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An Unfinished Truth:

An Analysis of the Commission of Truth and
Friendship's Final Report on the 1999 Atrocities in
East Timor



KOMNAS PEREMPUAN
Komisi Nasional Anti Kekerasan Terhadap Perempuan

Megan Hirst
March 2009

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NATIONAL COMMISSION ON
VIOLENCE AGAINST WOMEN
KOMISI NASIONAL ANTI KEKERASAN TERHADAP PEREMPUAN

KOMNAS PEREMPUAN

About ICTJ

The International Center for Transitional Justice (ICTJ) assists countries pursuing accountability for past 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.

About the Women's Commission

The National Commission on Violence Against Women (Komnas Perempuan) was established in 1998 by presidential decree in response to mass rapes that occurred that May. The commission has a mandate to eliminate all forms of violence against women and is currently focused on working with victims of domestic violence, migrant workers, women in regions of conflict, and female heads of households in rural areas. It has published reports on the impact of conflict on women in Aceh, on atrocities committed against women in 1965, and conducted research in Papua and Poso, as well as other conflict areas in Indonesia.

About the Working Group on Truth Recovery (KKPK)

This coalition of civil society groups aims to promote the recovery of truth regarding past atrocities in Indonesia. Established in 2008, the coalition has provided input and an alternative model on the proposed concept draft for a new truth commission prepared by the government, and has conducted advocacy on related issues. Coalition members are PEC, KontraS, Syarikat, JKB, Walhi, Elsam, IDSPS, PEC, SKP-HAM Palu, Imparsial, IKOHI, ICTJ, PBHI, Bakumsu, Pusdep, Demos, PPRP, LPH Yaphi, HRWG, SHMI, SNB, LBH Jakarta, Kalyanamitra, Solidaritas Perempuan and KPI.

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Cover Photo: Remains of a massacre, marked with flowers by local villagers at the Suai Church grounds. Photo by Galuh Wandita, October 1999.

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Executive summary

In July 2008 Indonesia and Timor-Leste's bilateral truth commission, the Commission of Truth and Friendship (CTF) submitted its final report. The commission had been tasked with reviewing the work of previous transitional justice mechanisms and revealing the "conclusive truth" regarding institutional responsibility for violence committed in East Timor in 1999.¹ During the CTF's three years of operation, it attracted significant criticism. This focused largely on the commission's power to recommend amnesty and on the problematic public hearings that it conducted.² The UN refused to participate in CTF processes, and human rights groups condemned the commission as a whitewash designed to perpetuate impunity.

Against this context, many were surprised when the CTF produced a report confirming that Indonesian security forces and civilian authorities committed crimes against humanity. By endorsing the report's findings at the ceremony to mark its submission, President Susilo Bambang Yudhoyono provided Indonesia's first official recognition that its state institutions had systematically violated human rights in East Timor. These developments were justifiably greeted with both relief and praise. However the CTF's final report deserves a closer investigation and a more nuanced appraisal. This paper reviews the CTF's document review and research, its findings and its recommendations. It is intended to supplement the ICTJ's first monitoring report, which covered the CTF's establishment, mandate and public hearings.³

The CTF's document review and fact-finding work

The CTF's terms of reference required it to review documents collected and created by the four main transitional justice mechanisms that predated the commission. Those mechanisms were:

- The Indonesian National Commission of Inquiry on Human Rights Violations in East Timor in 1999 (known in Indonesian as KPP-HAM);
- The Indonesian Ad Hoc Human Rights Court on East Timor;
- The Special Panels for Serious Crimes;⁴

¹ CTF Terms of Reference (TOR), art.12.

² For background on the CTF and an analysis of its establishment process, mandate and public hearings, see Megan Hirst, "Too Much Friendship, Too Little Truth: Monitoring Report on the Commission of Truth and Friendship in Indonesia and Timor-Leste," ICTJ Occasional Paper Series (January 2008).

³ *Ibid.*

⁴ Note that the CTF's terms of reference only referred expressly to the mechanisms established in Indonesia and Timor-Leste for the trial of international crimes, not those that conducted investigations and prosecutions. However, the commission gave this mandate a broad, purposive interpretation and thus also reviewed investigative files created by the prosecuting authorities involved in both processes.

- The Commission for Reception, Truth and Reconciliation (commonly referred to by its Portuguese acronym, CAVR).⁵

This process of document review was undertaken by a team of researchers recruited by the CTF's expert adviser. This process was ultimately the basis for the CTF's most meaningful contributions for two reasons.

