony by teleconferencing, the prosecution objected.

Of course, the Soedjarwo judges might have gone even further and argued that the deliberate withdrawal of security forces shortly before the attack made the defendant complicit because it facilitated and encouraged the attack, but this also would have taken them well beyond the narrow limits of the indictment. More significant, they refrained from any real analysis of a possible direct TNI connection to the perpetration of the violence (as alleged in the indictment), even though they acknowledge that it occurred. They also accept the conceptualization of the violence as “clashes,” even while acknowledging that the pro-integration forces perpetrated an armed attack against civilians as required for the crimes against humanity charge. They also fail to place these attacks in the larger context of the violence raging in Dili and across East Timor at the time. In sum, they stop well short of any conclusions that would implicate the Indonesian government or the TNI in the planning, direction, or perpetration of the violence. As such, this judgment goes beyond the deliberate myopia of the Kuswani case (below), but stops well short of the conclusions reached by the judges in the verdict against Nuer Muis.

As a final note, when asked what their greatest difficulties were in trying this case, the judges replied: the absence of key witnesses, the lack of prosecution cooperation with East Timor and the Serious Crimes Unit, the lack of support for the process of getting victim-witnesses to appear, the lack of procedural rules based on international practice rather than the Code of Criminal Procedure, and the lack of government commitment and seriousness in effectively providing proper logistics and support for the court.

G. Trial of Asep Kuswani et al.

Key Points:

- All three defendants acquitted.
- Refusal of the prosecution and the AG’s office to introduce adequate, although available, evidence, including the lack of victim-witness testimony.
- Judgment’s legal analysis does not reflect a close acquaintance with the case law of the ICTR and ICTY, but it does in a general, though often imprecise, way follow acknowledged doctrines of IHL.
- Judgment acknowledges the attack was “coordinated,” but seems at pains to describe the policy of the militias as uninfluenced by “external parties.”
- Refusal to accord victim-witness pretrial statements evidentiary weight.
- Results contradict the approach in the Muis case, which adopted a wider interpretation of command responsibility.

Indictment: The Kuswani case focused on the Liquisa Church massacre of April 6, 1999. The case was brought against three defendants: Lt. Col. Asep Kuswani (Dandim), the local TNI commander; Adios Salova (Kapolres), head of police in Liquisa; and the Regent of Liquisa, Leoneto Martins (Bupati). All were charged with murder and assault as crimes against humanity arising out of the attack on the church. This charge was based on a theory of military and civilian command responsibility for their failure to stop or prevent the attack, when they knew or should have known that their subordinates were perpetrating or were about to perpetrate gross violations of human

rights. The indictment alleges that 22 individuals were killed and 21 seriously injured in the incident. Col. Yayat Sudrajat was also alleged to be involved, but he was tried in a separate case.

- The indictment alleges that in anticipation of the referendum, the security situation in Liquisa deteriorated because of feud and conflict between the pro-independence and pro-integration groups. The indictment also alleges that events instigated by the pro-independence groups on April 3–4 were the original source of the violence, provoking the BMP to seek revenge. Prosecution, judges, and defense counsel accepted this account.⁴⁰
- According to the indictment, out of fear of violence from the BMP, on April 5 hundreds of pro-independence followers took refuge at the residence of Pastor Rafael dos Santos in the Liquisa Church complex. The indictment, significantly, also alleges that in the events leading up to the attack, as well as in the attack itself, members of the TNI acted together with followers of BMP. On April 6, approximately 2000 armed members of BMP, together with Indonesian police and TNI, surrounded the church. They fired shots in the air, which caused panic among those inside. The indictment names 12 TNI and 2 police officers who participated in the attack, as well as the 22 murdered victims. Despite alleging the direct and central role of TNI perpetrators, the indictment nonetheless charges the defendants only with command responsibility for the crimes arising from a failure to take appropriate action to prevent or stop the violence, or to detain the perpetrators for investigation.

Prosecution: In weighing these charges, the court confronted the problems discussed above presented by the lack of victim-witness testimony. Of 18 witnesses, only 3 were victim-witnesses and 14 were TNI, police, or governmental officials (and one expert). The victim-witnesses did testify that they had seen TNI participating in the attack and were able to name some of them. Ten victim-witnesses whose statements were included in the dossier were called, but did not appear, for what the court called “concerns about security.” The court had these statements read, but then, in its judgment, disallowed them as evidence (despite the fact that, as the Muis court held, Indonesian law does permit the introduction of such evidence when the witness cannot appear for one of the specified grounds). It justified this on two grounds. First, the rules of procedure that require direct testimony before the court. Second, that the statements have been contradicted by defense witnesses and therefore cannot be considered as proof. It specifically stated that this had damaged the prosecution’s case. What the court did not state, however, was that the victim-witnesses who did appear corroborated the pretrial statements and that the defense witnesses who testified were themselves implicated in the incidents or the same organizations as the defendants. Even more significant was that the court did not consider that the recanting of inculpatory pretrial statements by TNI witnesses (e.g., Damianus Dapa) when they appeared in court seriously damaged the credibility of the whole defense case. The court also refused to accept documents and photographs into evidence because they were copies, not originals. What is not clear is the extent to which these formalist positions on evidentiary matters were merely a convenient excuse to justify acquittals.

⁴⁰ It also specifically alleges that the pro-integration group (it does not use the word “militia”) Besi Merah Putih (BMP) overlapped with Pam Swakarsa, the umbrella organization for pro-integration militias financed by the Indonesian government through the governor of East Timor, Abilio Soares, and the regional administration. It also alleges that the BMP was organized through the office of the regent, defendant Leoneto Martin.

Judgment: In evaluating the evidence, the court concluded that local people in Liquisa formed the BMP spontaneously “of their own will,” and that when they gathered at the Liquisa Church, they were armed only with traditional weapons, like spears and arrows. They then make a very curious finding: they hold that gunshots were heard from the area where the crowd was gathered (TNI witnesses said shots came first from within the church) and that the BMP mass then attacked the church armed with “spears, samurai swords, arrows, and bats.” They do not state who fired the shots, although they acknowledge the presence of police in the crowd (and have already held that the BMP had no firearms), stating that they were unable to prevent the chaos. They also find that Kuswani and the other defendants took preventive measures, but that these proved inadequate because of the size of the attacking crowd.⁴¹

In applying the law to these facts, the court states that three questions must be answered: Was there a gross violation of human rights? Who committed the gross violation? Was the defendant responsible for the gross violation of human rights? They address the first question by analyzing the elements of each of the charged crimes against humanity. Their analysis does not reflect a close acquaintance with the case law of the ICTR and ICTY, but it does in a general, though often imprecise, way follow acknowledged doctrines of IHL, as in its discussion of the “systematic or widespread” requirement in order to establish the commission of a crimes against humanity. The court has no difficulty concluding that such crimes were committed as part of a deliberate attack against a civilian population. The difficulty with the judgment’s reasoning lies elsewhere and has little to do with its jurisprudential sophistication.

In analyzing the element of “systematic,” the court states that the term implies that the attack was planned in accordance with a sustained or systematic policy, although this can take either a direct or indirect form (i.e., the policy need not be explicitly formulated as such). They argue that the BMP attack at Liquisa was carefully planned and carried out, as evidenced by the way they moved forward at the same time. This led to the finding that, “The attack done by the Besa Merah Puti group was coordinated and in execution of a policy made by that organization *without any influence from external parties*” (emphasis added). Here, the court stresses that even though it is finding that there was a policy element implied by the attack, they in no way want to suggest that that policy might have been linked to the TNI or other organs of the Indonesian government. Because the prosecution never alleged that this was the case and no evidence was introduced to establish such an Indonesian policy, why would the judges think it necessary to make this point? The only plausible explanation is their political sensitivity in wanting to adhere to the basic political line that Indonesian institutions were not directly involved in the planning or perpetration of the violence. The rest of the judgment supports this conclusion. It should be noted, however, that at least the judges distance themselves from one of the most pervasive elements of the “politically correct” account of the violence: They explicitly state in the part of the analysis of Crimes Against Humanity dealing with the element of “an attack against a civilian population” that they disagree with *both* the *prosecution* and defense on this issue, in that the violence did not take the form of a “clash” between civilians, but rather was a deliberate, armed attack by the BMP group against unarmed civilians.

⁴¹ They do, however, clearly hold that the incident was a deliberate attack and not a spontaneous clash, and that the refugees inside the church consisted of unarmed and defenseless women, children, men, and elderly.

Having enumerated the elements of command responsibility, the court formulated the central question as whether BMP was either in the chain of command or under the defendant's authority and effective control. In addressing this, the court relied on its previous findings that a group of local people formed the BMP, that no TNI were involved in the attack, and that no evidence was introduced to show a superior-subordinate relation between the leader of BMP, Manuel Sousa, and Asep Kuswani. On this basis, the judgment concluded, there is no evidence for connecting the defendants to the crimes through the doctrine of command/superior responsibility, so they must be acquitted.

Before discussing this conclusion directly, it must be noted that the fundamental failing that makes such a verdict possible is the prosecution's refusal to introduce adequate evidence to support the charges made in the indictment. The debilitating effect of the inability to produce victim-witnesses from East Timor is amply manifested in this case. As will be discussed below, responsibility for this failure goes beyond the prosecutors assigned to the case and must rest with those in the AG's office responsible for the relevant policies. The judges themselves, however, must bear responsibility for their refusing to accord the pretrial statements by victim-witnesses evidentiary weight and giving credence instead to the self-serving testimony of TNI and police witnesses.

As should now be apparent, the results in the Kuswani case are diametrically opposed to the approach in the Muis case. There, the court also found that there was no superior-subordinate relation between the defendant and the pro-integration militias, but convicted nonetheless. The salient difference seems to be that they found that the TNI participated in organizing and equipping the militias, as well as in some of the attacks, and hence bore direct responsibility. Beyond this, however, they also adopted a fundamentally different approach to the issue of the failure to prevent. They held that because it was the duty of the defendant, Nuer Muis, to provide security, and because he must have and/or should have known of the serious threats to security in advance of the attacks, his failure to take adequate measures to have his subordinates prevent or stop the attacks makes him culpably negligent and also establishes his complicity in their perpetration. The Kuswani decision, on the other hand, relies on a stricter application of command responsibility. Here, their finding of a complete lack of TNI participation either in the attacks themselves or in the equipping or organizing of the militias is crucial.

Even without adopting an approach like that of the Muis panel, the court could have used IHL case law to justify holding at least Asep Kuswani accountable. Using decisions like that of the Musema and Akayesu cases in the ICTR, they could have focused in a more flexible manner on the issue of the nature of effective control (which they scarcely discuss). Instead of adopting a largely formalistic approach to command responsibility, they might have emphasized the very considerable *de facto* authority of the defendants in Liquisa. Taking this *de facto* authority together with their funding of Pam Swakarsa as the umbrella organization for groups like BMP, one could easily make a case for command responsibility, even without the evidence about direct TNI participation. This conservative, formalistic approach to command responsibility is much like the court's treatment of the evidentiary issues. Some Indonesian experts believe that this judicial conservatism among some of the career judges is genuine and not just a mask for justifying acquittals. This may be true, but at the very least (as noted above in the discussion of the policy requirement) it is coupled with a

seeming refusal to consider seriously the role of the TNI and other Indonesian institutions in supporting, organizing, and equipping the militias or directly participating in their attacks.⁴²

III. WEAKNESSES IN THE PROSECUTION AND TRIAL PROCESS

A. Overview: Issues to Be Addressed

The previous section provides an account of the problems of credibility and legitimacy that arose in many of the trials before the Ad Hoc Human Rights Court. In seeking to analyze the factors that were responsible for these shortcomings, this section proceeds from the starting point that blanket generalizations about the trials, especially those that lump the judges and prosecutors together as solely and equally responsible for the court's failings, will do little to advance understanding beyond the summary reports already available and certainly will have little credibility or impact inside Indonesia. Further, only such careful analysis can provide a solid basis for recommendations concerning what the international community can and should do to promote the necessary measures of justice regarding the events that occurred in East Timor in 1999. Accordingly, the report must distinguish the particular problems that have limited or determined the performance of the different institutional elements in the process. These include KPP HAM, the AG's office, pretrial investigation, trial prosecution teams, defense counsel, witnesses, and judges. Further, the report must also distinguish systemic problems that affect the administration of justice in Indonesia in general from problems specific to these trials. These systemic problems include the entrenched political culture of the AG's office and other elements in the justice system, as well as related issues of competence, training, corruption, and motivation.

B. Systemic Problems

1. Training and Accountability

Training is one part of the larger issue of competency, "a major issue whose importance cannot be overestimated," as one commentator stated. The Indonesian legal system typically does not operate to advance those who are most competent, for neither judges nor prosecutors are normally evaluated on the basis of performance in terms of quality of decisions or success in prosecution. A well-informed source claims that judges' personnel files contain no information about their performance as lawyers or jurists. A good judge or prosecutor follows orders, and those who don't are denied advancement. This arises from the military-hierarchical culture that characterizes both institutions.

⁴²As a cautionary note, it should be added that although the court in the Kuswani case could have relied on expansive treatments of command responsibility, there are other strands in IHL case law that support a restrictive approach. For example, in the Kunarac case, the ICTY found no effective control and superior-subordinate relation where a commander of a militia group whose membership was somewhat fluid supplied women as sexual slaves to his men. There was clear evidence of his *de facto* authority among the men and of their great deference to him as their commander, regardless of whether they were officially permanently assigned to his unit. Similar problems arose in one of the Omarska cases (Kvočka et al.), where the court seemed to follow a very formalistic notion of command responsibility sharply at odds with the approach of many decisions in the ICTR. There is no indication, however, of the judges' familiarity with such doctrinal issues. This again points up the need for more adequate training of judges and prosecutors. If the results reached in this case are due to genuine judicial conservatism, proper training in IHL could help to broaden the judges' perspective and give them the intellectual tools they need to deal with novel legal issues and circumstances.

As the recent Final Report of the Audit of the Public Prosecution Service of the Republic of Indonesia (FRAPPS) stated, performance is largely measured on subjective criteria such as “loyalty, honesty, and cooperation,” rather than tangible results.”⁴³

This recent audit emphasizes the way the Public Prosecution Services’s (PPS) organization and institutional practices systematically obscure responsibility. Thus, the report repeatedly notes, the PPS’s complex bureaucratic structure and general lack of a culture of accountability make it extremely difficult to identify what went wrong in an unsuccessful prosecution. If a prosecution case fails, the report states, it is almost impossible to locate responsibility in the tangled web of bureaucracy: “It could be the result of poor preparation by the prosecutor, poor decisions by his many superiors, or a poor strategic prosecution plan developed by the prosecutor or again by his superiors.”⁴⁴ On the other hand, there could also be other explanations. As the UN Special Rapporteur on the Independence of Judges and Lawyers concluded in his discussion of corruption in the Indonesian judiciary, “The Special Rapporteur considers that it is essential to place the allegations of judicial corruption in the context of the administration of justice as a whole. Corruption is not limited to the judiciary, instead it spreads as a cancer in the entire system, the judiciary, police, prosecutors and Office of the Attorney General.”⁴⁵

As seen in the analysis of the trials, the performances of judges and prosecutors have varied sharply from case to case. The most striking example of this appears from the glaring discrepancies outlined above in the Prosecution Summation of Charges and Proof (*requisitor*) and judgments in the Damiri, Suratman, and Muis cases. Given that we cannot know with certainty what factors have influenced the prosecutors’ performance in particular cases, a different approach is required. An analysis of the political culture and practices of the AG’s office and the PPS may tell us a great deal about the way in which case outcomes are shaped by the larger processes of which they are a part.

2. Political Culture: “Militarization” in the Public Prosecution Service

The starting point for such an account must be the military culture of the AG’s office and the PPS. This point was emphasized again and again by informed observers and individuals who had served at the highest levels of the AG’s office. The atmosphere at the Public Prosecution Training Center where one can observe prosecutors in military uniforms marching in formation in a setting that looked like a military compound. Such practices were considered an integral part of the training so as to instill the proper spirit in the trainees. This is also one of the central points of FRAPPS: “The PPS has a strong military culture.... Officers regularly wear military uniforms, conduct military ceremonies, give ritual salutes, and bring a military shape to every day life.... More importantly, the military culture is reflected in a rigidly hierarchical structure, in which lower ranks do not speak when their superiors are present, orders come from above, discretion is limited, initiative is not encouraged, and punishment for failing to fall in line can be swift.... Detailed rules, the seeking of consent in planning prosecution work and extensive review seem to leave little room for discretion at any level.”⁴⁶

⁴³ FRAPPS, audit carried out by Price Waterhouse, published by British Institute of Comparative Law 2001, 67.

⁴⁴ FRAPPS 56.

⁴⁵ UN Doc E/CN.4/2003/65/Add.2, Report of the Special Rapporteur on the Independence of Judges and Lawyers, Dato’ Param Cumaraswamy (Jan. 13, 2003), 19.

⁴⁶ FRAPPS 2001, 13, 16–17.

The report further notes that the inculcation of military values of loyalty and discipline are emphasized more than technical preparation for prosecutorial work: “Training and induction for new hires... focus on military values and administrative technical matters with little emphasis on prosecuting a criminal case. The course subjects include: Marching; Military Ceremony; History of the Prosecution Office of Indonesia; Organization Structure; and Prosecution Administration.”⁴⁷ In the Soeharto era, the report notes, as a result of the increasing militarization, “The concepts of loyalty and enforcement of the dictates of the regime became paramount.... [T]he role of the PPS was to enforce the policy of the government and not necessarily to independently uphold the law.”⁴⁸ The potential impact of such an orientation on politically charged cases like those involving East Timor (or human rights in general) is obvious.

When looked at from the standpoint of an individual prosecutor, the weight of this militarization operates to ensure a commitment to the values and goals of the state’s policies rather than to the legal system and the values of justice that it nominally serves. For this reason, as one might imagine, the PPS is characterized by a lack of a culture of professionalism and independence. Such attributes are simply not part of the prosecutors’ training, and the careers of individuals who display such qualities are not thereby advanced. Similar problems exist in the judiciary, where until recently judges were trained to be civil servants beholden to state interests. As the Special Rapporteur notes, this culture does not change quickly: “A number of judges informed the Special Rapporteur that after...years of serving as a civil servant, the challenges of altering mindsets to that of an independent and impartial judge are significant.”⁴⁹ As many experts on the AG’s office informed me, this problem of change of mentality is even more difficult there than among the judiciary, because the military culture of the PPS is far more blatant and deeply entrenched.

When looked at from the standpoint of the AG’s office, the culture of militarization is the product of a more fundamental orientation toward the state. As a leading figure in Komnas HAM informed me, from a structural perspective, the AG’s office is part of the institutional structure of a legal system that the military has largely co-opted. For 35 years, the AG was almost always a high-ranking military officer; only relatively recently has a civilian held the position. For an institution that has for so long seen itself as a quasi-military organization in the service of state interests, it is impossible to suddenly become independent and critical vis-à-vis the military. After decades where the military and the AG’s office have enjoyed what one expert called “a culture of cooperative corruption and abuse of power,” habits of deference persist. As a former senior official put it, “The difficulty here for the AG’s office is that this is all new. For over 30 years there was a completely different regime in the AG’s office. For this reason, without overall political direction, the AG’s office will not pursue the trials vigorously. The AG’s office takes its political direction from elsewhere. This direction comes primarily from the government. The culture of the AG’s office is to implement the political goals of the government.”

What has become increasingly clear, as the trials have progressed and international pressure on the government of Indonesia has diminished, is that the “political direction” from Megawati’s government to the AG’s office has not been to pursue these cases with vigor. If there were any

⁴⁷ Ibid at 83.

⁴⁸ Ibid at 23.

⁴⁹ Supra note 43 at 8.

lingering doubts about this, the implosion of the prosecution in the Damiri case has certainly erased them. Without the creation of a culture of independence in the PPS, the prosecution of human rights cases will continue to be shaped by the political requirements of a government that is ultimately too dependent on the military not to defer to its perceived needs when seriously challenged.

3. Prosecutorial Priorities and Motivation

How do these systemic features influence the establishment of prosecutorial priorities and the pursuit of particular cases? In the rigidly hierarchical, quasi-military culture of the PPS, career advancement depends on sensitivity to the signals sent from above in one's organization. If, at the highest levels of the AG's office, a lack of will to pursue a particular case or issue vigorously is apparent, this lack of commitment will be automatically transmitted downward throughout the organization. The motivation of prosecutors is almost entirely shaped by their perceptions of their superiors' commitments.