First, it allowed the CTF to provide critiques of the previous transitional justice mechanisms and the conclusions they had reached. Since all four previous mechanisms have been the subject of controversy in either Timor-Leste or Indonesia, an objective review of their work by a bilateral institution was a worthwhile endeavor. Ultimately the CTF concluded that the reports of KPP-HAM and the CAVR (including the OHCHR report) had some limitations, but it did not disagree with their findings.⁶ In contrast, the commission's review of the ad hoc trials in Indonesia demonstrates the fundamental flaws in that process and in doing so throws considerable doubt on the results of those trials.⁷

Second, the document review provided the commission with the strongest evidence in support of its findings. Much of this came from the Serious Crimes Unit (SCU)'s case files, which had not been reviewed by previous truth-seeking mechanisms.

The CTF's findings

Despite the shortcomings of the commission's research, valuable findings were made.

- The CTF's findings corroborate those already made by KPP-HAM, the CAVR, the OHCHR report and others: namely that crimes against humanity were committed in East Timor in 1999 by Indonesian military, police and civilian officials. Two annexes to the CTF report, produced by the CTF's expert adviser through the document review process, collate and analyze a substantial volume of evidence to support these findings.
- The CTF explains that the commission of serious crimes by security apparatus was not an aberration. In fact it resulted from established policies and practices within the Indonesian security sector.
- Although the commission was required to focus on institutional rather than individual responsibility, its report nonetheless presents evidence that implicates senior Indonesian officials. In addition, the framework used to analyze this evidence (notably the definition of crimes against humanity) is principally relevant to questions of individual criminal responsibility. Thus the CTF's findings are readily transferable to discussions or proceedings concerned with individual accountability.

⁵ TOR, art.14 (a) (i). The CAVR was mandated to look at human rights violations that took place between 1974-1995, covering the periods of the civil war (1974-1975) and the Indonesian occupation (1975-1999.) See www.cavr-timorleste.org

⁶ The OHCHR report was commissioned by the UN's Office of the High Commissioner for Human Rights and written by Geoffrey Robinson. See Geoffrey Robinson, *East Timor 1999: Crimes Against Humanity*. (Dili and Jakarta: HAK Association and ELSAM, 2006). It was annexed to the CAVR's final report and formed the basis for many of the CAVR's findings on events in 1999. For this reason the CTF also included the OHCHR report in the scope of its document review.

⁷ All 18 men tried through this process were eventually acquitted – either at trial or on appeal.

And yet, the CTF report also has some weaknesses:

- The report avoids touching on a number of important questions relating to institutional responsibility. Did senior officials instigate the violence or simply fail to prevent it? What was the role of discrete units, such as the special forces? The report likewise fails to address a number of poorly founded accusations made against individuals and institutions during the commission's public hearings.
- The findings made about the responsibility of pro-independence groups are based on minimal evidence and flawed legal analysis. They appear to have been motivated by a desire to share blame for the events of 1999. They are unconvincing.
- The commission's discussion of the history and causes of violence is scantily researched and poorly reasoned. The report seeks to excuse this on the basis that its mandate was to focus only on events during 1999. However it is clear that an understanding of earlier events would have helped develop a more coherent, meaningful truth, as well as provide a stronger basis for designing useful recommendations.

The CTF's recommendations

The CTF made a number of recommendations. They are, in broad terms, beneficial. While some of the recommendations concerning bilateral ties appear to bear little relation to the past human rights violations discussed in the report itself, others deal with institutional reform, reparations, documentation and research relating to past violations and creating a commission for disappeared persons.

The recommendations most significant weakness is their generality. They are broadly termed and provide little detail. Because most were intentionally phrased so they apply to both Timor-Leste and Indonesia, they do not respond to the specific circumstances of each country.

However, many of the recommendations agree with those made by the CAVR or other bodies. They therefore may serve to add extra political momentum to these more detailed existing recommendations. As in the case of the CAVR, the greatest challenge lies in ensuring implementation. There is a danger that only the less controversial recommendations, such as those relating to border management, will be implemented. The minimal movement on implementation since the report's submission and the absence to date of parliamentary debate on the report in either country are concerning.

With these issues in mind, the CTF's final report should be viewed as the beginning rather than the end of a process. Despite the commission's mandate, its truth is not conclusive. Revealing a more complete truth must be an ongoing process, as the CTF's own recommendations for future research demonstrate. Concerted effort is required to ensure that the recommendations are not neglected and to make the most important of its findings known, especially in Indonesia.

I. INTRODUCTION

On July 15, 2008, the bilateral Commission of Truth and Friendship submitted its report to the presidents of Indonesia and Timor-Leste. The report was made public in mid August 2008⁸ and formally presented to the Timorese Parliament on October 9, 2008.⁹ ICTJ, together with civil society from Indonesia and Timor-Leste, has monitored the CTF's work from an early stage. In January 2008 the ICTJ reported on the CTF's establishment, Terms of Reference (TOR) and public hearings process.¹⁰ Since then the commission has completed its work and delivered its final report. This paper is thus intended as a follow-up to the previous report. It provides an overview and brief analysis of the CTF's research, findings and recommendations.

II. THE CTF REPORT: CONTENT, FINDINGS AND RECOMMENDATIONS

The CTF's Final Report, *Per Memoriam Ad Spem* ("Through Memory to Hope"), is around 350 pages long.¹¹ It explains the commission's mandate and processes, sets out the evidence and analysis used, reaches findings, and makes recommendations.

A. The substantive content of the report

The report is divided into three parts:

- Part I : Purpose, Mandate and Process explains the CTF's objectives, TOR and methods.
- Part II : Findings and Analysis includes most of the commission's substantive discussion and analysis.
- Part III : Conclusions, Recommendations and Further Steps summarizes the CTF's findings in around 40 pages, then sets out recommendations and lessons learned.

Two substantial appendices (together almost 550 pages) are attached to the report. These are edited versions of reports submitted to the CTF by its expert adviser that detail the bulk of the evidence collected through the CTF's document review process.

B. Principal findings of the CTF report

The key findings of the report, as set out in Chapter 8 (Findings and Conclusions) are that:

- "Gross human rights violations," more specifically crimes against humanity including murder, torture, rape and forced transfer or deportation were committed throughout East Timor in 1999.

⁸ The report is available online at http://socrates.berkeley.edu/~warcrime/Truth_commission.html.

⁹ Address by His Excellency the President of the Republic José Ramos Horta at the National Parliament, Dili, Oct. 9, 2008.

¹⁰ Megan Hirst, "Too Much Friendship, Too Little Truth: Monitoring Report on the Commission of Truth and Friendship in Indonesia and Timor-Leste." ICTJ Occasional Paper Series (January 2008).

¹¹ *Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship*.

- These crimes were not spontaneous or random, nor were they the result of retaliatory dynamics.
- The main perpetrators of crimes were pro-autonomy (pro-integration) militia groups that targeted supporters of independence; these groups acted with the support and at times direct involvement of the Indonesian military, police and civilian authorities.
- The military, police and civilian authorities systematically supported the militias with money, food and weapons, and did so with the knowledge that the militias were committing gross human rights violations.
- Pro-independence groups also committed “gross human rights violations” in the form of systematic illegal detentions, although on a more limited scale.

Recommendations of the CTF

The Commission created recommendations that it considered “realistic and implementable.” Most are not directed at Timor-Leste or Indonesia specifically, but are written so as to apply to both or either country. Key recommendations made are outlined below.

1. Measures to establish accountability and for institutional reform

The commission dedicates around two pages to proposals for institutional reform including human rights training programs, legislative amendments and the creation of plans and special mechanisms for investigation and prosecution. It indicates the need to transform the culture of the security sector and for clear divisions of roles between civil authorities and security apparatus and between military and police institutions.

2. The creation of new institutions

The commission recommends the creation of the following new institutions:

- A documentation and conflict resolution center. The center would collect, preserve and protect “all of the documents relevant to violence in 1999,” as well as encourage wider “cooperative historical research.” The governments should use the center as a vehicle for creating programs “aimed at identifying, preventing and resolving social and political conflict” including programs to build capacity and train public officials. The center should also develop “survivor healing programs.”
- A commission for the disappeared. The governments of Indonesia and Timor-Leste should cooperate to recover information about the fate of disappeared persons and provide this information to their families. The commission for disappeared persons should also investigate the whereabouts of Timorese children who were separated from their parents. Programs should be implemented to protect and uphold these children’s rights.

3. Joint border and security policies, and economic and asset issues

Further recommendations are made about diplomatic relations between the two countries and residual issues resulting from the Indonesian occupation. These issues are not related to human rights violation committed during 1999, but they are included no doubt as a means of strengthening “friendship.” They include

recommendations for creating special “peace zones” along the border in which visas are not required, finalizing border demarcation issues, cooperating in border patrol issues, and resolving outstanding asset disputes.