These commitments are typically not directly communicated, but rather transmitted or tacitly signaled in a wide variety of ways, such as the manner in which resources are assigned to particular cases.⁵⁰ For example, on a given day in the Ad Hoc Human Rights Court, the number of prosecutors appearing in a particular case is usually two, sometimes only one. Experts have said that this is considerably less than one would expect in cases of this complexity and significance. These prosecutors' lack of familiarity with the case, the dossier, and the witnesses they are calling has also struck most observers of the trials. As a former senior official stated, it would be normal for at least three prosecutors to be assigned to the trial who are "completely familiar with the case." This is particularly necessary in the current human rights cases, where one or two prosecutors often face huge teams of 10 to 15 defense counsel. Large staffs of four or five prosecutors are common, for example, in corruption cases, and many more prosecutors could have been assigned to the Ad Hoc Human Rights Court cases if the political will to do so had existed. It is also common practice that when a trial prosecution team is staffed, one or two may be members of the investigative team who are carried over to the trial group. In the Ad Hoc Human Rights Court, this appears not to have been the practice and, as seen above, because the prosecutors were not familiar with the investigation, the results have been poor effectiveness and low quality of examination and cross-examination of witnesses. This has been exacerbated by the assignment of prosecutors who live in distant parts of Indonesia, who are nearing the very end of their careers, or who are attempting to manage a heavy load of cases.

On the analysis of a former senior official, the failure throughout the system to follow the normal pattern of allocation of resources is not the result of a "decision," but the consequence of a lack of will at the top. The individual officers see that the case is not a priority for their superiors and respond accordingly. They follow cues from their superiors and don't allocate adequate resources. There is substantial competition for such resources, especially with corruption and banking cases, and those allocating or competing for these resources follow their sense of what their superiors want. Thus, because of the perceived lack of commitment at the top of the AG's office, fewer resources are assigned to the human rights cases. This is true not only of the quantity of resources,

⁵⁰ Apart from the resources in personnel discussed here, chronic underfunding and lack of adequate physical resources also debilitate the PPS. According to FRAPPS, for example, only 470 computers are available for 5500 prosecutors (61). In general, the government approves only approximately 60% of the annual PPS budget request (59).

but also the quality. At the level of the case itself, individual prosecutors are well aware of this process and respond accordingly in terms of their motivation and performance. They are, of course, acutely cognizant that they are likely to be evaluated less on performance in terms of skill and more on their sensitivity to the political tone set by the top. As one would expect, given the nature of their training and the militarization of the institution as a whole, very few have an independent mentality, and most simply follow political direction.⁵¹ As a former senior official told me, the AG's office is merely "going through the motions. Some individual prosecutors (and judges) are very committed, but institutionally speaking they are merely going through the motions. This is the result of the lack of political direction to do more from the top levels of the AG's office."

Other systemic factors also affect case assignments in the PPS. The Special Rapporteur and FRAPPS confirmed that corruption affects case assignments in all areas and determines who gets which case. In a system where prosecutors routinely pay for their training and may pay to get cases that they want, human rights cases are not considered desirable. The selection process operates by default, and unless there is a decision to pursue a particular case more effectively, cases may be tried by prosecutors who haven't managed to get better assignments. As one well-informed observer told me, "Human rights cases are not attractive to prosecutors. They are difficult, high risk, and no money. They will not help prosecutors get good promotions." It is obvious that such a process is unlikely to produce a competent and committed prosecution, especially in cases as challenging as those before Ad Hoc Human Rights Court.

It worth pointing out that the judges in the cases were perfectly aware of some of these limitations. Six judges, when explaining the weakness of indictments, used the term "bonsaification" to characterize the prosecution. They explained that the indictments were made to look good, but are actually stunted and puny. They added, "The indictments were drafted to make it technically impossible to prove that the violence was widespread and systematic." This reveals that the judges also are aware of the overriding problem of a lack of independence in the PPS. This was also manifested, the same judges noted, in the prosecution's failure to take an active role in the questioning of witnesses in particular cases, leaving this task to the judges. As one of them put it, to the approval of all the others, "The Prosecutor is tossing us the hot potato so that the blame will fall on us."

In another discussion with four judges regarding a different case, when asked how they would explain the weakness of the prosecution, they replied that this weakness must be understood from the perspective of the fact that the "prosecution is an extension of state policy" because prosecutors are "agents of the state." When asked how control might be exerted over the prosecution, they said that they did not know for sure, but that there were certain indications. First, victim-witnesses were not summoned for particular cases, but merely brought to the trials, and then assigned to cases. This suggests that prosecutors are not making decisions about who will appear for their particular cases. Next, they continued, the dossiers show that the investigating prosecutors should have, but did not, remain on the prosecution teams. This is not efficient or usual, they maintained. The judges called this the "missing link" between investigation and prosecution. One judge added that this is a clear sign that the AG decided to keep the investigators out of the trial. Finally, the indictments are almost all the same, indicating that they were "mass produced." This uniformity of indictments is indicated by features like universal charge of "failure to prevent." The indictments thus make the

⁵¹ This theme runs throughout FRAPPS.

same charges without regard to whether they fit particular defendants. The judges concluded, “We judges cannot determine if the state is trying to undermine the trial,” but they do see the weaknesses and indicators that this may be the case.

4. “Processing” the Prosecutions: Extraordinary Crimes and Routine Responses

Prosecutorial motivation and performance are influenced by a variety of systemic factors. In such a justice system, political and personal career concerns are likely to shape the motivation of prosecutors and, to a certain extent, career judges. In the case of prosecutors, when the AG and high officials in his office signal that particular cases are not considered a priority, the natural tendency is simply to go through the motions in “processing” these prosecutions. As noted, in the ordinary functioning of the prosecutor’s office financial considerations may also be a motivating factor in terms of how cases are assigned and prosecuted. All of these elements have played a role in the East Timor prosecutions.

The lack of conviction that extraordinary crimes were committed in East Timor has also influenced the motivation of prosecutors and some judges.⁵² This originates in the highest political levels and sets the tone for institutional and bureaucratic responses. This lack of conviction, as noted above, is also widely shared in Indonesian society and by much of the press. These factors are part of the reason for the passivity with which some judges and prosecutors have proceeded at trial. The sense of moral outrage and urgency that has characterized the prosecution of most major war crimes and human rights trials is glaringly absent in the Jakarta courtroom—prosecutors proceed as if the case is simply “business as usual.”

It is easy to see how the perception that no extraordinary crimes were committed in East Timor arises from the quasi-military culture that characterizes the PPS and associated institutions. This culture informs the training of prosecutors by producing an understanding of the role of prosecutors and the AG vis-à-vis the Indonesian state. This understanding makes it extremely unlikely that prosecutors will perform effectively when key elements of the state apparatus itself are the subject of prosecutorial scrutiny. It also produces a natural tendency to frame indictments and conduct prosecutions in a manner that isolates events and individuals from the larger framework of state authority. Applied to the East Timor cases, this would explain why the indictments and the presentation of the prosecution case consistently present the violence in East Timor as a series of isolated, spontaneous incidents that are not related to the policies, operations, high-level officials, or institutions of the Government of Indonesia. As noted above, very few judgments proceeded from an adequate conceptualization of the nature and scope of the crimes against humanity committed in East Timor.

⁵²Almost all of the individuals emphasized the “newness” of these kinds of cases for Indonesia. By this they mean the lack of mental preparation and professional training to deal with the notion of state criminality carried out through the policies of the government they serve. This “newness,” and the lack of adequate preparation to deal with the issues that such cases raise, have influenced every aspect of the trials.

5. Control Mechanisms and the Preparation of Indictments

Apart from the informal steering mechanisms described above, there are also formal instruments of control within the PPS that are used to manage the prosecutorial process. The general weakness of the indictments, as well as their common failure (with very few exceptions) to indict on anything other than charges of command responsibility for failure to prevent crimes against humanity, prompted much speculation among observers about whether the prosecutors themselves had written the indictments or had them “mass produced” elsewhere. All the prosecutors interviewed maintained that they wrote the indictments in their cases. This may well be true, because the process of preparing indictments is so tightly controlled by institutional procedures that a general strategy formulated at higher levels can easily be brought to bear. For example, before the indictment is issued, the prosecutor has to make a presentation to his superior about how he proposes to draft it. This presentation of the “prosecution plan” ostensibly has the purpose of exposing weak points and making a stronger indictment, but more often it results in instructions of how to carry out a policy that has been explicitly or tacitly imposed. Functionally, as confirmed by FRAPPS, it operates as a control mechanism to ensure that indictments conform to expectations of the hierarchy in the PPS. This fits into the general military-hierarchical culture of the PPS that a prosecutor will not act autonomously from his office, but is only the delegate of a team. As the FRAPPS notes, it is through such mechanisms that discretion is limited and individual initiative discouraged.

Some experts noted that certain prosecutors, particularly the younger ones, are sometimes critical of this procedure and chafe under its restrictions. The audit of the PPS highlighted the problems caused by such practices: “As the PPS was militarized, this planning system became more rigid and *rentut* permitted control from the top without important institutional checks and balances.... It also produced a climate where the substance of the prosecution decision was often not analyzed carefully by the prosecutors actually working on the case.... At present prosecutors are not independent and have no discretion in the handling of cases. All prosecution plans have to be approved by a superior under the *rentut* system.”⁵³

6. Locating Responsibility and the Problem of Political Will

In the opinion of many (although not all) observers, the human rights trial process has not been completely predetermined by orders from on high. This is not because those in positions of political authority were prepared to let an impartial process lead where it might, but because such predetermination would not be necessary. Such blatant directives would not be required, for the entire system is finely tuned to follow indications from the top as to what kind of priority and commitment it should attach to a particular case. As one expert put it, prepackaged results are not the problem; rather, it is a matter of intervention at selected points, massive competency problems, and a culture of loyalty based on a mindset that blindly assumes that the government is acting in the interests of the people. This results in a complex interplay of factors that shape the process as a whole, thereby rendering it fundamentally opaque, especially in terms of locating individual responsibility for its failings. Incompetence or its appearance, for example, may be managed to produce desired results while obscuring accountability for them. As a former senior official told me, “Indonesian prosecutors are very smart at playing stupid. They may appear to be incompetent and

⁵³ FRAPPS 31, 56.

stupid, but sometimes it is the very smartest ones who cultivate this. One technique they use, and not only in these [human rights] cases, is to intentionally delete crucial elements from an indictment in order to provide a backdoor for an acquittal (which in other cases may be a lucrative source of income). In the human rights courts they do this because they don't have a moral conviction in the prosecution. They stay at the formal level, they don't feel that they are prosecuting 'real crimes.'"

In sum, the political culture of the AG's office and the PPS has shaped the prosecution's performance before the Ad Hoc Human Rights Court in ways that bring it into line with the perceived lack of commitment to pursue accountability at the highest levels of government. Individual prosecutors, who in any event are ill equipped to deal with such cases, take their cue from their superiors and pursue them only in form. They have little incentive, and absolutely no preparation in their training, to motivate them to do otherwise. In this way, the process is steered to a desired outcome without the necessity of heavy-handed intervention in the prosecution process. Of course, most experts agree, such intervention will be forthcoming when required. It is just this kind of selective intervention that produced the stunning failure of prosecutorial will in the Damiri case. Heretofore such measures had, unfortunately, not been necessary, as the normal operation of the system ensured that, in most cases, the prosecution (already hamstrung by its own weak and poorly written indictments) would operate with the desired ineffectiveness.

Although it may be impossible to locate individual responsibility within the PPS for such failures, it is beyond dispute that the ultimate responsibility for them resides at the highest levels of the AG's office and in the failure of political will in Megawati's government. In a system where the perceived priorities of the AG's office sets the tone for the PPS, the AG must ultimately shoulder the responsibility where there is a failure to motivate prosecutors to perform credibly in particular cases.

Any one of these problems might have undermined the prospects for the Jakarta trials to achieve real credibility. At the systemic level, they operate together to make real judicial independence and accountability goals extremely difficult—perhaps impossible—to achieve. From an analytical perspective, they also render it futile to try to advance monocausal interpretations to explain what has determined the outcome of the trials. What is far more important, however, is to understand the interaction of these factors so as provide a basis for recommendations aimed at diminishing their pernicious influence. The next section turns from these systemic issues to a series of particular problems that have characterized the Jakarta trials, most of which relate to the systemic issues just described.

C. Trial-Specific Weaknesses

1. Resources

In most of the trials, and to an extreme degree in the TNI cases, prosecutors have confronted more numerous, more capable, and better-prepared defense counsel. This imbalance, plus the weak indictments and other factors already mentioned, make it much more difficult to obtain convictions or justify heavy sentences. This kind of situation is not unknown in prominent trials in other legal systems (e.g., O.J. Simpson), but the important question is why it was allowed to occur to such an extent and why so little was done to remedy the glaring weaknesses.

FRAPPS has examined in detail the general lack of resources that characterizes the PPS. The impact of these systemic problems should not be underestimated, as they may also lead to unanticipated consequences. For example, according to FRAPPS, there is a severe lack of modern computers, technical expertise, up-to-date software, and general computer literacy in the PPS.⁵⁴ This may have significantly contributed to the prosecutors' failure to use fully the information contained in the KPP HAM report. Much of the detail of that information was contained in electronic form in the appendices and the database provided with the KPP HAM report on CD-ROM. The large KPP HAM database, moreover, employed the JURIDOC system, which is complex and sophisticated, and requires some expertise to master. There is evidence to suggest that, finding it too complicated (or perhaps not even having access to powerful PCs and appropriate software), prosecutors simply ignored it.

The systemic problem of lack of resources, however, provides only a partial explanation for the understaffing, underfunding, and prosecutors' lack of proper training in IHL. The AG's office is certainly aware of these systemic problems and does have the resources to address them, given sufficient political will. That in the Jakarta trials insufficient resources were allowed to undermine the prosecution effort so severely can, in the end, be interpreted only as highest-level AG decisions not to attach a high priority to these cases.

The same kinds of questions arise in regard to the woeful inadequacy of the material and administrative infrastructure for the trials. This involves the lack of even the most basic resources for the judges, such as offices, computers, research tools, photocopying budgets, clerks, secretarial support, paper, and other supplies. It extends to the lack of organization and commitment manifest in the production of witnesses, the difficulties in arranging teleconferencing, the lateness of the judges' pay (their first payment came nine months after the beginning of the trials), and other aspects of calendar and case management. These issues have not only affected the course of the trials, but also reveal a good deal about the underlying systemic issues.

2. Victim-Witnesses and Teleconferencing

The analysis of the seven trials revealed the vital importance of the victim-witnesses in establishing the prosecution case. It also demonstrated how few victim-witnesses were actually produced in court over the course of the trials. This failure had other consequences, apart from its substantive impact on proof of the crimes charged. Time and again, at the beginning of a trial session, the prosecution announced that none of its East Timorese witnesses had appeared. On such occasions, the hearing was either postponed a full week or available Indonesian witnesses were heard. Judges frequently protested and/or ordered prosecutors to produce more victim-witnesses. Because the trials were operating under 180-day statutory limits, these postponements had serious repercussions. This was exacerbated by the fact that because most judges were serving in multiple panels, each panel normally met only one day per week.

⁵⁴ According to FRAPPS, there are 470 computers for 5500 prosecutors, many of which are antiquated models. Similarly, software dates from 1991–1992 era. Such machines and operating systems simply cannot run the JURIDOC database and are incompatible with the software used in the KPP HAM Report and Annexes (61–66).

There are, as one might expect, conflicting accounts of why victim-witnesses did not appear in greater numbers. It is certainly clear, as has been widely remarked, that the witness-protection measures were grossly inadequate. Egregious practices included calling out the names of the witnesses on the public address system at the airport or housing them in a “safe-house” that had a sign on the door identifying it as such. It is difficult to determine to what extent these practices reflect inadequate preparation and lack of experience as opposed to deliberate intimidation. The Special Rapporteur noted the inadequacy of the measures in his conclusions.⁵⁵ It is certain, moreover, that the widespread perception in East Timor of the security risks and of the inadequacy of witness-protection contributed to the reluctance of victim-witnesses to come to Jakarta. It must be said, however, that the reluctance of many witnesses to cooperate in any way with Indonesian institutions was already manifested during KPP HAM’s investigation in East Timor, when they also had difficulty in persuading many witnesses to testify, even though there was no question of security. Even when teleconferencing became available, many Timorese still refused to testify in East Timor.

Teleconferencing was discussed from relatively early in the trials as a solution to this problem and many of the judges encouraged it, but an alleged lack of available funds and the restrictions of the Code of Criminal Procedure as insurmountable difficulties. That these problems seemed to evaporate so quickly in December 2002–January 2003, at the very end of the trials, raised the question of why they could not have been resolved sooner. Certainly, the argument of a lack of funds only begs the question. Given the resources of the Indonesian state and the AG’s office, the relatively modest amounts involved could have been made available if there had been sufficient will on the part of the AG’s office and the government. Further, it was reasonably clear that a serious Indonesian effort to obtain international funding could have succeeded months before teleconferencing arrived, largely “too little, too late,” for most of trials had already been concluded.

Even after teleconferencing was implemented, however, significant problems remained. It was announced in court on December 2 that Bishop Belo would testify by teleconference in the Damiri and Muis trials. However, Bishop Belo never did testify. He did not appear on the announced date in December and in January again made himself unavailable for testimony at the time that had been arranged. His repeated failure to testify was not the fault of the prosecution, and his excuses were transparently inadequate. The refusal of so prominent a figure, whose testimony could well have proved vital in these cases, points up the seriousness of the problem of lack of cooperation on the East Timorese side. This does not excuse the prosecution, however, for if it had initiated teleconferencing when it became apparent at the very beginning of the trials that victim-witnesses were refusing to appear, the results might have been far different.

Several of the judges complained that the teleconferencing was hastily thrown together at the last minute. When asked why it had take so many months for the AG’s office to arrange teleconferencing and why it had only happened when the trials were almost over, they responded, “No money, no will, no commitment, no seriousness.” The lack of preparation in the selection and examination of witnesses was obvious to observers and rendered the testimony of some the victim-witnesses via teleconferencing largely useless.

⁵⁵ “The instances recounted to the Special Rapporteur over the manner in which East Timorese witnesses were protected in Jakarta are an indication of the wholly unsatisfactory implementation of the witness protection measures” (20, para. 101).

3. Intimidation

From beginning to end, the trials were marked by the massive presence of TNI members in the courtroom. The daily demonstrations of “solidarity” with TNI defendants in the Jakarta courtroom via the presence of large numbers of military and other uniformed personnel represent the public face of this problem.

The most immediate effect of the TNI presence was the intimidation of participants in the trials. As one experienced member of the Jakarta legal community told me, “The massive TNI turnout at the trials was extraordinary. This was a message to the judiciary that these defendants are good soldiers and the military at the very highest ranks support them. This was most marked on the first day when all of the top commanders of the various services and of the Armed Forces were there in the front rows.” It was also a message to the prosecutors, the public, and the witnesses who appeared. On a typical day, several officers and soldiers milled around just outside the courtroom, and many more were seated inside. The range was usually 10 to 25, although sometimes more. On one occasion, international observers asked some of the soldiers why they were there. They replied that they didn’t know, but that they had simply been ordered to report to a bus that brought them to the courthouse and told to sit in the courtroom. Observers saw that green bus arrive every day that TNI trials were under way.

In interviews, judges said that they perceived the massive presence of TNI in the courtroom as intended to intimidate them and the prosecutors. They said that they felt uncomfortable by the presence of these often-armed soldiers. Before the Gutierrez trial ended, there often were significant numbers of East Timorese militia members in the courtroom, wearing black military style shirts and red and white Indonesian scarves. Such audiences made no secret of their sympathies, cheering when a defendant or witness opined negatively about East Timorese independence or the role of the UN in East Timor. Judges frequently had to admonish the audience on such occasions. The lack of bailiffs to maintain order was disturbing, and one of the judges said he felt very uneasy when one of the militia members came in the door usually used only by the court (open because of the lack of air conditioning) and stood only a few feet behind him while the trial was in progress.

The effect of such behavior was exacerbated by the practice of TNI defendants visiting other courtrooms when their own trials were not in session. The presence of these high-ranking officers, often openly conversing with one another, in the audience added to the sense of solidarity and of intimidation for judges, prosecutors and, above all, witnesses. It was also illegal under Indonesian procedural law.⁵⁶ Gutierrez and his followers also flowed in and out of the courtroom, greeting each other and talking, during the period before his conviction. Their presence was particularly disturbing for the victim-witnesses, whom they often sat near or next to.

Finally, a campaign of harassment and intimidation appears to have been directed at judges deemed likely to support convictions. This included telephone calls through all hours of the night, e-mail

⁵⁶ In process of the trial, the judges are obligated to order or prevent the witnesses from communicating with one another before delivering their testimonies in court (KUHAP, Art 159.1). Aside from that, the witnesses are restricted from conversing during the trial (Art. 167.3).

messages, visits from long-lost acquaintances who asked judges to meet with unspecified officials, and the like. It is impossible to assess the full impact of such harassment and intimidation on the trial process.

4. Lack of Evidence in Trials

When asked to account for the weakness of the prosecution and its failure to produce evidence to support the charges, prosecutors, defense counsel, and some Indonesian observers responded by shifting blame to the KPP HAM report. This view is widespread enough that it merits discussion here, especially because it is merely a device to shift attention away from the prosecution's glaring failings and the AG office's lack of commitment. The main thrust of such criticisms is that the members of KPP HAM were not experienced investigators and their findings had no value as evidence. Hence, the prosecutors had to begin from scratch and did not have sufficient time to work up the case. This raises the question of whether the task of KPP HAM was to prepare the case for the prosecution.

A former senior official confirmed that the KPP HAM mandate was limited to fact-finding and recommendations. He explained that if the AG accepts the report, it is his office's obligation to launch a prosecutorial investigation on the basis of the report's recommendations. Thus, "the AG should not complain if further investigation is required after KPP HAM because it is his job to build the investigation after the report. When the AG decides to accept a KPP HAM report and investigate then it becomes an official criminal investigation. So the real issue is whether the AG's office has the right perspective." Other experts confirmed that while the KPP HAM "evidence" was not admissible because all of the documents are photocopies, it was outside the scope of KPP HAM's mandate and authority to produce admissible evidence. KPP HAM's task was to produce preliminary evidence and a roadmap of the case for the prosecution. The work of gathering evidence for the prosecution dossier (BAP) to be used at trial is the job of the prosecution. Former members of KPP HAM also said that they had informed the prosecution that originals of many of the documents they had collected were available from the UNTAET prosecutors in Dili, but the prosecution made no attempt to obtain these documents. Prosecutors confirmed this.

Careful analysis of the report reveals that it does provide the data the investigators could have used to obtain introducible evidence. The annexes also provide ample documentation for the "widespread or systematic" nature of the crimes through their lists of all the incidents, perpetrators, victims, etc. Annex B contains preliminary evidence, consisting of transcriptions of witness interviews and documents. Further, the report itself refers to important evidence that the prosecution could have obtained to build a broader case of crimes against humanities so as to support its indictments.⁵⁷

For example, in discussing the PPI and the rallies it held in East Timor, the report mentions Indonesian financial support for such organizations. It cites Eurico Guterres' pretrial statement about the PPI/Pam Swakarsa rally at the Governor's house in Dili that preceded and led to the attack on Manuel Carrascalao's house. Guterres here admits that this rally was an official Appel of the Pam Swakarsa and that all the militias were joined under the umbrella organization PPI.⁵⁸ It

⁵⁷ Table 3 in Annex 3, available at www.ictj.org, contains an analysis of the documentary evidence in KPP HAM's Final Report.

⁵⁸ KPP HAM Final Report, para. 43.

then quotes Wiranto's letter as evidence of government involvement: "One way of providing direction for pro-integration groups that must receive support from all government institutions in order to ensure that they remain unified and do not splinter."⁵⁹

The report continues that, "The effort to make autonomy succeed involved the TNI and civil authorities.... From that time forward there were simultaneous Appels where blood oaths were taken by militias." It then gives the dates and places of the Appels. Although such factual allegations are not always fully referenced to the mass of evidence in Annexes, for prosecutors it would have just been a matter of cross-referencing and supplementing.

Numerous other pretrial statements are referenced in the KPP HAM report as providing vital testimony on the TNI's role. For example, the statement of Thomas Gonzalves, Regent (Bupati) of Ermera, states that he received 300 guns from defendant Yayat Sudrajat.⁶⁰ Likewise, in the summary of the statement of Sgt. Gabriel de Jesus: "He acknowledges that several days before the referendum registration 40 assault rifles (SKS) were dropped off at the military command HQ in Lautem. They were later stored and used by the militia in Lautem."⁶¹ Numerous other examples refer to specific testimony on this vital issue and reference the location of the testimony in the Annexes (e.g., B848; P376).⁶²

These examples (and there are many more in the report and its annexes) show that the KPP HAM report did contain references to specific evidence on key issues such as the TNI's role in supporting and arming the militias. This evidence went well beyond what was attached to the dossier presented at trial. The prosecution apparently ignored this evidence, as they did not try to prove these elements of the case. So although the report may not fully document all of its recommendations and conclusions in formal evidentiary fashion, it is at least clear that:

1. It was not the KPP's mandate to do all the work of investigation for prosecution and prepare the case for trial.
2. The report does present substantial documentation to support its recommendations and provides the foundation for prosecution cases by its roadmap to the annexes and database referenced in its conclusions.
3. The prosecution did not fully use this evidence, so it is hardly appropriate to complain that the report did not do more. The dossier omits most of the KPP HAM report's incriminating evidence, especially on TNI involvement. The prosecution team did not use most of the evidence that did get into the dossier.⁶³
4. Perhaps most important, the prosecution did not follow the lines of argument that the report laid out. The report goes far beyond the weak allegations of the indictments and prosecution cases, providing evidence by which the prosecution could have connected the TNI defendants far more directly to the violence, showing both the widespread and systematic nature of the violence and the TNI role in organizing and preparing for it.

⁵⁹ Ibid at 45.

⁶⁰ Ibid, Annex B at 460.

⁶¹ Ibid, Annex B at 179, para. 51.

⁶² Mark Cammack provided these translations and much useful information about the KPP HAM annexes and database.

⁶³ See Annex 3, available at www.ictj.org.

That is, the KPP HAM report indicted the system that produced the violence. The indictments themselves only focused on various individuals without connecting them to an overall policy or to the institutions that produced that policy. What emerged instead was a truncated narrative in which a series of crimes were described as isolated incidents by a prosecution which stubbornly refused to introduce available evidence that might show that they were part of a larger, systematic, and widespread pattern and were a product of governmentally financed, organized, and orchestrated criminality.

From a general systemic perspective, the prosecution's complaints about the AG's report are not surprising. FRAPPS notes the severity of the general rivalry and lack of cooperation between police and prosecutors: "The police often produce dossiers that the prosecutors find to lack sufficient evidence to secure a conviction.... Each side blames the other for these problems...." This view was confirmed by my discussions with experts. They also noted that rivalry between the AG's office and the police is typical. The AG, for example, "relishes sending back investigative files saying that they are inadequate.... They both use the to and fro in regard to the adequacy of the investigation as a weapon in fighting over jurisdiction." This pattern appears to be the model for the way that the AG's office treats KPP HAM, which explains its rejection of the adequacy of the report. The AG's office does not want to concede that anyone else has the right to determine their prosecutorial approach, as KPP HAM did in these cases. For this reason, they would be motivated to reject the value of the KPP HAM report no matter what its content. They might say that they had to start investigation from scratch and obtain their own evidence rather than relying on a group of "amateurs." These attitudes do not bode well for the future of the arrangement mandated by LAW 26/2000 under which the Komnas HAM is given the role of initiating and shaping the investigation of human rights cases.

5. Challenges for Judges

As has already been alluded to, judges of the Ad Hoc Human Rights Court face many of the same challenges as prosecutors. These range from the institutional (resources, pressure and intimidation, etc.) to the more subtle problem of adapting one's mentality to the new context of an independent human rights court weighing evidence against entrenched national institutions like the armed forces and police. The challenge of what observers and participants have called the "newness" of the trials was commented on above. In addition to the mental adjustment of applying a criminal label to those whom they may instinctively regard as "fellow countrymen doing their job" (as a former senior official described this difficulty), they are also confronted with a new legal context for which their training and experience can scarcely have prepared them. This section briefly explores these challenges and how some of the judges have responded to them.

Two of the judges explained that lack of training and experience in IHL is a problem for both judges and prosecutors. Only a few of the judges have real professional expertise in this field. This manifests itself in technical problems, such as a lack of understanding of the elements of crimes against humanity, command responsibility, or other doctrines. It is also responsible, as was seen in the analysis of the cases, for inadequate attitudinal responses to new legal problems that arise, for example, in applying the Code of Criminal Procedure to cases whose substantive law is defined by the norms of IHL.

Many of the judges, informed observers, and experts confirmed that some of the judges were taking refuge behind a very narrow conception of their authority and role. As a former senior official said, judges in the Indonesian system have the power to make their own investigation in the courtroom and can also pursue evidence on their own. The judge is not limited by the evidence produced by the prosecution, but can provide proof to fill in gaps in the indictment. Judges can also order prosecutors to produce particular evidence or to obtain it from the Serious Crimes Unit in Dili (although, as noted above, prosecutors have at times not been particularly responsive to orders from the judges in regard to producing witnesses). “The judge,” he added, “has the freedom to make a ‘breakthrough’ in evidentiary questions.” On his view, the lack of insistence from the many of the judges in pursuing the evidentiary problems are a sign, “that they are not that serious” and that the result in that particular case has been decided beforehand.

Another view, advanced by one of the most informed observers of the trial, maintains that the outcomes of cases depends on which of three groups the judges on a particular panel fall into. One group consists of conservative judges who “go by the book” and stick to the Code of Civil Procedure. Weak and inexperienced ad hoc judges are too often influenced by career judges on their panels who maintain such views. The conservative judges look at these cases like ordinary criminal trials for murder. They want autopsies, coroner’s reports, murder weapons, originals of all documents, etc. A second group comprises career and ad hoc judges who are known for their knowledge of IHL and progressive views. They are more aware of the extraordinary nature of the crimes, more committed to accountability and, because of their greater knowledge and awareness, will make better and more innovative rulings. This group is responsible for several of the convictions. Finally, there is a middle group that can go either way, depending on the panel they are sitting with. As this observer put it, “They want to look like they have embraced IHL but their motivations have to do with career decisions. These judges invoke IHL in their judgments and they acquit supposedly because there was no evidence, but really because of career considerations.”

The conflicts that can arise from such different perspectives on the part of the judges is indicated by the unusual step two judges took in writing an opinion dissenting from the acquittal in the Priyanto case. The end result, looking at the 12 trials as a whole, is that such divisions have produced wide divergences in the findings and results. This appeared from the analysis of different cases focusing on the same events and chain of command. That is, analyzing the convictions and acquittals, one can only conclude that there is no discernible pattern to the trials and that one is left with a series of seemingly unrelated judgments. This result has been exacerbated by the failure of the prosecution and the judges to adopt a shared, common account of what happened in East Timor in 1999. Comparing these trials with the ICTY and ICTR is instructive, for there a common account of the nature, scope, and causes of the violence in the former Yugoslavia and Rwanda is the bedrock on which the different panels of judges build.

IV. CONCLUSIONS

The lack of a credible shared account of the violence in East Timor, consistent with the findings of KPP HAM, the Serious Crimes Unit, and expert international opinion, has had a crippling effect. Together with the disturbing persistence, in prosecution pleadings and many of the judgments, of the myth that the violence in East Timor arose in purely random ways from spontaneous clashes between unorganized groups, it has produced two of the principal failings of the trials. First, the

political objectives have been lost. As a former senior official informed me, “The overarching political objective was to establish clear command responsibility at the institutional level and not just individual culpability. This has clearly not succeeded as some TNI officers have been acquitted and others convicted in a pattern that cannot be convincingly explained with reference solely to the merits of the individuals cases.” For this reason, the 12 trials have only succeeded in convicting a few individual perpetrators. They have failed to establish the individual responsibility of those in the hierarchy who were responsible for planning and ordering the tactics, strategies, and policies of the institutions they represent. Thus, they have failed to establish accountability and to undermine the culture of impunity that was responsible for the violence in the first place. In this regard, the failure of the AG to indict anyone above the level of Adam Damiri is of crucial importance.

Second, the trials have failed fundamentally in fulfilling the “truth function,” which is a central part of the mandate of human rights and war crimes courts. Indeed, by clinging to a version of the violence in East Timor that is accepted nowhere outside of Indonesia (and that many there have rejected), the trials have lost a unique opportunity to set the historical record straight, inform the Indonesian public of the accountability of their institutions for the gross human rights violation perpetrated in their name, and to provide a basis for reconciliation and justice for the victims in East Timor.

Finally, as the above analysis has emphasized repeatedly, whatever the confluence of various factors that have produced results in particular cases, overall responsibility for the failure of the trial process before the Ad Hoc Human Rights Court lies with the AG’s office and the Government of Indonesia. The trials as a whole were not based on an impartial evaluation of the available evidence, because the most important available evidence was not produced in court and the prosecution too often seemed to be working in the service of the defense. In several cases, the judges, struggling against a series of handicaps, attempted to meet international standards and convicted defendants based on a scrupulous weighing of the evidence and the proper application of international humanitarian case law and doctrine. In the majority of the cases, however, a combination of lack of prosecutorial and judicial initiative resulted in weak indictments, weak prosecution cases, the failure to produce vitally important available evidence and testimony, and a failure to assess credibly and fairly the evidence that was produced. Tragically, for those who have worked hard to legitimize the process, the failure of the prosecution has, in too many cases, provided a convenient excuse for acquittals that seem unsupported by the available evidence (or the outcomes of other cases before the court). And in the case of important convictions, such as that of Adam Damiri, the weaknesses of the prosecution have undermined the credibility of the process as a whole. Had the prosecution in this case acquitted itself with even a minimum of competence and credibility, the conviction of Damiri might have done much to call into question some of the denunciations that have been directed at the trials. In this regard, the AG’s office lost a unique opportunity to lend some legitimacy to this deeply flawed process.

Despite the central role of the prosecution in permitting this outcome, the systemic failures are more serious. The Ad Hoc Human Rights Court was designed to provide independence in the adjudication of human rights cases. Not only has it not done so, it *cannot* do so in its present configuration. It is clear from what has happened in these cases that without an independent prosecution function, credible results and accountability will not be achieved. Further, the legal framework of the trials under Law 26/2000 requires major revision, especially regarding matters of

evidence and procedure. Of equal importance is the provision of adequate and proper technical, financial, and other resources for judges and prosecutors, including far more extensive training in IHL. In the end, however, all of these problems come back to the issue of political will in the AG's office and higher governmental levels. Ultimately, the failure of these trials to meet international standards, and to achieve legitimacy in the eyes of national and international observers, rests on the lack of commitment on the part of the Indonesian Government to encourage or permit a process that could lead to genuine accountability.

APPENDIX 1: Table of Cases and Verdicts

<p><u>Abilo Soares</u> former governor of East Timor</p>	<p>Two cumulative charges of crimes against humanity:</p> <ol style="list-style-type: none"> 1. Murder as a crime against humanity (Art. 9(a) of Indonesia's Law 26/2000 on human rights courts); and 2. Assault/persecution as a crime against humanity (Art. 9(h)). <p>Convicted and sentenced to three years' imprisonment (has lodged an appeal and remains at liberty)</p>
<p><u>Timbul Silaen</u> Brigadier General former East Timor police chief</p>	<p>Two cumulative charges of crimes against humanity:</p> <ol style="list-style-type: none"> 1. Murder as a crime against humanity (Art. 9(a) of Indonesia's Law 26/2000 on human rights courts); and 2. Assault/persecution as a crime against humanity (Art. 9(h)). <p>Acquitted</p>
<p><i>Suai Church massacre</i></p> <p><u>Herman Sedyono</u> Lieutenant Colonel former Bupati of Covalima District</p> <p><u>Liliekh Kushadianto</u> Lieutenant Colonel former commander of Suai District Military Command</p> <p><u>Ahmad Syamsudin</u> Captain former chief-of-staff of Suai District Military Command</p> <p><u>Sugito</u> Lieutenant former commander Suai Military Sector Command</p> <p><u>Colonel Gatot Subiyakto</u> Lieutenant former police chief of Suai</p>	<p>Crimes against humanity. The indictment takes the form of a subsidiary/alternative charging:</p> <ul style="list-style-type: none"> • Primary charge against all accused—Art. 9(a) (murder as a crime against humanity) using Art. 42(1) (Military Command Responsibility) of Indonesia's Law 26/2000 on human rights courts • Subsidiary charge against all accused—Art. 9(a) (murder as a crime against humanity) using Art. 41 (attempting, plotting, or assisting the perpetration of crimes within the jurisdiction) • Further subsidiary charge for Herman Sedyono—Art. 9(a) (murder as a crime against humanity) using Art. 42(2) (Civilian Command Responsibility) • Further subsidiary charge for Liliekh Kushadianto—Art. 9(a) (murder as a crime against humanity) using Art. 42(1) (Military Command Responsibility) • Further subsidiary charge for Gatot Subiyakto—Art. 9(a) (murder as a crime against humanity) using Art. 42(1) (Military Command Responsibility) • Further subsidiary charge for Ahmad Syamsudin—Art. 9(a) (murder as a crime against humanity) using Art. 42(1) (Military Command Responsibility) • Further subsidiary charge for Sugito—Art. 9(a) (murder as a crime against humanity) using Art. 42(1) (Military Command Responsibility) <p>All acquitted</p>

<p><i>Liquisa Church massacre</i></p> <p><u>Asep Kuswani</u> Lieutenant Colonel former Liquica military commander</p> <p><u>Adios Salova</u> Lieutenant Colonel former police chief of Liquica</p> <p><u>Leoneto Martins</u> former Bupati Liquica</p>	<p>Two counts of crimes against humanity. The indictment takes the form of subsidiary/alternative charging:</p> <ol style="list-style-type: none"> 1. Murder as a crime against humanity <ul style="list-style-type: none"> • Primary charge against all accused—Indonesia’s Law 26/2000 on human rights courts, Art.9(a) murder as a crime against humanity using Art. 42 (by not limiting it to the subsections, the allegation can encompass Military Command Responsibility and Civilian/Police Command Responsibility) • Subsidiary charge against Asep Kuswani—Art. 9(a) murder as a crime against humanity using Art. 42(1) (Military Command Responsibility) • Subsidiary charge for Adios Salova—Art. 9(a) murder as a crime against humanity using Art. 42(2) (Civilian/Police Command Responsibility) • Subsidiary charge for Leoneto Martins—Art. 9(a) murder as a crime against humanity using Art. 42(2) (Civilian/Police Command Responsibility) 2. Assault as a crime against humanity <ul style="list-style-type: none"> • Primary charge against all accused—Art. 9(h) assault as a crime against humanity using Art. 42(1) (Military Command Responsibility) • Subsidiary charge against Asep Kuswani—Art. 9(h) assault as a crime against humanity using Art. 42(1) (Military Command Responsibility) • Subsidiary charge for Adios Salova—Art. 9(h) assault as a crime against humanity using Art. 42(2) (Civilian/Police Command Responsibility) • Subsidiary charge for Leoneto Martins—Art. 9(a) assault as a crime against humanity using Art. 42(2) (Civilian/Police Command Responsibility). <p>All acquitted</p>
<p><u>Endar Priyanto</u> Lieutenant Colonel former Dili police commander</p>	<p>Crimes against humanity. There are two charges:</p> <ol style="list-style-type: none"> 1. Murder as a crime against humanity in violation of Art. 9(a) of Indonesia’s Law 26/2000 on human rights courts using Art. 42(1) (Military Command Responsibility) 2. Assault as a crime against humanity in violation of Art. 9(h) using Art. 42(1) (Military Command Responsibility) <p>Acquitted</p>
<p><u>Soedjarwo</u> Lieutenant Colonel former Dili military commander</p>	<p>There are two charges:</p> <ol style="list-style-type: none"> 1. Primary charge of murder as a crime against humanity in violation of Art. 9(a) of Indonesia’s

	<p>Law 26/2000 on human rights courts using Art. 42(1) (Military Command Responsibility)</p> <p>2. Secondary charge of assault as a crime against humanity in violation of Art. 9(h) using Art. 42(1) (Military Command Responsibility)</p> <p>Convicted and sentenced to five years' imprisonment (remains free pending appeal—no appeal yet lodged)</p>
<p><u>Eurico Gutierrez</u> former Aitarak commander and former deputy commander PPI</p>	<p>Crimes against humanity. There are two charges:</p> <p>1. Murder as a crime against humanity in violation of Art. 9(a) of Indonesia's Law 26/2000 on human rights courts using Art. 42(2) (Civilian/Police Command Responsibility)</p> <p>2. Assault as a crime against humanity in violation of Art. 9(h) using Art. 42(2) (Civilian/Police Command Responsibility)</p> <p>Convicted and sentenced to 10 years' imprisonment (remains free pending appeal—no appeal yet lodged)</p>
<p><u>Adam Damiri</u> Major General former chief of the Udayana Regional Military Command</p>	<p>Crimes against humanity. There are two charges:</p> <p>1. Murder as a crime against humanity in violation of Art. 9(a) of Indonesia's Law 26/2000 on human rights courts using Art. 42(1) (Military Command Responsibility)</p> <p>2. Assault as a crime against humanity in violation of Art. 9(h) using Art. 42(1) (Military Command Responsibility)</p> <p>Convicted and sentenced to three years' imprisonment (remains free pending appeal—no appeal yet lodged)</p>
<p><u>Tono Suratman</u> Brigadier General former East Timor military commander</p>	<p>Crimes against humanity. There are two charges:</p> <p>1. Murder as a crime against humanity in violation of Art. 9(a) of Indonesia's Law 26/2000 on human rights courts using Art. 42(1) (Military Command Responsibility)</p> <p>2. Assault as a crime against humanity in violation of Art. 9(h) using Art. 42(1) (Military Command Responsibility)</p> <p>Acquitted</p>
<p><u>Nuer Muis</u> Brigadier General (Suratman's successor)</p>	<p>Two cumulative charges of crimes against humanity:</p> <p>1. Murder as a crime against humanity (Art. 9(a) Indonesia's Law 26/2000 on human rights courts)</p> <p>2. Assault/persecution as a crime against humanity (Art. 9(h))</p> <p>Convicted and sentenced to five years' imprisonment (remains free pending appeal—no</p>

	appeal yet lodged)
<u>Yayat Sudrajat</u> Colonel Tribuana military unit chief	Two cumulative primary charges of crimes against humanity and two subsidiary charges of crimes against humanity: <ul style="list-style-type: none"> • Primary charge (1)—Indonesia’s Law 26/2000 on human rights courts Art. 9(a) murder as a crime against humanity using Art. 42(1) (Military Command Responsibility) • Primary charge (2)—Art. 9(h) assault as a crime against humanity using Art. 42(1) (Military Command Responsibility) • Subsidiary charge (1)—Art. 9(a) murder as a crime against humanity using Art. 41 (attempting, plotting, or aiding the commission of a crime against humanity) • Subsidiary charge (2)—Art. 9(h) assault as a crime against humanity using Art. 41 (attempting, plotting, or aiding the commission of a crime against humanity) Acquitted
<u>Hulman Gultom</u> former Dili police chief	No documents available, but indictment related to responsibility under Art. 42 for failure to prevent attacks at the house of Manuel Carrascalao Convicted and sentenced to three years’ imprisonment (remains free pending appeal—no appeal yet lodged)