4. “Long Term and Aspirational” measures

These measures include cultural and educational exchanges, cooperation in the health sector, creating a culture of legal and human rights awareness in both countries, continuing bilateral cooperation in respect of the remains of the deceased (including Indonesian soldiers buried in Timor-Leste), and considering dual citizenship for children of mixed heritage.

5. Measures for the dissemination of the report and the implementation of its recommendations

- The CTF recommends taking various steps to be sure the report is widely disseminated in both countries. An advisory group should be established to oversee dissemination.
- An implementing body should be created to ensure that the CTF’s recommendations are implemented. It would function for at least five years, and should be funded by the creation of a “solidarity fund” as recommended by the UN Secretary-General.¹²
- As a first step the presidents of Indonesia and Timor-Leste should make a joint statement that would:
 - “together acknowledge responsibility for past violence”
 - offer an apology to the people of the two nations, especially the victims
 - offer an invitation to the two nations to overcome the legacy of past violence and work together to prevent the further conflict and promote friendship.

III. COMMENTARY ON THE CTF REPORT

Most of the discussion so far concerning the CTF report has focused on its findings that Indonesian institutions were responsible for crimes against humanity. This is clearly the CTF’s most important achievement. Given the weaknesses in the commission’s TOR and reports of initial internal divisions, the result is particularly remarkable. In Indonesia, the president’s acceptance of the CTF’s findings marks country’s first official recognition of the dominant role its security forces played in the commission of human rights violations in East Timor.

However thorough analysis of the report requires a consideration of other aspects of the CTF’s work as well. This report considers the extent to which the CTF’s report represents progress in three key areas:

1. Reviewing previous mechanisms
2. Revealing the conclusive truth
3. Making recommendations

¹² “Report of the Secretary-General on justice and reconciliation for Timor-Leste,” UN Doc. S/2006/580 (July 26, 2006), para. 39.

A. The CTF's review of previous mechanisms

As a part of its mandate to reveal the truth, the CTF was to:

“review all the existing materials documented by the Indonesian National Commission of Inquiry on Human Rights Violations in East Timor in 1999 (KPP HAM) and the Ad-hoc Human Rights Court on East Timor, as well as the Special Panels for Serious Crimes, and the Commission of Reception, Truth and Reconciliation in Timor-Leste”¹³

The CTF began its document review process in January 2006 using CTF staff.¹⁴ However, this initial process was based only on publicly available sources (access to archival documents had not yet been obtained). The commissioners found the results to be unsatisfactory, so in December 2006 they hired David Cohen, director of the University of California Berkeley War Crimes Studies Center as an expert adviser. Professor Cohen recruited a team of researchers, working in Jakarta and Dili, to conduct the document review process. They conducted the work in two stages, from February to March and July to October 2007. The results, which contained significantly more detailed information and analysis than was produced by the earlier attempt, were compiled in two reports submitted to the commission by the expert adviser. These documents provided the substance of the commission's document review work. They have been appended to the CTF's final report.

a. *The document review as a means of critiquing previous mechanisms*

The document review process not only collated the evidence collected by the previous mechanisms, but also analyzed whether the conclusions reached by each process were supported by the evidence, and the strengths and weaknesses of each of the bodies documents (p. 66).¹⁵

The CTF's report therefore provides commentary on the earlier transitional justice mechanisms. To some extent, these previous processes have been analyzed already. Reports and academic papers have reviewed the serious crimes process,¹⁶ the Ad Hoc trials,¹⁷ and the CAVR¹⁸; less has been written regarding KPP-HAM as an investigative

¹³ TOR, art.14 (a) (i).

¹⁴ Information provided by former CTF staff; see also *Per Memoriam Ad Spem*, 27.

¹⁵ All page numbers in the text of this paper refer to the CTF final report.

¹⁶ See David Cohen, “Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor,” East West Center Special Reports, No. 9 (June 2006); Caitlin Reiger and Marieke Wierda, “The Serious Crimes Process in Timor-Leste: In Retrospect,” ICTJ Prosecutions Case Studies Series (March 2006); Megan Hirst and Howard Varney, “Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor.” ICTJ Occasional Paper Series (June 2005); Caitlin Reiger, “Hybrid attempts at accountability for serious crimes in Timor Leste,” in Naomi Roht-Arriaza and Javier Mariezcurrena, eds, *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*. (Cambridge: Cambridge University Press, 2006); and Suzanne Katzenstein, “Hybrid Tribunals: Searching for Justice in East Timor,” *Harvard Human Rights Law Journal*, vol.16 (2003), 245.

¹⁷ See David Cohen, “Intended to Fail: The Trials Before the Ad Hoc Human Rights Court in Jakarta.” ICTJ Occasional Paper Series (July 2004); Suzannah Linton, “Unraveling the First Three Trials at Indonesia's Ad Hoc Court for Human Rights Violations in East Timor,” *Leiden Journal of International Law*, vol.17 (2004), 303; and ELSAM, “The Failure of Leipzig repeated in Jakarta: Final Assessment of the Human Rights Ad Hoc Tribunal for East Timor,” Sept. 9, 2003.

¹⁸ On the CAVR's community reconciliation processes, see Piers Pigou, “The Community Reconciliation Process of the Commission for Reception, Truth and Reconciliation,” UNDP Timor-Leste (April 2004); Lia Kent, “Unfulfilled Expectations: Community Views on CAVR's Community Reconciliation Process,” JSMP (August 2004); Patrick Burgess, “A new approach to restorative justice – East Timor's

process in its own right. In 2005 the UN Commission of Experts reported on the initiatives undertaken to date in Timor-Leste and Indonesia.¹⁹ However those reports focused on the processes used. The CTF, by contrast, reviewed the substantive evidence and questioned whether it justified the conclusions reached. In addition, the CTF gained access to confidential documents from these processes that enabled new insights.

The CTF report provides a brief but useful summary of the strengths and weaknesses of each process. Significantly, while it is noted that the KPP-HAM, CAVR and OHCHR reports each had some weaknesses, the fundamental findings of those reports are not challenged.

In contrast, the CTF report provides a clear critique of the Ad Hoc trial process, showing:

- That the prosecutors' investigations were flawed. Prosecutors did not use much of the extensive evidence collected by KPP-HAM (p. 89). They also restricted themselves to a "failure to prevent" model rather than using other forms of liability (pp. 89, 90) and fundamentally misunderstood the elements of crimes against humanity and the concept of command responsibility (p. 90). This resulted in weak cases that failed to present the available evidence on crucial issues (pp. 90-92).
- Weak evidence from the prosecution undermined the Ad Hoc trials. This was due in part to reliance on witnesses from the Indonesian military (TNI) and government, many of whom reversed their evidence at trial (p. 95). Prosecutors did not question these witnesses about their change of position. In addition some judges failed to weigh the relative credibility of various witnesses and simply accepted the version of events provided by the greatest number of witnesses.
- An analysis of the Ad Hoc Appellate Court's reasons in the Adam Damiri case reveals a decision that is "flawed in its understanding and application of the law and that fails to provide a reasoned justification for its decision."

These conclusions largely reinforce what was already known about the Ad Hoc trial process. They are limited also by their focus on the issues of greatest relevance to the CTF's work; thus they do not consider the eventual acquittals of everyone who was indicted.²⁰ However the comments are nonetheless useful in that they corroborate and add to earlier reviews. Their inclusion in an official report that the Indonesian government has endorsed may provide a basis for reconsidering the appropriateness of using

Community Reconciliation Processes," in Naomi Roht-Arriaza and Javier Mariezcurrena, eds, *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*. (Cambridge: Cambridge University Press, 2006); On the CAVR more generally, see "East Timor's Truth Commission," Special Forum in *Pacific Affairs*, vol. 80 (4) (Winter 2007/08), 563; and Annemarie Devereux and Lia Kent, "Evaluating Timor-Leste's Reception, Truth and Reconciliation Commission" in David A. Blumenthal and Timothy L.H. McCormack, eds, *The Legacy of Nuremberg: Civilizing Influence or Institutionalised Vengeance?* (Netherlands: Martinus Nijhof, 2007).

¹⁹ "Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999," UN Doc. S/2005/438 (May 26, 2005).

²⁰ The CTF was mandated to review the materials documented by the Ad Hoc Human Rights Court on East Timor. No reference was made to subsequent appeals from that Court's decisions. With respect to each source of documentation, the CTF was most interested in considering what conclusions were reasonably supported by the evidence available (rather than simply which conclusions were actually reached). For this reason, considering the outcomes of final appeals was less relevant than reviewing the evidence available to the Ad Hoc Court.

the Indonesian justice system to prosecute senior officials charged with international crimes.