Source: Adapted from Judicial Systems Monitoring Program

APPENDIX 2: Law 26/2000 Establishing the Ad Hoc Human Rights Court

REPUBLIC OF INDONESIA ACT 26 OF 2000 CONCERNING HUMAN RIGHTS COURTS

WITH THE MERCY OF GOD ALMIGHTY

THE PRESIDENT OF THE REPUBLIC OF INDONESIA,

Considering:

- a. Whereas human rights are basic rights bestowed by God on human beings, are universal and eternal in nature, and for this reason may not be disregarded, diminished, or appropriated by anyone whosoever,
- b. Whereas to participate in preserving world peace and guaranteeing the implementation of human rights, and to provide protection, assurance, justice, and a feeling of security to both individuals and society, it is necessary to establish forthwith a Human Rights Court in order to resolve gross violations of human rights in accordance with Article 104 clause (1) of Act No. 39 of 1999 concerning Human Rights;
- c. Whereas establishment by the government of a Human Rights Court to resolve gross violations of human rights based on Government Regulation in Lieu of an Act No. 1- of 1999 concerning Human Rights Courts was considered inadequate and therefore not ratified as an Act by the House of Representatives of the Republic of Indonesia, and for this reason it is necessary to revoke the aforementioned Government Regulation in Lieu of an Act;
- d. Now, therefore, upon consideration of clauses a, b and c, it is necessary to enact provisions in an Act concerning Human Rights Courts;

In view of:

1. Article 5 clause (1) and Article 20 clause (2) of the 1945 Constitution;
2. Act No. 14 of 1970 concerning Principal Provisions on Judicial Authority (State Gazette No. 74 of 1970, Supplement to the State Gazette No. 2951) as amended by Act No. 35 of 1999 concerning Amendments to Act No. 14 of 1970 concerning Principal Provisions on Judicial Authority (State Gazette No. 147 of 1999, Supplement to the State Gazette No. 3879);
3. Act No. 2 of 1986 concerning Courts of General Jurisdiction (State Gazette No. 20 of 1986, Supplement to the State Gazette No. 3327);

4. Act No. 39 of 1999 concerning Human Rights (State Gazette No. 165 of 1999, Supplement to the State Gazette No. 3886);

**With the joint approval of
THE HOUSE OF REPRESENTATIVES OF THE REPUBLIC OF INDONESIA
and
THE PRESIDENT OF THE REPUBLIC OF INDONESIA**

DECREES:

To enact:

ACT CONCERNING HUMAN RIGHTS COURTS.

**CHAPTER I
GENERAL PROVISIONS**

Article 1

The terms used in this Act have the following meanings:

1. Human rights are a set of rights bestowed by God Almighty in the essence and being of humans as creations of God which must be respected, held in the highest esteem and protected by the state, law, Government, and all people in order to respect and protect human dignity and worth.
2. Gross violation of human rights is a violation of human rights as referred to in this Act.
3. A Human Rights Court is a court dealing specifically with gross violations of human rights.
4. A person is an individual, group of people, civil or military, or police, having individual responsibility.
5. Inquiry is a set of acts of inquiry to identify the existence or otherwise of an incident suspected to constitute a gross violation of human rights to be followed up by an investigation in accordance with the provisions set forth in this Act.

**CHAPTER II
STATUS AND LOCATION OF HUMAN RIGHTS COURTS**

**Section One
Status**

Article 2

A Human Rights Court is a special court within the context of a Court of General Jurisdiction.

Section Two

Location

Article 3

1. A Human Rights Court shall be located in a regional capital or a municipal capital and its judicial territory shall cover the judicial territory of the relevant District Court.
2. In the case of the Special District of Jakarta, a Human Rights Court shall be located in the territory of each relevant District Court.

CHAPTER III

SCOPE OF AUTHORITY

Article 4

A Human Rights Court has the task and authority to hear and rule on cases of gross violations of human rights.

Article 5

A Human Rights Court has the authority to hear and rule on cases of gross violations of human rights perpetrated by an Indonesian citizen outside the territorial boundaries of the Republic of Indonesia.

Article 6

A Human Rights Court does not have the authority to hear and rule on cases of gross violations of human rights perpetrated by persons under the age of 18 (eighteen) at the time the crime occurred.

Article 7

Gross violations of human rights include:

1. the crime of genocide
2. crimes against humanity

Article 8

The crime of genocide as referred to in Article 7 is any action intended to destroy or exterminate in whole or in part a national group, race, ethnic group, or religious group by:

1. killing members of the group;
2. causing serious bodily or mental harm to members of a group;
3. creating conditions of life that would lead to the physical extermination of the group in whole or in part;
4. imposing measures intended to prevent births within a group; or

5. forcibly transferring children of a particular group to another group.

Article 9

Crimes against humanity as referred to in Article 7 include any action perpetrated as a part of a broad or systematic direct attack on civilians, in the form of:

- killing;
- extermination;
- enslavement;
- enforced eviction or movement of civilians;
- arbitrary appropriation of the independence or other physical freedoms in contravention of international law;
- torture;
- rape, sexual enslavement, enforced prostitution, enforced pregnancy, enforced sterilization, or other similar forms of sexual assault
- terrorization of a particular group or association based on political views, race, nationality, ethnic origin, culture, religion, sex or any other basis, regarded universally as contravening international law;
- enforced disappearance of a person; or
- the crime of apartheid.

CHAPTER IV JUDICIAL PROCEDURE

Section One General Provisions

Article 10

Unless stipulated otherwise in this Act, the judicial procedure for cases of gross violations of human rights shall be conducted according to provisions governing criminal judicial procedure.

Section Two Arrest

Article 11

1. The Attorney General as investigator is authorised to arrest, for the purposes of investigation, any person who, on the basis of sufficient preliminary evidence, is strongly suspected of perpetrating a gross violation of human rights.
2. The investigator shall carry out arrest as referred to in clause (1) by producing an order and serving the suspect an arrest warrant stating the identity of the suspect, the reason for the arrest, and the location of the investigation, along with a brief description of the gross violation of human rights he or she is suspected of perpetrating.

3. Attachments to the arrest warrant as referred to in clause (2) must be given to the family of the accused immediately following the arrest.
4. In the event of a suspect being caught in the act of perpetrating a gross violation of human rights, arrest shall be executed without an order on the condition that the arrester immediately surrenders the suspect and any evidence to the investigator.
5. Arrest as referred to in clause (2) shall not exceed 1 (one) day.
6. The period of arrest shall be subtracted from the sentence passed.

Section Three

Detention

Article 12

1. The Attorney General as investigator and public prosecutor is authorised to undertake the detention or extend the detention of a suspect for the purposes of investigation and prosecution.
2. The judge of a Human Rights Court, by his or her ruling, is authorised to undertake the detention of a suspect for the purposes of investigation in a court session.
3. A warrant for detention or extended detention shall be served on a suspect or defendant, who based on sufficient evidence, is strongly suspected of perpetrating a gross violation of human rights, should circumstances raise concerns that the suspect or the defendant may abscond, damage or conceal evidence, and/or re-perpetrate the gross violation of human rights.

Article 13

1. Detention for the purposes of investigation shall not exceed 90 (ninety) days.
2. The time period referred to in clause (1) may be extended for a maximum of 90 (ninety) days by the Chief Justice of a Human Rights Court in accordance with his or her judicial scope.
3. In the event that the time period referred to in clause (2) elapses before the investigation is complete, the period of detention may be extended for a maximum of 60 (sixty) days by the Chief Justice of a Human Rights Court in accordance with his or her judicial scope.

Article 14

1. Detention for the purposes of prosecution shall not exceed 30 (thirty) days.
2. The time period referred to in clause (1) may be extended for a maximum of 20 (twenty) days by the Chief Justice of a Human Rights Court in accordance with his or her judicial scope.
3. In the event that the time period referred to in clause (2) elapses before the investigation is complete, the period of detention may be extended for a maximum of 20 (twenty) days by the Chief Justice of the Human Rights Court in accordance with his or her judicial scope.

Article 15

1. Detention for the purposes of a hearing in a Human Rights Court shall not exceed 90 (ninety) days.
2. The time period referred to in clause (1) may be extended for a maximum of 30 (thirty) days by the Chief Justice of the Human Rights Court in accordance with his or her judicial scope.

Article 16

1. Detention for the purposes of cross-examination in a High Court shall not exceed 60 (sixty) days.
2. The time period referred to in clause (1) may be extended for a maximum of 30 (thirty) days by the Chief Justice of the High Court in accordance with his or her judicial scope.

Article 17

1. Detention for the purposes of an appeal hearing in the Supreme Court shall not exceed 60 (sixty) days.
2. The time period referred to in clause (1) may be extended for a maximum of 30 (thirty) days by the Chief Justice of the Supreme Court in accordance with his or her judicial scope.

Section Four Inquiry

Article 18

1. Inquiries into cases of gross violation of human rights shall be conducted by the National Commission on Human Rights.
2. In conducting an inquiry as referred to in clause (1), the National Commission on Human Rights may form an ad hoc team comprising the National Commission on Human Rights and public constituents.

Article 19

1. In conducting an inquiry as referred to in Article 18, the inquirer is authorized:
 - A. to conduct inquiry into and examination of incidents occurring in society, which, based on their nature or scope, can reasonably be suspected of constituting gross violations of human rights;
 - B. to receive reports or complaints from individuals or groups concerning the incidence of gross violations of human rights, and to pursue statements and evidence;
 - C. to call on complainants, victims, or subjects of a complaint to request and hear their statements;
 - D. to call on witnesses to request and hear their witness;
 - E. to review and gather statements from the location of the incident and other locations as deemed necessary;

- F. to call on relevant parties to give written statements or to submit necessary authenticated documents;
- G. on the order of the investigator to:
 - examine of letters;
 - undertake search and seizure;
 - examine houses, yards, buildings, and other places that certain parties occupy or own;
 - dispatch specialists pertinent to the investigation.

The inquirer shall inform the investigator upon initiating an inquiry into an incident suspected of constituting a gross violation of human rights.

Article 20

1. Should the National Commission on Human Rights consider there is sufficient preliminary evidence that a gross violation of human rights has occurred, a summary of the findings of the inquiry shall be submitted to the investigator.
2. No later than 7 (seven) working days following the submission of the summary findings of inquiry, the National Commission on Human Rights shall submit the inquiry findings in full to the investigator.
3. In the event that the investigator considers the inquiry findings referred to in clause (2) insufficient, the inquirer shall immediately re-submit the inquiry findings to the investigator accompanied by guidelines for their completion, and within 30 (days) of receiving the inquiry findings, the investigator is required to consummate these insufficiencies.

Section Five Investigation

Article 21

1. Investigation of cases of gross violations of human rights shall be undertaken by the Attorney General.
2. Investigation as referred to in clause (1) excludes authority to receive reports or complaints.
3. In undertaking the task referred to in clause (1), the Attorney General may appoint an ad hoc investigator, which may be a government agency and/or a public constituent.
4. Prior to undertaking his/her task, an ad hoc investigator shall take an oath or pledge in accordance with his or her religion.
5. To be appointed as ad hoc investigator, a person is required to:
 - be a Citizen of the Republic of Indonesia;
 - be at least 40 (forty) years of age and no more than 65 (sixty-five) years of age;
 - be a graduate at law or other graduate with expertise in law; matters; .
 - be of sound mind;
 - be of authoritative standing, honest, fair, and of good character;
 - be loyal to Pancasila and the 1945 Constitution; and

- have knowledge of and concern for human rights.

Article 22

1. Investigation as referred to in Article 21 clause (1) and (3) must be completed within a period of no longer than 90 (ninety) days from the date the inquiry findings are received and declared complete by the investigator.
2. The time period referred to in clause (1) may be extended for a period not exceeding 90 (ninety) days by the Chief Justice of the Human Rights Court in accordance with his or her judicial scope.
3. In the event that the time period referred to in clause (2) elapses before the investigation is complete, the investigation may be extended for a period of no more than 60 (sixty) days by the Chief Justice of the Human Rights Court in accordance with his or her judicial scope.
4. If during the time period referred to in clause (1), clause (2), and clause (3) insufficient evidence is obtained from the investigation findings, a writ to terminate the investigation must be issued by the Attorney General.
5. Once a writ to terminate an investigation is issued, an investigation may be re-opened only if additional proof and evidence for prosecution exists which supplements the investigation findings.
6. In the event that termination of an investigation as referred to in clause (3) is not accepted by a victim or his/her family, the victim or his/her family by blood or marriage to the third degree, has the right to submit a pre-trial request to the Chief Justice of the Human Rights Court in accordance with his or her judicial scope and in accordance with prevailing legislation.

Section Six Prosecution

Article 23

1. Prosecution of cases of gross violations of human rights shall be conducted by the Attorney General.
2. In the implementation of her/his task as referred to in clause (1), the Attorney General may appoint an ad hoc public prosecutor, who may be a member of the government and/or a public constituent.
3. Prior to undertaking his or her task, an ad hoc public prosecutor shall take an oath or pledge in accordance with his/her religion.
4. To be appointed as ad hoc public prosecutor, a person is required to:
 - be a Citizen of the Republic of Indonesia;
 - be at least 40 (forty) years of age and no more than 65 (sixty-five) years of age;
 - be a graduate at law or other graduate with expertise in law;
 - be of sound mind;
 - be of authoritative standing, honest, fair, and of good character;
 - be loyal to Pancasila and the 1945 Constitution; and
 - have knowledge of and concern for human rights.

Article 24

Prosecution as referred to in Article 23 clause (1) and clause (2) must be completed within no more than 70 (seventy) days from the date of receipt of the investigation findings.

Article 25

The National Commission on Human Rights may at anytime request a written statement from the Attorney General concerning the progress of the investigation and prosecution of a case of gross violation of human rights.

Section Seven **Oath**

Article 26

The oath taken by an ad hoc investigator and ad hoc Public Prosecutor as referred to in Article 21 clause (4) and Article 23 clause (3) shall be worded as follows:

“I solemnly swear/promise that in undertaking this task, I shall not, directly or indirectly, using any name or method whatsoever, give or promise anything whatsoever to anyone whatsoever.”

“I swear/promise that I, in order to undertake or not undertake something related to this task, shall not at any time accept directly or indirectly from anyone whatsoever any promises or favours.”

“I swear/promise that I will be faithful to, uphold, and apply the state principles of Pancasila, the 1945 Constitution, and legislation in force for the state of the Republic of Indonesia.”

“I swear/promise that I will consistently undertake this duty conscientiously, objectively and with integrity, without discriminating between people, and will hold professional ethics in the highest regard in carrying out my obligations in proper and fair manner as befitting an official of good character and integrity with regard to upholding law and justice.”

Section Eight **Court Hearings**

Paragraph 1 **General Provisions**

Article 27

1. Cases of gross violations of human rights shall be heard and ruled on by a Human Rights Court as referred to in Article 4.

2. Hearings of cases of gross violations of human rights as referred to in clause (1) shall be conducted by a Human Rights Court judges' panel of 5 (five) persons, comprising 2 (two) judges from the relevant Human Rights Court and 3 (three) ad hoc judges.
3. The Panel of Judges referred to in clause (2) shall be chaired by a judge from the relevant Human Rights Court.

Article 28

1. Ad hoc judges shall be appointed and dismissed by the President as Head of State upon the recommendation of the Chief Justice of the Supreme Court.
2. The total of ad hoc judges as referred to in clause (1) shall number at least 12 (twelve) persons.
3. Ad hoc judges shall be appointed for a period of 5 (five) years and may be re-appointed for 1 (one) additional period of office.

Paragraph 2 Conditions of Appointment for Ad Hoc Judge

Article 29

To be appointed as ad hoc Judge, a person is required to:

- be a Citizen of the Republic of Indonesia;
- be faithful to God Almighty;
- be at least 45 (forty-five) years of age;
- be a graduate at law or other graduate with expertise in law;
- be of sound mind;
- be of authoritative standing, honest, fair, and of good character;
- be loyal to Pancasila and the 1945 Constitution; and
- have knowledge of and concern for human rights.

Article 30

Prior to undertaking his/her tasks, an appointed ad hoc judge as referred to in Article 28 clause (1) is required to take an oath or pledge in accordance with his/her religion, worded as follows:

“I solemnly swear/promise that in undertaking this task, I shall not, directly or indirectly, using any name or method whatsoever, give or promise anything whatsoever to anyone whosoever.”

“I swear/promise that I, in order to undertake or not undertake something related to this task, shall not at any time accept directly or indirectly from anyone whosoever any promises or favours.”

“I swear/promise that I will be faithful to, uphold, and apply the state principles of Pancasila, the 1945 Constitution, and legislation in force for the state of the Republic of Indonesia.”

“I swear/promise that I will consistently undertake this duty conscientiously, objectively and with integrity, without discriminating between people, and will hold professional ethics in the highest

regard in carrying out my obligations in proper and fair manner as befitting an official of good character and integrity with regard to upholding law and justice.”

Paragraph 3 Hearing Procedure

Article 31

Cases of gross violations of human rights shall be heard and ruled on by a Human Rights Court within a period of no more than 180 (one hundred and eighty) days from the date of the case being brought before the Human Rights Court.

Article 32

1. Ruled on within a period of no more than 90 (ninety) days from the date of the case being brought before the High Court.
2. Hearings of cases as referred to in clause (1) shall be conducted by a judges’ panel of 5 (five) persons, comprising 2 (two) judges from the relevant High Court and 3 (three) ad hoc judges.
3. The total of ad hoc judges in the High Court as referred to in article (2) shall number at least 12 (twelve) persons.
4. Provisions set forth in Article 28 clause (1) and clause (3), Article 29, and Article 30 shall also apply for the appointment of ad hoc judges to the High Court.

Article 33

1. In the event of a request for appeal to the Supreme Court, a case of gross violation of human rights must be heard and ruled on within a period of no more than 90 (ninety) days from the date of the case being brought before the Supreme Court.
2. Hearings of cases as referred to in clause (1) shall be conducted by a judges’ panel of 5 (five) persons, comprising 2 (two) Supreme Court judges and 3 (three) ad hoc judges.
3. The total of ad hoc judges in the Supreme Court as referred to in article (2) shall number at least 3 (three) persons.
4. Ad hoc judges in the Supreme Court shall be appointed by the President as head of state upon the recommendation of the House of Representatives of the Republic of Indonesia.
5. Ad hoc judges as referred to in clause (4) shall be appointed for one period of office of 5 (five) years.
6. To be appointed as ad hoc judge in the Supreme Court, a person is required to:
 - be a Citizen of the Republic of Indonesia;
 - be faithful to God Almighty;
 - be at least 50 (fifty) years of age;
 - be a graduate at law or other graduate with expertise in law;
 - be of sound mind;
 - be of authoritative standing, honest, fair, and of good character;
 - be loyal to Pancasila and the 1945 Constitution; and
 - have knowledge of and concern for human rights.

CHAPTER V PROTECTION OF VICTIMS AND WITNESSES

Article 34

1. Every victim of and witness to a gross violation of human rights has the right to physical and mental protection from threats, harassment, terror, and violence by any party whatsoever.
2. Protection as referred in clause (1) is an obligatory duty of the law enforcement and security apparatus provided free of charge.
3. Provisions on procedures for protecting witnesses shall be further governed in a Government Regulation.