Finally, the report also adds to previous critiques of the serious crimes process. The commission was uniquely positioned to comment on the SCU's work on issues such as pro-independence crimes and sexual violations because it had access to the unit's archive... While the CTF's ultimate conclusions on these matters are open to question,²¹ the information provided about the amount of evidence collected on these categories of crimes and the extent of investigative efforts undertaken is valuable. Most importantly, the document review reveals that despite voluminous evidence collected on sexual crimes, these were not considered a priority for investigation.²²

b. The document review as a truth-seeking mechanism

The document review process provided the CTF with its best evidence, and the strongest parts of the report are found in chapters 5 and 7 where this evidence is detailed. In those chapters, large amounts of evidence gathered by SCU investigators, provided in court to the Special Panels or gathered by KPP-HAM, OHCHR, and Indonesian prosecutors, is set out at length. This mass of evidence supports irrefutable conclusions concerning the systematic, widespread perpetration of forced displacement, deportation, murder, rape and torture by militia, with the involvement of TNI, police and Indonesian civilian authorities.

The most significant shortcomings of the document review process were that it managed to access only a small portion of the documents identified for review, and that the commission did not use the process effectively to identify further areas for research or investigation. Both these problems were largely the result of the commission's weak planning and time and resource management. The document review team spent only about four months conducting research. Because of this time limitation, the team prioritized its work and selected areas of research within the archives that would yield evidence most relevant to the CTF's mandate and the research topics stipulated by the commissioners. Given the short timeframe, it is impressive that the team reviewed so many documents. The researchers reviewed more than 1,000 witness statements from the SCU archive alone (p. 113). However the commission fell very short of its mandate to "review all the existing materials documented [by the four previous mechanisms]."

Indeed, many documents within the CTF's document review mandate were not made available to it. This was especially apparent with the CAVR documents; the Post-CAVR Technical Secretariat (STP-CAVR) which has custody of the CAVR archive provided access to only a tiny proportion of its documents).²³ While the STP-CAVR may have had some valid concerns about confidentiality, officials there could have made efforts to address these through an appropriate agreement. Such agreements for

²¹ For example, the CTF's claims that more efforts should have been put into investigating pro-independence crimes needs to be considered in the light of the SCU's policy (admittedly not established at the beginning of its work) of focusing on crimes against humanity – which would not include attacks against militia members – and of the significantly more numerous reports it received of militia crimes. This information provided by staff from the UN Serious Crimes Investigation Team.

²² See especially *Per Memoriam Ad Spem*, Addendum to the Report of the Expert Advisor to the CTF, 40.

²³ Access was provided to the CAVR's 297 community profile reports. However access was not provided to any of 7,824 statements collected by the CAVR, and only to a handful of the CAVR's more than 1,000 interviews.

access were made and successfully implemented for access to the SCU and Ad Hoc investigative files, which were no less sensitive than CAVR documents. At the very least, the STP-CAVR could have granted access to the large number of statements collected by the CAVR in respect of which deponents had agreed in writing to give the public access in the future.

Despite these limitations the document review process revealed much useful information. This included not only evidence of human rights violations, but also indications of areas for further research and investigation. Unfortunately, these avenues for further research were not followed up adequately, if at all. The commission's "fact-finding" processes were not used to fill the gaps identified by the document review process.²⁴

Despite a lack of clarity in the commission's TOR, the CTF interpreted its truth-seeking mandate as encompassing not only document review but also "fact-finding."²⁵ This included taking statements, conducting interviews, holding public and closed hearings, and receiving submissions. Unlike many truth and reconciliation commissions that typically conduct an open process of documenting thousands of testimonies, the CTF only interviewed or took statements from 85 people in addition to 62 witnesses who gave evidence in open or closed hearings.²⁶ Overall the commission heard directly from a total of 147 witnesses, only marginally more than KPP-HAM, which carried out its work in only three months.²⁷

Even given the small number of testimonies collected, this process could nonetheless have been useful, had it been carefully designed and robustly conducted. However, the CTF did not use its contact with witnesses in a targeted way to fill gaps in the voluminous documentary evidence collected by the previous mechanisms. Not a single person who participated in the "fact-finding" process was sourced through the document review team's research.²⁸ Witnesses were identified based on the initial 2006 review, despite the fact that the commission had rejected that process as inadequately researched.²⁹ As a result much of the information gleaned through "fact-finding" was unhelpful or inconclusive. Some useful evidence was gathered in closed hearings and interviews, particularly concerning the financing and provision of weapons to militias. But since these activities were already well documented within the SCU archive, the information gathered was helpful principally in adding detail to or corroborating existing evidence rather than in yielding new insights. Since the document review ultimately revealed significant gaps in archival evidence, it is regrettable that fact-finding was not directed at filling these.