CHAPTER VI COMPENSATION, RESTITUTION, AND REHABILITATION

Article 35

1. Every victim of a violation of human rights violations, and/or his/her beneficiaries, shall receive compensation, restitution, and rehabilitation.
2. Compensation, restitution, and rehabilitation as referred to in clause (1) shall be recorded in the ruling of the Human Rights Court.
3. Provisions concerning compensation, restitution, and rehabilitation shall be further governed in a Government Regulation.

CHAPTER VII PENAL PROVISIONS

Article 36

Any person who perpetrates actions as referred to in Article 8, letter a, b, c, d or e, shall be sentenced to death or life in prison or to a maximum of 25 (twenty-five) years in prison and no less than a minimum of 10 (ten) years in prison.

Article 37

Any person who perpetrates actions as referred to in Article 9 letter a, b, d, e, or j shall be sentenced to death or life in prison or to a maximum of 25 (twenty-five) years in prison and no less than a minimum of 10 (ten) years in prison.

Article 38

Any person who perpetrates actions as referred to in Article 9 letter c shall be sentenced to a maximum of 15 (fifteen) years in prison and no less than a minimum of 5 (five) years in prison.

Article 39

Any person who perpetrates actions as referred to in Article 9 letter f shall be sentenced to a maximum of 15 (fifteen) years in prison and no less than a minimum of 5 (five) years in prison.

Article 40

Any person who perpetrates actions as referred to in Article 9 letter g, h, or i shall be sentenced to a maximum of 20 (twenty) years in prison and no less than a minimum of 10 (ten) years in prison.

Article 41

For attempting, plotting, or assisting the perpetration of a violation as referred to in Article 8 or Article 9, the sentences set forth in Article 36, Article 37, Article 38, Article 39, and Article 40 shall apply.

Article 42

1. A military commander or person acting as military commander shall be held responsible for any criminal action within the judicial scope of a Human Rights Court perpetrated by troops under his or her effective command and control, and for any such criminal action by troops under his or her effective command and control arising from improper control of these troops, namely:
 - a military commander or aforementioned person acknowledges, or under the prevailing circumstances ought to acknowledge that these troops are perpetrating or have recently perpetrated a gross violation of human rights; and
 - a military commander or aforementioned person fails to act in a proper manner as required by the scope of his or her authority by preventing or terminating such action or delivering the perpetrators of this action to the authorised official for inquiry, investigation, and prosecution.
2. Both police and civil leaders are held responsible for gross violations of human rights perpetrated by subordinates under their effective command and control resulting from a failure on the part of the leader to properly and effectively control his or her subordinates, namely:
 - the aforementioned leader is aware of or deliberately ignores information that clearly indicates his or her subordinates are perpetrating, or have recently perpetrated a gross violation of human rights; and
 - the aforementioned leader fails to act in a proper manner as required by the scope of his or her authority by preventing or terminating such action or delivering the perpetrators of this action to the authorised official for inquiry, investigation, and prosecution.
3. Actions as referred to in clause (1) and clause (2) shall be liable to the same penal provisions set forth in Article 36, Article 37, Article 38, Article 39, and Article 40.

CHAPTER VIII AD HOC HUMAN RIGHTS COURTS

Article 43

1. Gross violations of human rights occurring prior to the coming into force of this Act shall be heard and ruled on by an ad hoc Human Rights Court.
2. An ad hoc human rights court as referred to in clause (1) shall be formed on the recommendation of the House of Representatives of the Republic of Indonesia for particular incidents upon the issue of a presidential decree.
3. An ad hoc human rights court as referred to in clause (1) is within the context of a Court of General Jurisdiction.

Article 44

Hearings in an ad hoc human rights court and their judicial procedure shall be in accordance with the provisions set forth in this Act.

CHAPTER IX TRANSITIONAL PROVISIONS

Article 45

1. From the date this act comes into force, establishment of human rights as referred to in article 4 shall begin in Central Jakarta, Surabaya, Medan and Makassar.
2. The judicial territory of Human Rights Courts as referred to in clause (1) shall respond to the judicial territory of the district court in:
 - a. Central Jakarta, which encompasses Greater Jakarta, and the provinces of West Java, Banten, South Sumatra, Lampung, Bengkulu, West Kalimantan, and Central Kalimantan;
 - b. Surabaya, which encompasses the provinces of East Java, Central Java, Special District of Yogyakarta, Bali, south Central Java, Special District of Yogyakarta, Bali, South Kalimantan, East Kalimantan, West Nusa Tenggara and East Nusa Tenggara;
 - c. Makassar, which encompasses the provinces of south Sulawesi, Southeast Sulawesi, Central Sulawesi, North Sulawesi, south East Sulawesi, Central Sulawesi, North Sulawesi, Maluku, North Maluku, and Irian Jaya;
 - d. Medan, which encompasses the provinces of North Sumatra, the Special district of Aceh, Riau, Jambi, and West Sumatra.

CHAPTER X CONCLUDING PROVISIONS

Article 46

For gross violations of human rights as referred to in this Act no lapse provisions shall apply.

Article 47

1. Resolution of gross violations of human rights occurring prior to the coming into force of this act may be undertaken by a Truth and Reconciliation Commission.
2. The Truth and Reconciliation Commission as referred to in clause (1) shall be established by an Act.

Article 48

Inquiry, investigation and prosecution of gross violations of human rights that have been or are currently being undertaken in accordance with Government Regulation in Lieu of an Act No. 1 of 1999 concerning Human Rights Courts shall remain in effect insofar as they do not contravene the provisions set forth in this Act.

Article 49

Provisions concerning the authority of Superiors Entitled to take Punitive Action and Submitting Officers as referred to in Article 74 and Article 123 of Act No. 31 of 1997 concerning Military Tribunals are deemed no longer in effect with regard to the examination of gross violations of human rights in accordance with the provisions set forth in this Act.

Article 50

With the coming into force of this Act, Government Regulation in Lieu of an Act No. 1 of 1999 concerning Human Rights Courts (State Gazette No. 191 of 1999, Supplement to the State Gazette No. 3911) is revoked and deemed no longer in effect.

Article 51

This Act comes into force on the date of its enactment. For the public to be informed, it is ordered that this Act be promulgated in the State Gazette of the Republic of Indonesia.

Ratified in Jakarta, (date)

**PRESIDENT OF THE REPUBLIC OF INDONESIA,
ABDURRAHMAN WAHID**

Enacted in Jakarta, (date)

SECRETARY OF STATE OF THE REPUBLIC OF INDONESIA

ANNEX 1: Commission of Inquiry for Human Rights Violation in East Timor (KPP HAM Tim-Tim)⁶⁴

by Asmara Nababan⁶⁵

I. INTRODUCTION

A. The Popular Consultation⁶⁶ in East Timor

In the spring of 1998, Indonesia witnessed the downfall of President Soeharto's 32-year authoritarian rule. As the government collapsed and the masses voiced their demands for change, Indonesia's new leader, President BJ Habibie, gradually implemented a series of reforms. In an attempt to establish a more democratic society and improve human rights, a critical analysis of the regime's former policies was initiated. Of the policies that came under review was that of the status of East Timor, a country that had been under Indonesian occupation since 1975.

On January 27, 1999, President Habibie announced his willingness to resolve the status of East Timor and presented the East Timorese with two options. The first granted East Timor autonomy while remaining one of Indonesia's provinces. The other offered East Timor independence from Indonesia. Habibie's proposal was formally expressed in an agreement between Indonesia and Portugal and was supervised by the Secretary-General of the United Nations on May 5, 1999.⁶⁷ This agreement determined the conditions necessary for the referendum ("popular consultation") in East Timor and defined the role of the parties involved. Specifically, the agreement stipulated that the Indonesian government (in particular, the Indonesian Police Force⁶⁸) was responsible for maintaining order and peace in East Timor to ensure that the referendum would be implemented without intimidation or interference from any party. The presence of this police force was considered vital to ensure transparency and security. The unusual structure of the armed forces in Indonesia, however, would prove to be an impediment to this arrangement. As part of the Indonesian Armed Forces, the Chief of the National Police Force had to report to and take orders from the Chief Commander of Armed Forces.⁶⁹

The popular consultation was successfully conducted on August 30, 1999, and the results were announced five days later. A full 78.5 percent (334,580) voted overwhelmingly to secede from Indonesia and rejected the special autonomy option, while only 21 percent (94,388) voted to remain as part of Indonesia. The days following the referendum saw a bloodbath in East Timor that seemed

⁶⁴ Abbreviation of the name in Bahasa Indonesia: Komisi Penyelidik Pelanggaran Hak Asasi Manusia di Timor-Timur.

⁶⁵ Former Secretary of KPP HAM Tim-Tim.

⁶⁶ The Government of Indonesia prefers to use this term rather than "referendum." While in most cases the results of a referendum are final, a popular consultation's result can be implemented or formally acknowledged only if approved by the Indonesia's People's Consultative Assembly (MPR).

⁶⁷ This agreement is sometimes incorrectly referred to as "The Three Partied Agreement" and assumes the UN as a party to it. The UN is party to Annex II and III attached to the New York Agreement.

⁶⁸ Article 4 of Annex III of the New York Agreement states: "The police will be solely responsible for the maintenance of law and order."

⁶⁹ In 1967, during the initial phase of Soeharto's regime, the police force was integrated into ABRI (The Armed Forces of The Republic of Indonesia) as the fourth division, along with the army, navy, and air force. This arrangement was revoked only in January 2000, at which point the Police Force was once again considered as a civilian institution.

unstoppable. Led by pro-Indonesian militias and Indonesian soldiers this terror campaign included murder, looting, torture, destruction, and forced displacement of a large number of the East Timorese population to West Timor and scattered areas in the mountains.

Although cases of violence prior to the referendum had been reported, it rapidly intensified following the vote for independence. National and international reaction was slow to the violence that had been building up, but the dire situation following the vote began to draw increasing concern at both levels. On September 8, 1999, Komnas HAM,⁷⁰ Indonesia's National Human Rights Commission, issued a statement on the situation in East Timor declaring that

The government of Indonesia, in particular the security apparatus, has proven to be completely incapable of providing minimal protection and respect for the human rights of the citizens of Indonesia, who for the large part have been forced to seek refuge in other regions.

In September 1999, the UN Office of the High Commissioner for Human Rights (UNHCHR) decided to convene a Special Session calling for the establishment of an international commission of inquiry to investigate possible human rights violations that had taken place since January 1999. The Indonesian government, realizing that the special session would lead one step closer to the establishment of an international tribunal for the crimes occurring in its former province, attempted to prevent the session from being held. The government, however, was well aware that in order to recuperate from a deteriorating economic crisis it needed international support, which would not be won if it appeared reluctant to take appropriate actions against human rights violations occurring under its rule. Once it was confirmed that the special session was inevitable, the Government of Indonesia (GOI) strongly urged Komnas HAM to investigate human rights violations in East Timor.

Meanwhile, the escalation of violence continued despite the GOI's efforts to contain the situation by declaring a state of military emergency in the region on September 7, 1999. On September 27, Habibie revoked his decree on the state of military emergency in East Timor and allowed for the entry of INTERFET.⁷¹

B. Komnas HAM and The Establishment of the Legal Process for Human Rights Violations

Komnas HAM was established in 1993 as an independent institution with the mission of protecting and promoting human rights in Indonesia.⁷² It was an ambitious undertaking, considering the fact that it was established as a nonlegally binding institution. One of its tasks,⁷³ for example, was to monitor human rights conditions in Indonesia. However, it could only *recommend* resolutions for human rights violations to the government, which in turn could ignore it if it chose to. After several incidents of the kind, Komnas HAM was quite reluctant to establish a special investigative team on

⁷⁰ Abbreviation of the name of the commission in Bahasa Indonesia: Komisi Nasional Hak Asasi Manusia.

⁷¹ The establishment of the International Forces for East Timor was approved by the UN and entered East Timor at the request of the Government of Indonesia to restore order in the region.

⁷² Komnas HAM was initially established by Presidential Decree No. 50/1993. In 1999 the decree was revoked by the issuance of Law No. 39/1999 on Human Rights.

⁷³ Komnas HAM has three main duties: to provide human rights education, monitor human rights violations, and research international human rights instruments for recommendation of ratification.

human rights violations in East Timor without the GOI's assurance that the results of the investigation would be followed by due process of law.

This assurance was granted by the GOI less than 24 hours before the special session of UNHCHR convened, immediately after which Komnas HAM announced that it would establish KPP HAM Tim-Tim (the Ad Hoc Commission of Inquiry for Human Rights Violations in East Timor). The GOI's promise for due process of the commission's findings materialized in PERPU⁷⁴ (Government Regulation in Replacement of Act No. 1 year 1999 on Human Rights Tribunal) and was enacted on October 8, 1999. This provision provided the legal basis for an investigation into and the prosecution of those suspected of gross violations of human rights, as well as for bringing those responsible before a human rights court. This legal instrument made Komnas HAM a somewhat legally binding institution and established it as the national institution authorized to initiate inquiries for cases of gross violations of human rights in Indonesia. Its findings were also to be followed up by an investigative process by the Attorney General (AG).⁷⁵ In September 1999, Law No. 39 on Human Rights was passed, granting Komnas HAM the power to issue subpoenas in commencing an inquiry.

It should be noted, however, that as the national institution authorized to commence the inquiry process, the duty of Komnas HAM was restricted to presenting preliminary evidence on cases of gross violation of human rights, crimes against humanity, or genocide to the AG to pursue in the investigation process. It was not empowered with the AG's authority to, for example, confiscate and register material evidence. All legal actions required to formulate an indictment remained under the authority of the AG.

⁷⁴ Abbreviation of the term in Bahasa Indonesia: Peraturan Pengganti Undang-Undang, Later, PERPU 1/1999 would be replaced by Law No. 26/2000 on Human Rights Tribunal issued on November 2000.

⁷⁵ Unofficial translation of PERPU 1/1999:

Article 10

- (1) The inquiry on human rights violations is to be done only by the National Commission of Human Rights.
- (2) In certain cases the National Commission of Human Rights in executing the inquiry as stipulated in verse (1) may establish a team that is Ad Hoc in nature.

Article 11

- (1) The result of the inquiry as stipulated in Article 10 is to be submitted to the agency authorized to execute investigation.
- (2) The result of the inquiry as stipulated in verse (1) is a sufficient preliminary evidence to be followed up by investigation.

II. THE INQUIRY PROCESS OF GROSS VIOLATIONS OF HUMAN RIGHTS IN EAST TIMOR

A. KPP HAM Tim-Tim

KPP HAM Tim-Tim was established by Komnas HAM's plenary session on September 23, 1999, and set forth in the Decree of the Chair of Komnas HAM No. 770/TUA/IX/99.⁷⁶ It was established as an independent commission and, to ensure its objectivity, four additional members from civil society were appointed aside from the five members from Komnas HAM. Twenty-seven employees and administrative clerks, as well as more than 20 volunteers, also staffed the commission.

KPP HAM Tim-Tim was mandated to:

1. Gather facts, data, and information on violations of human rights in East Timor since January 1999, focusing particularly on gross violations of human rights. These included, but were not limited to, genocide, massacre, torture, enforced displacement, crimes against women and children, and systematic destruction of property.
2. Investigate the degree of involvement of the state apparatus and/or other national and international agencies in human rights violations.
3. Compile the findings of the inquiry to be the preliminary evidence for the investigation and prosecution in a Human Rights Court.

Pursuant to Act No.39/1999 on Human Rights and PERPU 1/1999, KPP HAM Tim-Tim had the authority to:⁷⁷

1. Conduct inquiries or preliminary investigations into alleged human rights violations in East Timor.
2. Request testimonies from victims.
3. Call and examine witnesses (including alleged perpetrators of human rights violations).
4. Collect evidence on alleged human rights violations.
5. Examine sites, including buildings, perceived as necessary to the inquiry.
6. Examine and request documents held by official institutions and other institutions as necessary to the inquiry.
7. Provide protection for witnesses and victims of human rights violations.
8. Process and analyze facts uncovered for the purposes of prosecution and to publicize the results.

KPP HAM Tim-Tim operated from October 1999 to January 2000. The first month was spent on technical preparations such as staff recruitment and setting up administrative support. The real process of inquiry was only initiated in the second month. Throughout its work, KPP HAM Tim-Tim questioned 123 individuals in Dili, Suai, Liquisa, Maliana, Jakarta, and Kupang, Atambua

⁷⁶ On October 22, 1999, the decree was revised accordingly with PERPU 1/1999 with a Decree of the Chair Komnas HAM No.797/TUA/IX/99.

⁷⁷ It should be noted that Komnas HAM was almost without any authority of enforcement, except in its ability to issue subpoenas. For example, collecting preliminary evidence or examining sites could be done only by request.

(where a large percentage of refugees from East Timor was concentrated).⁷⁸ Overall, it sent nine missions to the field (including three to East Timor) not only to question witnesses but also to examine sites of crimes and collect evidence. This included the exhumation of a mass grave in Alas village in the Belu regency of West Timor. To facilitate its work in the field, KPP-HAM Tim-Tim opened a secretariat office in Kupang staffed by three assistants who were assigned to expedite secretarial activities, arrange documents and communications, prepare witnesses, and assist with the evacuation of witnesses and their families. As stipulated in UNHCHR Resolution No. 1999/S-4/1, KPP HAM Tim-Tim also held several meetings with the UN International Commission of Inquiry on East Timor (CIET) in Darwin and Jakarta.

B. Obstacles to KPP HAM Tim-Tim's Inquiries

1. Insufficient Time

KPP HAM Tim-Tim was initially given three months to complete its inquiry and only later was granted a one-month extension. This time period was quite short considering the limited access to the area as a result of constrained means of transportation to and inside East Timor. Access to parts of East Timor, which was under INTERFET and later UNTAET, was also restricted for security reasons. West Timor proved to be problematic in areas where militia forces operated.

2. Lack of Cooperation From Essential Parties

At the start of its investigation, KPP HAM Tim-Tim enjoyed fair support from the Indonesia Armed Forces (ABRI), which, for example, ordered military personnel to fulfill the summons sent by KPP HAM Tim-Tim. Once the commission began calling upon some high-ranking military officers, it encountered significant resistance. It took weeks before the former Chief of ABRI, for example, finally agreed to answer the summons from KPP HAM Tim-Tim. The commission lost a great deal of the already limited time it had to complete its duties.

KPP HAM Tim-Tim also encountered a lack of support and cooperation from CIET. Although three meetings were held with the CIET, significant information, documents, and evidence were not exchanged, and an agreement concerning the protocol of cooperation was never reached. KPP HAM Tim-Tim was aware of the fact that CIET was able to question 170 witnesses in East Timor, and gathered information and evidence (such as documents), some of which were inaccessible to KPP HAM Tim-Tim. Exchange of documents and evidence would have helped KPP HAM Tim-Tim to work more effectively in the minimum time provided to complete its tasks.

3. Limited Resources

The budget provided by the government of Indonesia was insufficient for KPP HAM Tim-Tim to execute its duties effectively in the limited amount of time it had. Money was also always late in delivery. On certain occasions, this late delivery resulted in great delays in the operation of the commission. In one case, KPP HAM Tim-Tim had to postpone one mission to East Timor. In another case, it was forced to request a loan from one of its members to pay its staff's salaries.

⁷⁸ A total of 55 victims, 23 witnesses, and 45 alleged human rights violators were interviewed.

Combined with the short period of time granted to the commission, this situation frequently posed hindrances to the commission's work.

4. Intimidation and Harassment

The presence of KPP HAM Tim-Tim (just as President Habibie's initiative to hold a referendum on East Timor) caused a great deal of controversy in Indonesia. Many considered the commission as traitorous, particularly after the summoning of military officials. The national media also criticized the commission and issued a number of negative comments. Telephone pranks and harsh written notes were delivered to the commission's office and demonstrations against the KPP HAM Tim-Tim by militias and groups labeling themselves as "nationalists" were frequently held. There was even an incident where Komnas HAM's secretariat was rampaged (the office of KPP HAM Tim-Tim was located in the same compound).

Fortunately, the constant intimidation and harassment did not deter the commission from completing its work. KPP HAM Tim-Tim continued to exert its utmost effort to fulfill its mandate despite the encountered obstacles and persistently collected and analyzed various types of evidence, such as media reports, forensic reports, literature, official letters from civil and military offices, and oral testimony. Upon completion of its work, KPP HAM Tim-Tim composed a 47-page report based on its findings and, along with all the preliminary evidence it attained, submitted it to the Attorney General on January 31, 1999. On that same day, the General Secretary of the UN released the report of CIET.⁷⁹ The simultaneous release of the two reports was informally arranged beforehand to avoid any accusations that KPP HAM Tim-Tim merely copied the CIET reports or was working to serve the interest of foreign parties (largely interpreted as referring to the UN) as was alleged by certain circles in Indonesian society.

III. FINDINGS AND RECOMMENDATION OF KPP HAM TIM-TIM⁸⁰

A. The Pattern of Human Rights Violations in East Timor

In its Final Report, KPP HAM Tim-Tim concentrated on a number of primary cases during the period of January 1999 to September 1999.⁸¹ The violence in the region, however, was by no means limited to those occurrences.

1. The Liquisa Church Massacre

On April 6, 1999, hundreds of people sought refuge in Liquisa Church to escape a violent attack by the Barisan Merah Putih (BMP) militia (supported by both the Police Force and the TNI). The militia surrounded the church and a Brimob⁸² unit demanded that Costa Concise (the head of the village) be surrendered to the BMP. Pastor Rafael refused the request. The militia and members of

⁷⁹ Previous schedule CIET reports will be issued in early January.

⁸⁰ Generally adapted from The Report of KPP HAM Tim-Tim that was given to the Attorney General on January 31, 1999.

⁸¹ This period started from the announcement of BJ Habibie's option in January until Indonesia withdrew its military and police forces from East Timor in September 1999.

⁸² The abbreviation for the Police's Mobile Brigade in Bahasa Indonesian.

KODIM⁸³ subsequently attacked the church and butchered the refugees inside. The Commander of Aitarak, Eurico Guiteres, and the head of the Liquisa Regency, Leonito Martins, were present at the site. Costa Conceico and four other refugees who had been hiding in the bathroom of Pastor Rafael's attic were killed. Witness accounts estimate that 30 people were killed in the attack. The corpses of some of the bodies were discarded in Masin Lake near Maubara.

2. The Arbitrary Arrest and Torture in Kailako

On April 12, 1999, the Halilintar militia and officers from Kailako, Koramil⁸⁴ abducted six residents of Kailako who were suspected of being pro-independence sympathizers. They were detained, interrogated, and tortured at the Koramil Headquarters.

3. The Ambush of Manuel Gamma

Manuel Soares Gamma, a resident from Kailako, was making his way home from Maliana with some companions on April 12, 1999. An armed group, suspected to be members of Falinitil, ambushed them. Manuel and two members of TNI died, and four others were injured.

4. Summary Executions in Bobonaro

On April 13, 1999, the detainees from case number two (see above) were taken to the house of Manuel Gamma where people had been assembling to pay their last respects to the slain Gamma (see case three). The detainees were summarily executed in front of the mourners. The Commander of Bobonaro KODIM, Lieutenant Colonel Burhanuddin Siagian, who was present along with Joao da Silva Tavares (Commander of PPI), issued the following statement: "Whoever dares to go against the armed forces or government of Indonesia will meet the same end as the six victims." The corpses were discarded in Marobo River, 10 km from Kailako.

5. The Attack on Manuel Carrascalao's House

On April 17, 1999, a militia ceremony was held at the lawn of the Governor's Office in Dili. Approximately 5000 militia members from 13 regencies in East Timor, complete with their weapons, attended the ceremony led by Joao Tavares. After the event, the militia members rallied around Dili. They destroyed the office of the Suara Timor Timur Newspaper, considered to be pro-independence. Some attacked the home of Manuel Carrascalao. The residence held more than 100 refugees from Liquisa, Alas, and Turisca who had been seeking shelter and protection. Fifteen refugees were killed in the attack, one of whom was Manuel Carrascalao's son.

6. The Riots in Dili, August 26, 1999

The referendum that was to resolve the status of East Timor was preceded by campaigns and protests by both pro-autonomous and pro-independence groups. During one of the final pro-autonomy rally, the Aitarak militia forced some members of the community to participate, triggering a bloody clash. At least six people died in the incident. One of them was Bernardino

⁸³ Abbreviation from Bahasa Indonesia for Military District Command.

⁸⁴ Abbreviation from Bahasa Indonesia for Military Resort Command.

Augusto Soares, who was shot to death by a member of Brimob, witnessed by many people. LIFE Magazine in its December 1999 edition printed sequence-photos of this summary killing.

7. The Attack on the Dili Diocese

The Dili Diocese complex became one of the many places where the Timorese people sought refuge. On September 5, 1999, a militia attacked the complex and its office was subsequently burned down. Bishop Belo stated that there were 25 fatalities.

8. The Attack on Bishop Belo's house, September 6, 1999

Bishop Belo's house also served as a place of refuge during the systematic violence. Approximately 5000 people were there on September 6, 1999. On that day, security apparatus evacuated Bishop Belo to police headquarters before the militia attacked the refugees and burned Bishop Belo's house. Two victims died.

9. Scorched-earth Operation in Maliana

On September 4, 1999, the Dadarus Merah Putih (DMP) militia, together with the KODIM apparatus, unleashed a cleansing operation in Maliana that was to purge pro-independence supporters. More than 80 percent of houses and buildings in the city were burned. The militia also established checkpoints at several locations in order to seek out pro-independence supporters amongst the refugees who were heading to West Timor.

10. The Attack on the Suai Church Complex

On September 6, 1999, the Laksaur Merah Putih and the Mahidi militias, along with TNI and Police Force members, attacked Suai Church (which protected a large number of refugees) by rampantly shooting at the complex. The attack was led by the head of the Kovalima Regency, Herman Sediono, and Suai Danramil⁸⁵ Lettu Sugito. Fifty people died, three of whom were pastors. A number of the corpses were moved to West Timor and thrown in a mass grave at a remote site at the beach of the Weluli Sea in the village of Alas Selatan, unmarked. The exhumation conducted by KPP HAM Tim-Tim unearthed the corpses of 27 men, women, and children, including the three pastors.

11. The Killings in Polres Maliana

On September 8, 1999, the Dadarus Merah Putih militia attacked refugees at the Polres Maliana complex. The police did nothing to prevent the attack from occurring. Witness accounts indicate that three people died. The total number of victims, however, is unknown because the victims were transported outside the complex to an unknown site in the evening following the attack.

⁸⁵ The abbreviation from Bahasa Indonesia for the Commander of Military Rayon.

12. The Murder of Sander Thoenes

Sander Thoenes was a Dutch journalist who was riding on a motorcycle with Florinda Araujo on the way to Bacora Village from the Tourisme Hotel on September 21, 1999. A convoy suspected to be from the 745 Battalion (which was retreating from Los Palos heading to West Timor) accosted and shot both men. Thoenes died but Araujo managed to escape.

13. The Killing in Los Palos

On September 25, 1999, a group of nuns on their way to Baucau were attacked by Tim Alfa (a team established and trained by Kopasus). Nine people died, including an Indonesian journalist, Agus Mulyana. The perpetrators were already detained in Dili when KPP HAM Tim-Tim visited the city.

14. Gender-based Violence

In the village of Wemasa-Raihenek, West Timor, approximately 30 females were separated from the rest of the refugees and sexually assaulted by the Laksaur militia every night. Those who refused were subjected to torture. One woman who did refuse to submit was shot in the back. In another case, two women abducted from Ainaro were sexually abused by Commander of Mahidi Corps J and his companions every night in a refugee camp in West Timor.

A third case showed the BMP militia at Gugleur of Maubara Liquisa Regency detaining 23 women on June 6, 1999. The women were forced to wash clothing and cook, and were also subjected to sexual violence.

B. The Culpability of Indonesian Civil and Military Sectors

KPP HAM Tim-Tim documented the previous violations using HURIDOC (Human Rights Information and Documentation System, International) and compiled them as annexes to its final report. The tables in the annexes consisted of three different types of headings; “Events,” “Victims,” and “Perpetrators.” Each “Event” entry specifies date, location, and type of abuse. These events were carefully cross-referenced with the other two headings that identified the victims and the perpetrators of the abuse.

By analyzing the cases and the evidence, as well as the background and situation of East Timor, KPP HAM Tim-Tim discovered a link between Indonesian civil and military officials and the armed Timorese militias/civilians. Prior to the announcement of the popular consultation in January 1999, armed civilian groups (militias), with support from the civilian and military apparatus, had already initiated violent acts against groups or individuals they perceived to be pro-independence.⁸⁶ Soon after the announcement of the vote, various existing or newly formed militia organizations were consolidated into one organization called Pasukan Pejuang Integrasi (PPI).⁸⁷ This paramilitary

⁸⁶ On October 1998, the case of Alas in Manuhani was already under the scrutiny of the international community at large. When the killings, abductions, and house-burnings occurred, hundreds of the population took refuge at Alas Church. The UN Secretary-General sent a special envoy to observe the case to East Timor.

⁸⁷ The Fighter For Integration.

organization was the military wing of the Front Bersama Pro Otonomi Timur-Timur⁸⁸ (FBOTT), a political group fighting for East Timor to remain as a part of Indonesia. FBOTT itself was the product of the merger between two factions: Barisan Rakyat Timor Timur (BRTT) and Forum Perdamaian Demokrasi dan Keadilan (FPDK).⁸⁹

Governor Abilio Soares Timor testified that he ordered all regents in East Timor to establish Pam-Swakarsa⁹⁰ in every village under the leadership of the head of the village for the purpose of ensuring that autonomy, and not independence, would be the result of the referendum. The Provincial Governor and the Regents had direct administrative authority over the Pam-Swakarsa. Police forces played the role of supervisor and the military provided the physical support. The financing of Pam-Swakarsa came from the state annual regional budget.

KPP HAM Tim-Tim investigations on Pam-Swakarsa uncovered that Pam-Swakarsa was a covert term for “militia groups,” as proven in the example of the Pam-Swakarsa in Dili. In May 1999, the Regent of Dili, Domingus M.D. Soares, issued a decree to appoint Eurico Guiteres, commander of the Aitarak militia, as Coordinator for Operational Section of Dili Pam-Swakarsa. Dili Pam-Swakarsa had 2651 members: 1521 came from the Aitarak militia; 78 from KAMRA;⁹¹ 25 from Babinsa;⁹² and 25 from Binpolda.⁹³ Provincial governors and commanders of regional military commands acted as advisors to Pam-Swakarsa. Some civilian and military officers questioned by KPP HAM Tim-Tim denied the claim that that Pam-Swakarsa and militias were one and the same, even though Governor Abilio Soares admitted that Pam-Swakarsa units had used names like Aitarak (a militia group in Dili) and Besi Merah Putih (a militia group in Liquisa). Vidal Sarmento, who was regent in Manatutu, stated that Mahidi, Laksaur, and Sakundar (notorious militia groups) were all names of local Pam-Swakarsa.

The GOI and the military supported the militias by various means. Facilities were provided for the militia groups, most of whose headquarters were at KODIM or KORAMIL headquarters.⁹⁴ In the case of the attack on Liquisa Church (see case number one above), the militia had gathered at the KODIM compound in the morning before attacking the church. Several witnesses also testified that the military often gave weapons to militia groups.⁹⁵ General Wiranto admitted to KPP HAM Tim-Tim during the interrogation that that government provided weapons to the militia.⁹⁶ In addition to

⁸⁸ The United Front of Pro East Timor Autonomy.

⁸⁹ Letter from Minister of Defense/ Chief of Armed Forces (No. K/362/P/IV/1999, dated June 15, 1999) to Minister Coordinator for Politics and Security, explained this process and asked that all department/institution of GOI to support this organization.

⁹⁰ Abbreviation from the name in Bahasa Indonesia: Pengamanan Swa Karsa (Self Reliance Security).

⁹¹ Abbreviation from Bahasa Indonesia: Keamanan Rakyat meaning Civilian Guard attached to military structures.

⁹² Abbreviation from Bahasa Indonesia: Bintara Pembina Desa meaning Military Officer Supervisor of the Village.

⁹³ Abbreviation from Bahasa Indonesia; Pembina Polisi Daerah, meaning the supervisor from regional police level.

⁹⁴ Testimony of several witnesses from member of military and government official (Final Report of KPP HAM Tim-Tim, p. 14).

⁹⁵ One of the witnesses is a former Regent of Ermera Thomas Gonzalves, the other is former intelligence staff of KODIM Lautem First Sergeant Gabriel de Jesus.

⁹⁶ In the Document: Rencana Tindakan Menghadapi Kontijensi Purna Penentuan Pendapat di Timor Timur Opsi 1 Gagal (Contingency Plan for Post-Referendum Period in East Timor when The 1st Option is Defeated), it is stated that the numbers of armed militia 1100 with 546 weapons over various types.

supplying space and weaponry, government documents⁹⁷ and statements made available by military officers⁹⁸ and other government officials⁹⁹ clearly indicate that the GOI financed many militias.

Witnesses questioned by KPP HAM Tim-Tim also testified that militia and military personal often conducted joint patrols or attacks (such as the attack at Liquisa, Suai and in other places where systemic violence occurred). The official report of the police investigation on the attack on Liquisa Church stated that the BMP had been accompanied by three members of KODIM and even noted their names. One witness, in a written testimony made under oath, stated that all militia operations had been under the responsibility of Mayor General Zacky Anwar.

C. The Systemic Violations of Human Rights in East Timor

Based on the facts and evidence as described above, there was a strong indication that planned, widespread, and systematic gross violations of human rights had occurred in East Timor.

The pattern of these crimes is described as follows:

1. Mass Murders

Systematic and brutal murders directed mainly at civilian populations by the militia and security apparatus took place in several areas, including churches, police stations, and military barracks. From January 1999 to the end of September 1999, 394 murders were recorded. These figures include only the murders that were proven through investigative evidence conducted by KPP HAM Tim-Tim.

2. Torture and Persecution

Broad, large-scale, and systematic intimidation and torture of pro-independence civilians occurred prior to murders and at times of and following arbitrary arrest. Militia groups, both with and without the knowledge of security apparatus, were responsible for this intimidation. Torture and ill treatment of university and high school students and members of the CNRT was also highly prevalent during the mass displacement of the population.

3. Forced Disappearances

Forced disappearances followed three basic patterns. The first occurred during the recruitment of the militias. As a number of civilians refused to join, a number of them also disappeared. Disappearances also occurred as a means of forcing pro-independence supporters to submit. Third, there are reports that a number of students and pro-independence supporters disappeared as a result of continued militia activities in the refugee camps.

⁹⁷ Governor of East Timor letter No. 100/734/SEK/V/1977, Document of PAM SWARARSA and Order of Dili City issued by The Dili Regent.

⁹⁸ Tono Suratman's (Chief of Military Resort of East Timor) statement to KPP HAM Tim-Tim.

⁹⁹ All the former regencies who were questioned by KPP HAM Tim-Tim admitted these arrangements.

4. Sexual Enslavement and Rape (Gender-based Crimes)

Sexual enslavement and rape occurred in civilian homes, military headquarters, and refugee camps prior to and following the results of the popular consultation.

5. Scorched-earth Operation

The scorched-earth operation, involving the destruction of property throughout most of East Timor, was also conducted before and after the announcement of the results of the popular consultation. Homes of civilians, various government offices, and other buildings were systematically destroyed and the homes of pro-independence supporters were burned to the ground. This campaign escalated following the results of the popular consultation.

6. Forced Displacement and Deportation

The massive campaign of terror and intimidation prior to the popular consultation forced a large part of the population to seek refuge in scattered areas such as churches and the mountains. After the results of the popular consultation were announced, a large-scale forced displacement and deportation of the population took place with logistical support from the civil, military, and police authorities in compliance with established plans. Forced displacement was the ultimate aim of the acts of violence and scorched earth campaigns that arose in different locations. Terror and intimidation were the means to ensure the forced displacement and deportation of the refugees and continued to be used to obstruct the return of the refugees to their homes.

7. Destruction and Loss of Evidence

The destruction of evidence by perpetrators of crimes against humanity was planned and intentional. It included destruction of documents, mass burials, and relocation of corpses to hidden places.

In order to substantiate the strong claim that planned, widespread, and systematic gross violations of human rights had occurred in East Timor, it is also important to note the following relevant documents.

The Garnadi Documents¹⁰⁰ highlight the plans for the destruction of vital infrastructures and displacement of the East Timorese population to West Timor if the results of the referendum indicated that voters opted for independence from Indonesia. Garnadi acknowledged that the signature on the document was his but denied its content. The GOI denied the existence of this document. Other evidence uncovered by KPP HAM Tim-Tim makes it clear, however, that contingency plans did in fact exist to deal with East Timor if it voted for its independence. This was clearly indicated in a classified telegram dated May 5, 1999, from Army headquarters, signed by Lieutenant General Johnny Lumintang on behalf of the Chief of Staff of the Indonesia Army. This particular telegram ordered the military commander in East Timor to use force if independence was

¹⁰⁰ The document is sometimes referred to as “The Garnadi Document” because it is related to Mayor General (Ret) H.R. Garnadi, the Deputy of the Task Force for the Security of the Implementation of The Popular Consultation on the Special Autonomy in East Timor, and also Deputy of the Task Force for the Popular Consultation in East Timor.

voted on. This order blatantly deviated from the standard protocol that the order to use force should only come from Armed Forces Headquarters. Finally, in August 1999, General Wiranto issued a general plan referred to as the Contingency Plan for Post-Referendum Period in East Timor. This plan included the preparations to force the population from East to West Timor.

D. Alleged Perpetrators

Based on its extensive analysis, KPP HAM Tim-Tim uncovered three categories of perpetrators:

Those who committed crimes directly in the field, including individuals from militias, the military, and police forces. KPP HAM Tim-Tim's analysis of these individuals consisted of 106 names and 91 groups/organizations.

Those who ran the field operations in the civilian bureaucracy, including Heads of Regencies, the governor and local military and police officials:

- Mayor General Adam Damiri, Commander of UDAYANA Military Regional Command
- Police Colonel Timbul Silaen, Chiefs of East Timor Regional Police
- Colonel M. Noer Muis, Commander of 164/WD Resort Military Command
- Colonel FX Tono Suratman, Commander of 164/WD Resort Military Command
- Lieutenant Colonel Yayat Sudrajat, Commander of Task Force TRIBUANA
- Lieutenant Colonel Sudrajat, Commander of Military District Command of Lautem
- Mayor Yakraman Yagus, Commander of Battalion 744/Dili
- Lieutenant Colonel Jakob Joko Sarosa, Commander of Battalion 745/SYB Los Palos
- Captain Tatang, Commander of B Battalion 744/Dili
- Abilio Soares, Governor of East Timor
- Domingos Soares, Head of Regency Dili
- Guelherme dos Santos, Head of Bobonaro Regency
- Colonel Herman Sedyono, Head of Covalima Regency
- Lieutenant Colonel Asep Kuswandi, Commander of Liquisa Military District
- Lieutenant Colonel Ahamad Agus, Commander of Covalima Military District
- Edmundo Conceicao, Head of Regency Lautem
- Suprpto Tarman, Head of Regency Aileu
- Lieutenant Colonel Burhanuddin Siagian, Commander of Bobonaro Military Command

Those who held responsibility for the national security policy including, but not limited to, high-level military officials who were actively or passively involved in these crimes:

- General Wiranto, former Minister of Defense/Chief Commander of Armed Forces
- Lieutenant General Johny Lumintang, Deputy Commander of Army Forces
- Mayor General Zacky Anwar, member of P4OKT¹⁰¹ and security adviser to Task Force P3TT¹⁰²

¹⁰¹ Team Pengamanan Pelaksanaan Penentuan Pendapat Mengenai Otonomi Khusus Timor-Timur, in English: Team for The Security of The Implementation of The Popular Consultation on The Special Autonomy in East Timor.

- Mayor General (retired) H.R. Garnadi, Vice Chairman of Task Force P3TT

E. Recommendations by KPP HAM Tim-Tim

KPP HAM Tim-Tim's final report made several recommendations regarding the situation in East Timor to the GOI and the Attorney General. These included:

- Prosecutors should investigate suspects in major abuses, but should not limit themselves to the names mentioned in the report.
- The government should arrange access to all new evidence being uncovered by UN investigators in East Timor.
- The government and parliament should set up a new court with powers to try past human rights violations, including those in East Timor.
- The government should immediately ratify international treaties on human rights.
- Security should be provided for all witnesses and victims. No interference should be involved in the legal processes. Compensation should be provided for victims and special help should be provided for victims of gender-based crimes.
- All hindrances to return of refugees must be removed.

IV. CIET AND KPP HAM TIM-TIM

The International Committee of Inquiry on East Timor (CIET) was established pursuant to the resolution adopted by the UNOHCHR on October 15, 1999. It was mandated to gather and compile evidence on possible violations of human rights in East Timor and to provide the Secretary-General with the basis for recommendations on future actions regarding this matter.

As previously mentioned, KPP HAM Tim-Tim and CIET maintained minimal practical cooperation throughout their work. Despite this, there were generally no significant differences between the findings of both bodies regarding the events in East Timor before and after the 1999 referendum.

Both commissions came to the same primary conclusion that there were patterns of gross human rights violations and breaches of humanitarian law that varied over time and took the form of systematic and widespread attacks on the civilian population. They also found that the Indonesian Armed Forces and the militias were involved in these violations.

Some differences between the two reports need to be noted. The first is that CIET, in contrast to KPP HAM Tim-Tim, did not name persons allegedly responsible for the crimes. Another slight difference is the way crimes were identified and named by the two commissions, which can be observed in the following table:

¹⁰² Satgas Pelaksanaan Penentuan Pendapat di Timor Timur, in English: The Task Force for The Popular Consultation in East Timor.