The report's lack of detail regarding the nature of institutional responsibility (see further below) could have been addressed by identifying cooperative witnesses within the key institutions and using appropriate investigative and questioning techniques.

²⁴ This was in spite of the commission's claim that the two processes were "distinct but nonetheless complementary": *Per Memoriam Ad Spem*, 256.

²⁵ See *Per Memoriam Ad Spem*, 19.

²⁶ The CTF report lists 119 people who gave a statement or were interviewed (Attachment 4, 327 *et seq.*). Thirty-four of these were people who also gave evidence in public hearings.

²⁷ According to the CTF Report, p. 76, footnote 10, KPP-HAM interviewed 123 witnesses and conducted nine field visits.

²⁸ Information provided by CTF staff.

²⁹ Information provided by CTF staff.

While the CTF did interview a number of key institutional figures, most were uncooperative and did not reveal useful information. The CTF did not consider itself to be conducting an “investigation,” and perhaps because of this it did not adopt methods likely to elicit useful testimony from members of the TNI and other implicated institutions (including the Timorese resistance movement, CNRT, and its armed forces, Falintil).³⁰

Of course, the fact-finding process and its effective linkage to the document review depended not only on whether the commission had sufficient time and resources, but also on whether they were used effectively. The commission’s suggestions that it was unable to answer the questions before it because of “the limitation of ...resources and mandate” (p. 266) do not bear scrutiny. Despite having a budget of more than U.S. \$4 million and a working period of 32 months, the commission reportedly spent less than \$50,000 and about four months on its most productive activity: the document review research.³¹ As a point of comparison, the CAVR with around 45 months of work and U.S. \$6 million to \$7 million in resources managed to collect nearly 8,000 statements, conduct more than 1,000 interviews, hold 60 public hearings, and convene 216 Community Reconciliation Procedure hearings.³² In contrast, the CTF involved 147 people in interviews, hearings, or taking statements, and received a submission from only one additional institution.³³ This comparison must raise questions about how efficiently the CTF managed its time and resources.

B. The CTF’s findings

1. Contributions made by the CTF’s findings

Despite weaknesses in the format of the report, in which conclusions on similar issues are made in several different chapters, the CTF’s findings are significant. It is likely that their most important contribution will be in Indonesia, where even the most basic facts about the occupation of East Timor are little known, and the issue of responsibility for the mass violations has been shrouded in secrecy and denial. In this respect the clearest benefits of the findings are:

- a. The report corroborates many of the findings made by KPP-HAM, the CAVR and the OHCHR report concerning the criminal responsibility of militias, Indonesian security forces and civilian officials. . In doing so, the report also departs from the

³⁰ CNRT is the *Conselho Nacional de Resistência Timorese* (National Council of Timorese Resistance), which was an umbrella organization for the various Timorese independence groups. It is not to be confused with the current political party, *Conselho Nacional de Reconstrução do Timor*, (National Congress for Timorese Reconstruction), which is also referred to as CNRT. Falintil refers to *Forças Armadas da Libertação Nacional de Timor-Leste* (or the Armed Forces for the National Liberation of Timor Leste.)

³¹ Information provided by CTF staff.

³² *Chega!* Annex 4: Acknowledgements, 3. Donors provided the CAVR with about \$5.75 million, as well as an unquantified amount of assistance in the form of in-kind contributions and advisers.

³³ *Komnas Perempuan* (the Indonesian National Commission on the Elimination of Violence Against Women). The other 11 submissions were received by Commission staff, the CTF’s statement-taking partner organization, or those who also participated in the CTF’s hearings.

final conclusions reached in all criminal cases so far heard in Indonesia, including most recently the Supreme Court's conclusions in Eurico Guterres's case.³⁴