CIET	KPP HAM Tim-Tim
Intimidation and Terror	Mass Murders
Killings and Massacres	Torture and Persecution
Gender Violence	Gender-Based Crimes
International Staff & Journalists (as the target of attack)	Forced Disappearances
Destruction of Property	Scorched-earth Operation
Displacement of People	Forced Displacement and Deportation
Destruction of Evidence	Destruction and Loss of Evidence

The main difference in the reports lies in their recommendations. CIET recommended an investigation by an independent international investigative body and the establishment of an international human rights tribunal, while KPP HAM Tim-Tim advised that investigation and prosecution be conducted by the Attorney General's office and that a National Human Rights Tribunal should be established.

V. THE IMPLEMENTATION OF KPP HAM TIM-TIM'S RECOMMENDATIONS

Several actions were taken following the release of KPP HAM Tim-Tim's recommendations. The Attorney General's office, after receiving the reports, appointed an investigative team that consisted of attorneys, military, and police officers. The Attorney General also appointed a 15-member team of experts to act as consultants. The team completed its investigation on September 1, 2000.

On April 5, 2000, the Attorney General and UNTAET signed a Memorandum of Understanding (MoU) for the cooperation in legal, judicial, and human rights-related matters. The MoU afforded each party the widest possible measure of mutual assistance in investigations or court proceedings with respect to offences held in the jurisdiction of either party. Following the implementation of the MoU, UNTAET allowed the AG's investigative team in East Timor to question witnesses and observe crime scenes. However, when the Special Crimes Unit from UNTAET attempted to do the same in Indonesia, it was not able to question a single witness it requested. Witnesses refused to be interrogated and the AG's office showed reluctance in enforcing the summons even though it had the authority and obligation to do so. The Parliament of Indonesia further questioned the legality of the MoU, citing that Parliament had never approved the agreement. It also argued that the Minister of Foreign Affairs of Indonesia, rather than the Attorney General, should have been the one to sign the MoU.

Parliament passed the Human Rights Tribunal Act to replace the PERPU No.1/1999, which was signed by the president on November 23, 2000 (known as Act No. 26/2000). The Act stipulated the establishment of an ad hoc tribunal for past crimes. Even though the explanatory section of the Act noted that its definition of crimes was derived from the Rome Statutes of International Criminal Court, there are several discrepancies that may disrupt the due process of law.¹⁰³

¹⁰³ The Act 26/2000 does not include one of the acts of crimes against humanity as stipulated in Article 7(k) of Statute Rome. Subsequently the act of scorched as a crime committed in East Timor cannot be included in prosecution.

A government regulation on victim and witness protection was finally issued on March 13, 2002, merely one day before the first trial commenced. This raised doubts regarding the effectiveness of this provision for the initial trials. In addition, to be more effective, protection should have been promulgated as an Act instead of a regulation. Due to pressure by various parties, the government has drafted an Act to replace the government regulation.

The effort to return the refugees back to East Timor from West Timor was initiated though it has proven to be difficult even with support from the international community. In West Timor, militias operate freely and intimidate and threaten refugees who intend to return to East Timor. On September 6, 2000, three members of the UNHCR staff were killed in Attambua. It was only after that incident that the GOI finally took firm action to control the militia. By early 2003, there were approximately 24,000 refugees still living in West Timor, in contrast to the 250,000 in September 1999.

It should be noted that the government of Indonesia has not ratified any international treaty on human rights since 2000. The last treaty ratified by Indonesia was the International Convention Against Race Discrimination in 1999.

VI. THE KPP HAM TIM-TIM'S INQUIRY VERSUS THE ATTORNEY GENERAL'S INVESTIGATION: DIFFERENCES IN CONCLUSIONS

After submitting the final report, there was practically no consultation or discussion between KPP HAM Tim-Tim and the Attorney General regarding to the findings of the inquiry. KPP HAM Tim-Tim was invited only once by the office of the AG, a visit that was merely to teach the commission how to operate the HURIDOC system. The database system was used by KPP HAM Tim-Tim to process its data and records and was the system used in the electronic version of the report submitted to the AG.

Komnas HAM initially perceived this lack of contact positively. PERPU 1/1999 article 11, verse 3 states, "In events where the result of the inquiry process as stipulated in verse 1 is considered by the investigator as incomplete the inquirer is obligated to complete it." The lack of objections from the AG regarding the preliminary evidence, even when the indictments were completed and submitted to the Ad Hoc Human Rights Court for East Timor, was an informal indication that KPP HAM Tim-Tim had fulfilled its duties properly. It was therefore surprising to the commission once the indictments were made public. It clearly appeared that the AG had constructed their case much differently from the commission's findings and recommendations.

The following table summarizes the most important of these differences:

	AG'S CASE	KPP HAM'S REPORT
The Patterns of Crimes	Murder Persecution	Mass Murder Torture and Persecution Forced Disappearance Sexual Enslavement and Rape Scorched-earth Operation Forced Displacement and Deportation Destruction and Loss of Evidence
Occurrences of Crime	Four incidents: <ul style="list-style-type: none"> • The Liquisa Massacre • The Attack of Suai Church • The Attack of Manuael Carascalao's House • The Attack of Bishop Belo house 	Sixteen primary cases, although not limited to them (as elaborated previously)
Crime Scenes (locus delictum)	Three location/regencies: <ul style="list-style-type: none"> • Suai (Kovalima) • Dili • Liquisa 	All the 16 regencies of East Timor
Alleged Perpetrators	Sixteen individuals	More than 100 individuals, including those allegedly had executed the crimes directly
Time Period (tempus delictum)	April 1999 to September 1999	January 1999 to September 1999

Some of these differences can be attributed to the legal base of the Human Rights Court in Indonesia, Law No. 26/2000. While based on the Rome Statutes, the legal instrument in some instances contained flawed or partial interpretations and translations of the stipulations in the international agreement. For example, Article 7 on Crimes against Humanity in the Rome Statutes allowed for "Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health" to be taken into consideration. The adaptation of the article in Law No. 26 (Article 9) excluded this section and made it difficult to include the scorched-earth campaign in the indictments. However, other patterns of crimes in the KPP HAM Tim-Tim's findings are actually included in Law No. 26/2000.

One of the most curious differences is the exclusion of more than 84 alleged perpetrators in the case composed by the Attorney General, especially those who had allegedly directly executed the crimes. This omission is quite counterproductive if one intends to prove command responsibility, for which all 16 defendants were indicted. The logical first step would have been to prosecute the

field perpetrators before bringing to court individuals who allegedly had ordered the crimes or neglected to take all necessary and reasonable measures within their power to prevent or repress their commission (or to submit the matter to the competent authorities for investigation and prosecution).

Unfortunately, yet predictably, it is hard to escape the conclusion that the underlying reason for these serious differences is politically based. The explanation for the vast reduction in the scope of investigation and prosecution with regards to the patterns and occurrences of crimes, locus delictum, and alleged perpetrators, ultimately resides in the shift of the GOI's political commitment to resolve the gross human rights violations in East Timor fairly and impartially.

Megawati's government is currently contending with political instability and various regional conflicts that cause tens of thousands of casualties. The government believes it requires the support of the military to ensure national stability. Megawati's government must therefore accommodate the military and refrain from taking positions that can be interpreted as cornering or harassing the ABRI. Furthermore, there is a strong opinion within (as well as outside) Indonesian military circles that the military defended the interests of the nation in the case of East Timor. Bringing the responsible military officers before the tribunal is considered a humiliation for an armed forces that, according to this view, committed patriotic acts for the sake of national unity.

This current situation has had substantial impacts on the prosecution of crimes against humanity in East Timor. The scale of crimes described in the KPP HAM Tim-Tim report was systematically narrowed down. Indictments were composed in a way that did not indicate how crimes against humanity could have occurred as a product of the state's security policies at the time. This is what the findings of KPP HAM Tim-Tim had suggested, and the retrenchment in the AG's investigation from these findings eliminated the larger context of the crimes, making it difficult to prove command responsibility for crimes against humanity as charged in the indictments.

ANNEX 2: Evidence Introduced in the Trial of Eurico Gutteres¹⁰⁴

1 (one) Getau firearm/G-3 No. FMP.172322;

1 (one) SKS firearm No. OH.2289;

1 (one) Mauser firearm Los No.;

1 (one) Homemade firearm;

1 (one) Homemade Pistol;

TNI Directive Commander:

No 02/P/ix/1999 dated on September 6, 1999, concerning the Military Emergency Territorial Command of East Timor (Komando penguasa darurat militer wilayah Timor Timur);

Decrees (Surat Keputusan):

- Skep/991/P/XII/1998 dated December 31, 1998 concerning the Discharge and Appointment within the Indonesian Army's Office (Pemberhentian dari dan Pengangkatan Dalam Jabatan Di Lingkungan Angkatan Bersenjata RI/Indonesian Army), for Maj. Gen. TNI I Gede Nyoman Asrana along with 99 personnel;
- Skep/821/P/IX/1999 dated September 20, 1999 concerning the Use of Authority of the Military Emergency Territorial Command of East Timor (Penggunaan Wewenang Penguasa Darurat Militer Daerah Timor Timur);

Letters of Order (Surat Perintah):

- Sprin/757/IV/1999 dated April 15, 1999 concerning the Official Travel to East Timor (Perjalanan Dinas Tim Tim) for Marsda Tamtomo along with three personnel;
- Sprin/889/V/1999 dated May 10, 1999 concerning the Special Assignment to Assist the Independent Commission (Bertugas Khusus Membantu Pelaksanaan Komisi Independen) for Maj. Gen. Zacky Anwar Makarim along with two personnel;
- Sprin/1096/VI/1999 dated June 04, 1999 concerning the Order to Maj.Gen. Zacky Anwar Makarim along with two personnel as members of TP40KTT;
- Sprin/1660/VIII/1999 dated August 13, 1999 concerning Security Advisor (Sebagai Penasehat Keamanan) P3TT in Dilli, East Timor for Maj.Gen. TNI Zacky Anwar Makarim along with two personnel;
- Sprin/1798/IX/1999 dated September 07, 1999 concerning the East Timor Territorial Command (Penguasa Daerah Militer Wilayah Tim tim).

Telegrams:

- TR/614/1999 dated June 17, 1999 concerning the Security Guarantee in East Timor;
- STR/675/5/1999 dated July 6, 1999 concerning Popular Consultation for East Timorese;
- STR/551/1999 dated September 5, 1999 concerning the Anticipation of Developing Situation in East Timor Territory.

Reports of Situation (Laporan Situasi):

- STR/560/1999 dated September 22, concerning the Report of Situation of the Fourth Week dated September 14 to 20, 1999;

¹⁰⁴ This list is taken from the official Judgment.

- STR/17/2000 dated January 20, 1999 concerning the Report on the Indication of Worsening Security Situation in East Timor;
- R/33/1999 Lapsit dated October 11, 1999 concerning the Report of the Development of the Situation in East Timor on October 11, 1999.

Others (Special Report / Laporan Khusus):

- R/184/Lapsus/IV/1999 dated April 7, 1999 concerning the Clashes between Pro Integration and Anti Integration People in Liquica Regency;
- R/02/X/1999/Lapsus dated October 11, 1999 concerning the Chronology of Incident on Gunshoot Contact between Interfet and TNI (Indonesian Army) and POLRI (Indonesian Police) Troops;
- Suggestion from Pangdam IX/Udayana as Pangkoops TNI Nusara dated September 7, 1999;
- STR/551/1999 dated September 5, 1999;
- STR/553/1999 dated September 6, 1999;
- Letter of Order (Surat Perintah) from TNI Commander No.: Prin/1798/P/IX/1999 dated September 7, 1999;
- STR/253/1999 dated April 13, 1999;
- STR/550/1999 dated August 31, 1999;
- STR/558/1999 dated September 3, 1999;
- Letter of Order No.: Prin-/1000/VII/1998 dated July 30, 1998;
- TR/614/1999 dated June 17, 1999;
- STR/172/1999 dated May 5, 1999;
- STR/223/1999 dated March 1999;
- Examination (not visum et repertum) provided by 2nd Lieutenant CKM dr. Maksum Pendelima;
- Situation Report No.: R/ / Lapsit/IX/1999;
- Situation Report No.: R/ /IX/1999/Lapsit;
- Special Report No.: R/ /Lapsus/IX/1999 dated September 22, 1999;
- TR/909/P/1999 dated September 7, 1999.

ANNEX 3

The following table illustrates the argument made previously on how documentary and material evidence produced during the investigation were often not included in the dossier (BAP).¹⁰⁵

Table 1

*EVIDENCE IN THE BAP OF THE DOSSIER OF BRIGJEN M NUR MUIS
(FORMER COMMANDER OF EAST TIMOR MILITARY RESORT)*

Evidence	Form of Evidence	Material Evidence	Source	Note	Content and Relevance
1. Document on the establishment of a team to discuss autonomy for East Timor and prepare the government's basic position (No. 960/ PC/ X/98 04 dated October 27 1998)	Document / Writing		Confiscated from Kasubdit Legal Politic and Decoloni- zation, Directorate of Internationa l Organizatio n, The Ministry of Internationa l Affairs	Confiscation procedure report attached to the BAP The evidence itself is not attached to the BAP	Dokumen 1 dan 2 berisi gambaran kebijakan TNI/Police dalam hal pengamanan pra dan pasca jejak pendapat
2. Copy of Hanoi Lorosae I and II Operation Plan, year 1999	Document / Writing		Confiscated from police head quarters	Confiscation procedure report attached to the BAP The evidence itself is not attached to the BAP	
	Document				

¹⁰⁵ Tables prepared by Rusman Sayiddin of ELSAM.

3. Copy Kepres No. 43, year 1999	/ Writing				
4. Copy of Presidential Decree No. 5 year 1999	Document / Writing				
5. Security and Political Coordination Ministerial Decree No. Kep-13 / Menko / Polkam/6/1999 (original)	Document / Writing			Evidence no. 3-5 confiscated from the Office of the Ministry of Politic and Security Coordination	Confiscation procedure report attached to the BAP. The evidence itself is not attached to the BAP
6. Direktive Summon TNI No. 02/P/IX/1999 on PDM Command for the area of East Timor	Document / Writing				
7. Decree No. Skep/991/P/XII/1998 on the dismissal and appointment for a position in ABRI	Document / Writing			Evidence no. 6-22 confiscated from unknown source	Evidence no. 6-22 is not attached to the confiscation procedure report
8. Alteration of Decree No. Skep / 991 a / P / XII/ 1998 on the dismissal and appointment for a position in ABRI	Document / Writing				Attached to the BAP is the decree issued by the State Court of East Jakarta regarding the confiscation of the evidence.
9. Copy of Decree no. Skep/ 821/ P / IX/	Document / Writing				

1999 on the elaboration of the implementation of PDM authority in East Timor					
10. Letter of order no. Sprint/ 757/IV/ 1999 on official trip	Document / Writing				
11. Letter of order no. Sprint/ 889/V/ 1999 on official trip	Document / Writing				
12. Letter of order no. Sprint/ 1096/VI/ 1999 on the dispatch of a special team	Document / Writing				
13. Letter of order no. Sprint/ 1660/VIII/ 1999 on the dispatch of Security Team P3TT Task Force	Document / Writing				
14. Letter of order no. Sprint/ 1798/IX/ 1999 on the establishment of PDM	Document / Writing				
15. Telegram from High Commander to Commander of The IX					

Commander of The IX Military Region Udayana	Document / Writing				
16. Telegram from the High Commander to the Commander of Military Regions	Document / Writing				
17. Telegram from Commander of the IX Military Region Udayana to Danrem 164/Wd	Document / Writing				
18. Wire Telegram from Commander of the IX Military Region Udayana to the TNI High Commander Up. AssOps Kasum TNI Kasad Up. AssOps	Document / Writing				
19. Wire telegram from the commander of the IX Military Region Udayana to the TNI Head of General Affairs Division	Document / Writing				
20. Situation Report no. R.33/X/99/ Lapsit from Task Force Commander of East	Document / Writing				

Timor					
21. Special Report no. R/184/Lapsus / X/ 1999 on the inter-group fight between the pro-Integration community groups and the anti-integration groups in Liquisa Regency	Document /Writing				
22. Special Report no. R/021/ X/1999/ from Commander of Task Force East Timor to the Minister of Defense and Security	— —				
— — —		<p>Material Evidence:</p> <p>Ex-Militia weapon list in Korem 161/WSI/Kupang:</p> <p>1). FIREARMS :</p> <ul style="list-style-type: none"> - M 16 A1 (10 pc(s)) - FN 35 (3pc(s)) - FN 46 (2 pc(s)) - SP 1 (3pc(s)) - SP 2 (2pc(s)) 	Evidence based on the report from Korem 161/ WSI Kupang on the surrendering of ex-militia	The confiscation procedure report by the Attorney General's investigative team is not attached to the BAP. The surrendering of ex- Militia	The existence of this material evidence is central to the case of M Nur Muis since, according to KPP HAM's

		<ul style="list-style-type: none"> - Mouser (7 pc(s)) - Getmi (28 pc(s)) - Ruger (1pc(s)) - LE (1 pc(s)) - Mixed Weapons (20 Pc(s)) - SKS (141 pc(s)) <p>2). GRENADES :</p> <ul style="list-style-type: none"> - Manggis / Korea (36 pc(s)) - Nenas (1pc(s)) - Smoke (3 pc(s)) - Lauching Tool (3 pc(s)) <p>3). AMMUNITI ON:</p> <ul style="list-style-type: none"> - M16 A1 (159 pc(s)) - SKS (718 pc(s)) - G3 / SP 1 (8625 pc(s)) - Mouser (34 	<p>weapons from Kodim 1618 Kafamenanu and Kodim 1605 Belu to Korem 161 Kupang</p>	<p>weapons from Kodim 1618 Kafamenanu and Kodim 1605 Belu to Korem 161 Kupang, is also not attached to the BAP.</p> <p>Attached to the BAP is the letter of order for confiscation by the Attorney General for the evidence.</p> <p>Attached to the BAP is the decree from the State Court of Kupang on the confiscation of the items and evidence of a letter for the storage of the items in police headquarters.</p>	<p>report, there is a strong indication that the militias were given weapons by TNI and the police.</p>
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		pc(s)) - Ruger (214 pc(s)) - FN 45 (31 pc(s)) - FN 46 (5pc(s)) - SS1 (2402 pc(s)) - AK (42 pc(s)) - SMR (10 Pc(s)) - Sten (53 pc(s)) - Colt (10 pc(s)) - M16 A1 (60 pc(s)) - SKS (24 pc(s)) - G3 (55 pc(s)) 4) GENERIC WEAPON: - Shortmuzzle(628) Long muzzle (370)			
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According to this table it is clear that in assembling the dossier (BAP) the investigative team did not attach all the documentary evidences or the confiscation depositions to the BAP.¹⁰⁶ Rusman Sayiddin concludes his report by stating:

“The failure to attach those letters/documents stated as evidence is a blatant disregard to the procedural law, specifically Article 48 verse 1 of KUHAP that states ‘a document as evidence that is already assessed by the investigator and is relevant with the case in trial should be *attached* with the *case’s dossier*’ and Article 75 that states ‘...the investigator is *obligated to make depositions* for all actions taken related to the investigation of the defendant, *arrest, detainment, search, entry into house, confiscation of items, assessment of documents*, examination of witness, investigation at the crime scene, the execution of the decrees and ruling of the court, and the execution of other actions as stipulated in KUHAP¹⁰⁷. This failure poses as a hindrance in the process of the trial, both for the judges who have to deliberate and deliver the verdict and *especially* the prosecutor themselves, because some of the letters in general are evidence of the substantiation of the involvement of TNI/Police/Regional Government in the gross violations of human rights. One would question how this basic legal requirement is neglected when doing so may only sabotage the case of the prosecutor themselves and benefit the defense.’¹⁰⁸

¹⁰⁶ In Timbul Silaen’s dossier the only document attached is the copy of Hanoi Lorosae I and II Operation Plan, while in the Abilio Soares and Nuer Muis dossiers no document/letter is attached, including the confiscation deposition. For the later mentioned dossiers, only the “list of letters/documents” as printed in the Decree of Confiscation issued by the State Court for those documents/letters is attached.

¹⁰⁷ Article 75 jis Article 121, Article 126, 129 verse (2) KUHAP.

¹⁰⁸ Page 27.

Table 2

The following table illustrates the disjunction between the documentary evidence assembled by KPP HAM Tim-Tim in its inquiry and that that was used by the prosecution in its investigative process and ultimately used as part of the prosecution case against Timbul Silaen, Abilio Soares, and Nuer Muis. The column on the right indicates the documentary evidence used by the prosecution in the three cases. The middle column shows which KPP HAM Tim-Tim's evidence found its way into the prosecution's investigation. Only two documents overlapped between the commission and the prosecution.

THE DEVELOPMENT OF EVIDENCE FROM KPP HAM'S INQUIRY THROUGH THE INVESTIGATION AND UP TO THE SUBSTANTIATION PROCESS IN COURT

NO	Evidence in the form of letters/documents in the KPP HAM Inquiry Process	Evidence in the form of letter/document In the Investigation Process	Used in Substantiation Process in Court
1	Report of the situation and condition of East Timor before the referendum	Situation Report No. R.33/X/99/ From the Commander of Task Force in East Timor Not attached to the BAP	
2	Telegram of weekly report of Dandim 1627/Dilli to the Danrem 164/WD on November 27 1998 (classification: secret). The telegram no. is not mentioned	Does not exist (in investigation or BAP)	
3	Statements made by the Regents to KPP Ham Tim-Tim	Not attached to the BAP	
4	Decree of Regent Level II Dilli signed by the regent of Dilli M D Soares, SH, MS (no number or date).	Does not exist	
5	Document of the Independent Community Security (Pam Swakarsa) and Order of Dili in 1999 signed by the Regent of Dili Domingos MD Soares, SH.MS.	Does not exist	
6	Governor letter no. 100/734/SEK/1999 issued in May 1999, exact date unknown.	Does not exist	

7	Document of contingency plan composed by TNI General Wiranto that mentions the existence of pro-integration militia	Does not exist	
8	Result of KPP HAM's interrogation of TNI High Commander Wiranto.	Included in the BAP	
9	Letter of the Ministry of Security and Defense, TNI High Commander No. K/362/P/IV/1999 (dated June 15, 1999)	Does not exist	
10	Report of Military Region Commander (Pangdam IX/Udayana) Adam Damiri to the Minister of Security and Politic Coordination entitled "The Development of the Situation and Condition in East Timor Pre-Referendum", signed by Adam Damiri (dated July 11, 1999)	Wire from Pangdam IX/Udayana to Kasum TNI It cannot be ascertained whether the wire confiscated by the Attorney General's investigative team is the same as KPP HAM's report on Adam Damiri	
11	Transcript of Wiranto's examination by KPP HAM	Attached to the BAP	
12	Document no. Pol: R / 355 / IV / 1999 / Ditserse.	Does not exist	
13	The Report of the National Commission for Violence Against Women	Does not exist	
14	Document of the special report of the UN Thematic Special Rapporteur (dated December 8, 1999)	Does not exist	
15	Letter No: B/376/IV/1999 indicating the request for vehicle support for Korem 164/WD from Adam R. Damiri to the General Staff of ABRI in Jakarta (dated April 26, 1999)	Wire from Pangdam IX/Udayana to Kasum TNI It has not been determined whether this wire is the same letter that KPP HAM uncovered	

		letter that KPP HAM uncovered (Letter no: B/376/IV/1999 dated April 26 1999)	
16	STR/172/1999: Issued by the Army Head of Staff Johnny J. Lumintang on the disposition of KASAD in the letter KOORSEXPRT KASAD No.B/50/IV/1999/SEXPRT (dated May 5, 1999)	Does not exist	
17	R/60/V/1999, on the delivery of names of highly influential CNRT figures yang issued by Toyib Anwari, Major Inf., official of the intelligence section (dated May 8,1999)	Does not exist	
18	Sprin/654/V/1999, on the activities and campaign monitoring in East Timor from Major General Adam Damiri (dated May 3, 1999)	Does not exist	
19	R/95/LH/VI/1999, on the Dili Report of Intelligence Section of Kodim 1638/Liquica (June 24-25 1999) from Second Liutenant Inf Syafei Saleh, an official of the intelligence section (dated June 30 1999)	Does not exist	
20	Sprin/654/V/1999: Letter of order on the preparation of referendum and monitoring of East Timor Campaign issued by Pangdam Udayana (dated May 31, 1999)	Does not exist	
21	Document of Hanoin Lorosae I Operation Plan (1999)	Document of Hanoin Lorosae I Operation Plan (1999) Attached to the BAP of Timbul Silaen	Introduced in Timbul Case
22	Document of Hanoin Lorosae II Operation Plan (1999)	Document of Hanoin Lorosae II Operation Plan (1999) Attached to the BAP of Timbul Silaen	Introduced in Timbul Case
		Directive summon of TNI No. 02/B/IV/1999 - PDM G...	

		02/P/IX/1999 on PDM Command in East Timor The document is not attached to the BAP	
		Decree no. Skep/991/P/XII/1998 on a dismissal from and appointment of a position in the circle of ABRI The document not attached to the BAP	
		Alteration of Decree No. Skep / 991 a / P / XII/ 1998 on the dismissal from and appointment of a position in the circle of ABRI The document not attached to the BAP	
		Copy of decree no. Skep/ 821/ P / IX/ 1999 on the implementation of PDM authority in East Timor. The document not attached to the BAP	
		Letter of order no. Sprint/ 757/IV/ (1999) on an official trip	
		Letter of order no. Sprint/ 889/V/ 1999 on an official trip The document not attached to the BAP	
		Letter of order no. Sprint/ 1096/VI/ 1999 on the deployment of a special team The document not attached to the BAP	
		Letter of order no. Sprint/ 1660/VIII/ 1999 on the	

		<p>deployment of the P3TT Task Force Security Team</p> <p>The document not attached to the BAP</p>	
		<p>Special Report No. R/021/X/1999/ from the Task Force Commander of East Timor to the Minister of Security and Defense</p> <p>The document not attached to the BAP</p>	
		<p>Letter of order no. Sprint/1798/IX/ 1999 on the appointment of PDM</p>	
		<p>Telegram from the High Commander to Pangdam IX Udayana</p> <p>The document not attached to the BAP</p>	
		<p>Telegram from the High Commander to the Military Region Commanders</p> <p>The document not attached to the BAP</p>	
		<p>Telegram from Pangdam IX Udayana to Danrem 164/WD</p>	
		<p>Situation report no. R.33/X/99/ Lapsit from the Task Force Commander of East Timor</p>	
		<p>Special Report no. R/184/Lapsus / X/ 1999 on the fight between the pro-integration community group and the anti-integration group in the Liquisa Regency</p> <p>The document not attached to the BAP</p>	

		<p>The formation of a team to discuss autonomy for East Timor and prepare the government's basic position, No. 960/ PC/ X/98 04 (dated October 27, 1998)</p> <p>The document not attached to the BAP</p>	
		<p>Copy of Presidential Decree no. 43 year 1999</p> <p>The document not attached to the BAP</p>	
		<p>Copy of Presidential Instruction no. 5 (1999)</p> <p>The document not attached to the BAP</p>	
		<p>Kepmenko No. Kep-13 / Menko / Polkam/6/1999 (original)</p> <p>The document not attached to the BAP</p>	

Table 3

**LIST OF EVIDENCE FOR GROSS HUMAN RIGHT VIOLATION CASES IN EAST TIMOR
ACCORDING TO KOMNAS HAM'S TIM-TIM'S INQUIRY**

This table provides description and analysis of key documentary evidence in KPP HAM's final report and shows the importance that such evidence could have had for the trials.

NO	EVIDENCE	CONTENT	FORM OF EVIDENCE	RELEVANCE	NOTES
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1	Report on situation and conditions developing in East Timor prior to the referendum	Mentions that pro-integration groups, engineered by youths, had established organizations for the love of red and white (none other than armed militia groups) such as BMP, Mahidi, AHI, JMP, ABLAI, Laksaur, Darah Integration, Halilintar, Aitarak, Morok, Makikit, Pejuang 59/75, Alfa and Sakunar.	Document / Writing	In general, those organizations were led by influential figures that attained strong support from regional government's, TNI, or police officials.	Evidence not attached to the BAP in Timbul, Abilio, or Nuer Muis Cases
2	Telegram of Dandim 1627/Dilli weekly report to Danrem 164/WD on 27 November 1998 (classification: confidential). No. telegram tidak disebutkan	Contains the involvement of Eurico in Gada Faksi (Garda Pemuda Penegak Integration)	Document / Writing	Gada Faksi was a unit that was created, trained, and funded by TNI, especially the Special Troop Command during 1994 – 1995. This indicated the involvement of TNI in nurturing the seeds of the militias.	Evidence not attached
3	Regents' accounts to the KPP HAM (Evidence of KPP Ham No. 829,766, 779, 770, 834, 768, 857, 856, 798, 780).	Contains various statements that refer to the pro-integration militias as Pam Swakarsa and how the groups were formed in every village to achieve the victory of pro-autonomy.	Document / Writing	These documents clarify the connection between militias and the regional government/ TNI/police.	Evidence not attached
4	Dili Regent Decree (not numbered nor dated)	Uncovers that Eurico Guterres, as sebagai Commander of Aitarak, was the Operational Coordinator of Dili Pam Swakarsa, whose	Document / Writing	This document clarifies the connection between militias and the regional government	Evidence not attached

	signed by Dilli Regent M D Soares, SH, MS.	membership amounted to 2,651.			
5	Document on Autonomou s Maintenan ce of Security (Pam Swakarsa) and Order in the City of Dili year 1999 signed by Dili Regent Domingos MD Soares,SH. MS. (Komnas HAM Evidence No. 492).	Demonstrates that out of the 2,651 members of Dili Pam Swakarsa, 1,521 were members of Aitarak & 78 were Kamra members. Within the Aitarak itself there were 25 Babinsa ¹⁰⁹ and 25 Binpolda ¹¹⁰ from ABRI elements. The advisor of the organization was the governor Danrem 164/WD, patrons were from Level II Regional Leaders Consolidation. The mayor of Dili served as the chair while the vice commander of Military Division 1627/ Dili and vice-chief of the Dili Resort Police served as deputy chairs.	Docum ent / Writing	This document substantiates the role of the regional government, TNI, and the police in training and funding the activities of the militias in East Timor.	Evidenc e not attache d
6	Governor Letter No. 100/734/SE K/1999 issued in May 1999, no date. (Komnas HAM Evidence No. 526)	Mentions that the regional budget from the routine regional development budget and the social security fund would cover all funding for Pam Swakarsa, which served as the umbrella organization for the pro-integration militias.	Docum ent / Writing	This document substantiates the connection between the regional government and the militia.	Evidenc e not attache d
7	Document of Plan to	Among other things, mentions that: "The armed power covers approximately 1,100 people	Docum ent / Writing	The evidence shows the probability that the regional government	Evidenc e not attache

¹⁰⁹ TNI's unit posted in every village to provide guidance to the village

¹¹⁰ TNI's unit posted to provide guidance for the regional police

	Address Contingency composed by TNI General Wiranto, which refers to the existence of pro integration Militia	approximately 1,100 people equipped with 546 firearms of various types, including generic ones, and all of them are united in pro integration organizations. The militant supporters consist of 11,950 people participating in struggle organizations such as BMP, Aitarak, Mahidi, Laksaur Merah Putih, AHI, Jati Merah Putih, Darah Integration, Dadarus Merah Putih, Guntur Kailak, halilintar Junior, Tim Pancasila, Mahademi, Ablai and Naga Merah.	Writing	regional government, TNI, and police were already aware of the situation in society where many armed civilian groups were present, but neglected to take proper actions. The document also raises the question as to where the firearms originated.	attached
8	The result of the inquiry of KPP HAM on TNI High Commander General Wiranto (Komnas HAM Evidence No. 570)	Notes that Wiranto explained that: "...morally indeed there were <i>efforts to ensure the victory of autonomy</i> so that East Timor would remain as a part of Indonesia and also reinforcing what the MPR Decree has already stipulated. Aside from that, if autonomy had won, the risk would have been minimum. This was evident in the security and government apparatus who were stationed in the region".	Document / Writing	That particular statement provides a description on the basis of the TNI's policy on East Timor at the time.	Evidence not attached
9	Letter of The Minister of Defense and Security, High Commander of TNI No. K/362/P/IV /1999, tanggal 15 Juni 1999.	Contains explanation on the merger of all militia organizations into Paukan Pejuang Integrasi (PPI) with its political wings Barisan Rakyat East Timor (BRTT) and Forum Perdamaian Demokrasi dan Keadilan (FPDK). Wiranto in the document stated: "One form of guidance upon the pro-integration that should be supported by all related departments/institutions is to guard themselves from being disintegrated and prioritize dialogue and discussion and avoid physical and intimidation activities which would be very counter productive with the struggle for their	Document / Writing	This evidence is important in substantiating the existence of efforts to consolidate civilian pro integration powers to achieve the victory of the autonomy option.	Evidence not attached

		aspirations. In relation to this, the two pro integration factions FPDK and BRTT have successfully been united in one forum for the struggle named Front Bersama Pro otonomi East timor (FBPOTT) with collective leadership from the two factions”.			
10	Report from the Military Region Commander Adam Damiri to the Minister of Politic and Security Coordination on the “Development of Situation and Condition in Wilayah East timor before the Referendum”, signed by Adam Damiri, dated Juky 11 1999. (Komnas HAM Evidence No. 569, page 3)	In the third page of the report, Adam Damiri stated that the attack of Liquisa Church caused fatalities on the anti-integration side, rendering anti-integration youths powerless. Of the attack on Manuel Viegas Carrascalao’s house, Adam Damiri stated that following the attack the East Timorese community became in love with red and white. The East Timor community realized that the integration group had many supporters. In page two of the report it states that the effort to consolidate the pro-integration mass was a reaction of the military and civil officials in East Timor to the rise of pro-referendum political power which had previously been engineered by CNRT particularly prior to October until December 1998.	Document/writing	Evidence shows the partiality of TNI to the pro-integration mass.	Evidence not attached
11	Transcript of Wiranto’s Examination	In his account Wiranto stated: “...now there is only people’s struggle power assisting each	Document/writing	Shows the involvement of TNI, the police, and the	Evidence not attached

	Examination by KPP HAM (Komnas HAM Evidence No.888).	Kodim. They have been assisting the Kodim apparatus since previously, they are organized. They are given formal incentive by the government and are armed, but with old weapons and not modern ones”.	ing	regional government with the militia.	d
12	Document No. Pol: R / 355 / IV / 1999 / Ditserse	Report from the Kaditserse East Timor Regional Police Carlos brigs Tewu after investigating the attack of Liquisa church. The report states that: “...witness saw that those who went in and executed the attack were besi merah putih group with Kodim members that the witness recognized, namely Isak, Tome, and Jacob who were wearing civilian outfits”.	Document/writing	Proves TNI’s direct involvement in the attack of Pastor Rafael’s house in Liquisa.	Evidence not attached
13	The report of the National Commission For Violence Against Women (Komnas HAM Evidence No.907)	Elaborated on the kidnapping and rape of 30 women in Kovalima by Laksaur Militia.	Document/writing	Establishes the occurrence of one form of crimes against humanity, namely rape. It is unfortunate that the prosecutor failed to include rape in the indictments as one of the crimes against humanity in East Timor.	Evidence not attached
14	UN Thematic Special Report dated December 8, 1999 (Komnas HAM	Contains Violence against Women	Document/writing	Idem	Evidence not attached

	Evidence No. 566)				
15	Letter No: B/376/IV/1999 Dated April 26, 1999, on the request of vehicle support for Korem 164/WD from Adam R. Damiri to ABRI General Staff in Jakarta	<p>The complete content of the letter:</p> <ol style="list-style-type: none"> 1. Refers to: <ol style="list-style-type: none"> a. Work Program and Budget of Kodam IX/Udayana TA.1998/1999. b. The letter of Danrem 164/WD No.: B/198/III/1999 dated March 30 1999 on the request for vehicle support in Korem 164/WD c. The Consideration of Command and staff of Kodam IX/udayana in maintaining optimum implementation of duties in the perilous area of East Tmor. 2. In relation with the reference, we are submitting a request for vehicle to support the readiness of the unit, bearing in mind that the condition of the vehicles in Korem 164/WD from the total number only 10% are ready to use due to lack of spareparts thus many of the vehicles have broken down and cannot be repaired. The details of the required vehicles are as follows: <ol style="list-style-type: none"> a. Ran Truck 2,5 ton: <ol style="list-style-type: none"> 1) 13 Kodim x 2 unit = 26 units 2) Kiangmor = 34 units Totak = 60 units b. Ran Jeep ¼ Ton = 24 units (for the vehicle-on-duty for Kasdim, Wadanyon and the Pasi Korem 164/WD) 3. For the request to be assessed. 	Document / Writing	<p>The relevance of the evidence:</p> <p>(1) that there had been an increase in the facility for the security in East Timor (2) related to the forced displacement after the referendum</p>	Evidence Attached

16	STR/172/1999 dated May 5 1999 issued by the Army Chief of Staff (KASAD) Letjen. Johny J. Lumintang on KASAD Disposition in the letter of KOORSEX PERT KASAD No.B/50/IV/1999/SEX PERT	<p>Content of the Letter:</p> <p>A. Refers to the disposition of Kasad in the letter of Expert Staff Coordinator Kasad No.B/50/IV/1999/SAH:I dated 13/4/99 on the order to anticipate the situation that may occur upon the determination of option for the people of East Timor.</p> <p>B. Accordingly to the reference above, those addressed should:</p> <ol style="list-style-type: none"> 1. Always be ready to deal with all possibilities concerning the options for the people of East Timor 2. Prepare a plan in preventing civil war including preventive (condition construction), police, repressive/coercive measures as well as the transfer to the back line/ transport of refugee if the second option becomes the most-voted for option. <p>C. This letter is an order.</p> <p>D. To be executed. End.</p>	Docum ent / Writing	<p>The relevance of the evidence:</p> <p>(1) related to the order to execute preventive measures (condition construction), police actions, repressive and coercive measures by TNI/Police, and</p> <p>(2) the existence of a plan to transfer to the back line/transporting refugees if the second option becomes the most-voted option (forced displacement)</p>	Evidenc e attache d
17	R/60/V/1999 dated May 8, 1999 on the delivery of names of CNRT influential figures,	<p>The content of the letter:</p> <p>1. Referring to the Military Resort Commander Express Note dated May 8, 1999 at 09.40 wita on the order to deliver the names of two figures of CNRT/ vocal influential figures from the anti-integration</p>	Docum ent / Writing	Reveals the systematic partiality and policy of TNI/Police/Regional Government in East Timor in pressuring the pro-independence figures.	Evidenc e attache d

	<p>issued by Toyib Anwari, Mayor Inf., officer in intelligence section</p>	<p>group who are suspected of hindering the socialization of autonomy in East Timor.</p> <p>2. Related to the above issue, herewith the two names of the figures of CNRT:</p> <p>a. David Diaz Ximenes, address Vilaverde West Dili.</p> <p>b. B. Fransisco De Carvahlo, address Colmera West Dili.</p> <p>Thus to be assessed.</p> <p>Note</p> <p>[RELATED DOCUMENT]</p> <p>Military Resort Commander Express Note dated May 8, 1999 at 09.40 with the order to deliver the names of two figures of CNRT/ vocal figures who are influential from the anti-integration group who are suspected of maybe hindering the socialization of autonomy in East Timor.</p> <p>[from list (lihat Attachment) there are 20 names]</p>			
18	<p>Sprin/654/V/1999 dated May 3, 1999 on the activities to prepare the referendum and monitor the campaign in East Timor from Mayjen Adam</p>	<p>The Content of the Letter :</p> <p>1. To the addressed to deliver each 2 (two) names of CNRT/ vocal figures from the anti integration group who are suspected of hindering the socialization of autonomy in the region may it be those who have masses or charismatic figures in order to be invited to a meeting with the Minister of Foreign Affairs Mr. Ali Alatas to be given explanation on the special autonomy for East Timor.</p>	<p>Document / Writing</p>	<p>Idem</p>	<p>Evidence attached</p>

	Damiri	<p>2. Those names to be submitted on May 8, 1999 at 14:00 WITA at the latest to Danrem (Commander of Military Rayon) 164/WD up. Kasi Intel Korem (Intelligence of Military Rayon Command) 164/WD.</p> <p>3. Thus to be executed.</p> <p>[RELATED DOCUMENT] Is an attachment of reply from Danrem 164 WD, May 8, 1999 (No.R/60/V/1999)</p>			
19	R/95/LH/VI/1999 dated June 30 1999, on the Daily Report of the Intelligence section of Kodim 1638/Liquica (24-25 June 1999) from Officer of Intelligence Syafei Saleh, Second Lieutenant Inf.	The letter and attachment received on 11/06/99 distributed by Kodim 1627 Dili to all subordinate officers by means of Disposition Sheet (TU Agenda Number: R/182/VI/199) dated 17/06/99.	Document / Writing	Important in revealing TNI's policy concerning the situation and condition in East timor at the time	Evidence not attached
20	Letter of order Sprin/654/V/1999 dated May 31, 1999 on the Activities in Preparation		Document/Writing	To provide a description on the policy and security measures by the apparatus before the referendum	Evidence not attached

	of Referendu m and Campaign Monitoring in East Timor issued by Pangdam (Military Region Commande r) Udayana				
21	Hanoi n Lorosa e I Operat ion Plan year 1999		Docum ent/Wri ting		Evidenc e attache d
22	Hanoi n Lorosa e I Operat ion Plan year 1999		Docum ent/Wri ting		Evidenc e attache d