- b. The report brings together the weight of four different sources, providing a massive amount of evidence that the militias, TNI, Indonesian police and government officials were responsible for the mass violations committed in 1999. This large body of evidence from multiple sources serves as a comprehensive answer to claims that Indonesia was not responsible for crimes committed by pro-autonomy militias. The report's two voluminous appendices of evidence are unassailable in this regard.
- c. The report gives substantial attention to gender-based violence, with a focus on the systematic sexual violence perpetrated against women from Suai after the popular consultation.³⁵ While research on gender-based violence with a wider scope would have been preferable, the Suai crimes make a convincing case study. Based on its document review the CTF confirms the CAVR's finding that the militias and Indonesian security forces used rape and sexual violence systematically in 1999.³⁶ Substantial additional evidence from the SCU archive is provided in support of these findings.
- d. Because the report's findings expressly tie the human rights violations committed in East Timor to established institutional practices, particularly within the Indonesian military, they are relevant to past and present conflicts) within Indonesia. This is strengthened by some references in the history chapter that link practices in East Timor to those in conflict zones in Indonesia such as Aceh, Papua, Ambon and Kalimantan (pp. 39, 44 and 54). If the report succeeds in changing Indonesian perceptions of events in East Timor, it may also have a broader impact in identifying institutional practices that led to massive human rights violations in these other conflicts.
- e. Despite fears that the CTF's report would impede justice, it can be viewed as a step toward accountability and criminal justice in Indonesia. This is not only because the CTF declined to recommend amnesty. While the report focuses on institutional responsibility, its findings and the evidence provided are also relevant to questions of individual criminal liability, including command responsibility at the highest levels. The evidence in the report is sufficient not only to prove that Indonesian officials participated in committing crimes against humanity, but also that senior officials should have known about this, thus providing the basis for command responsibility liability.

Secondly, it is significant that the CTF chose to define "gross human rights violations" as crimes against humanity. This conflates concepts of international human rights and international criminal law, and is surprising from a body specifically mandated to deal only with institutional - not individual - responsibility. Treating crimes against humanity as a type of "gross violation of human rights" is, however, consistent with Indonesian Law 26/2000 Concerning Human Rights Courts. That law provides for the creation of special human rights courts (such as

³⁴ In that case the Supreme Court took the view, *inter alia*, that the killings at Manual Carrascalao's house on April 17, 1999, did not constitute crimes against humanity but rather a "clash" between rival groups. All 18 of those indicted and tried before the Ad Hoc court were acquitted at trial or on appeal.

³⁵ This likely was based in part on the time constraints the document review team faced, as well as ,on limited access the documents. SCU investigations had not covered sexual crimes systematically (pp. 119, 121), and the consultants were not given access to CAVR statements (p. 108).

³⁶ See *Chega!*, Part 7.7: Sexual Violence.

the Ad Hoc Human Rights Court for East Timor) to hear cases of “gross human rights violations,” defined as genocide or crimes against humanity.³⁷

The commission’s TOR did not require it to follow this approach.³⁸ Given the CTF’s focus on the responsibility of institutions, it would have been more natural for it to use international legal frameworks relating to state or organizational responsibility, specifically, human rights law and the law of armed conflict. However despite causing some conceptual anomalies, the use of an individual criminal responsibility framework makes the report more helpful as a means of advocating for prosecutions, and the report and its appendices more useful as a compendium of evidence that could be used in any future prosecutions.

- f. The Indonesian leadership’s close association with and endorsement of the CTF gives the Commission’s report the potential to have a greater impact within Indonesia than the similar findings of other commissions and reports. The joint statement made by the two presidents on the handing over of the report includes an official acceptance by both heads of state of the Commission’s findings and conclusions. This amounts to official recognition that the Indonesian military, police and government committed crimes against humanity. Whether or not this recognition is intended to result in justice, it has certain consequences under international law, including an obligation to provide a remedy of some kind to victims. This may include reparations and/or the investigation and prosecution of the individuals responsible.

2. The conclusive truth?

Despite the CTF’s mandate to “establish the conclusive truth,” it seems clear that the commission’s report will not stand as the final word on the violence in East Timor.

a. There are significant gaps and areas of imprecision in the CTF’s findings.

The CTF fails to resolve several issues which are of central importance regarding the human rights violations and crimes committed in East Timor in 1999.

- *The specific role of Indonesian institutions, especially at senior levels*

One such gap relates to the formation of militias in 1998 and 1999. While the CTF makes strong findings that militias were not formed “spontaneously” and that Indonesian institutions “assisted” in creating of militias, it does not indicate who initiated and led the process of militia formation. The report does reveal the close links between militias and Indonesian institutions, including the blurring of lines between official civilian defense groups and militias. It also shows the involvement of high-ranking Indonesian officials in militia formation and the organization of pro-integration groups.³⁹ However in some places it implies that militias arose at the instigation of

³⁷ Law 26 of 2000 Concerning Human Rights Court, art. 7.

³⁸ Article 13(a) of the CTF’s TOR required it to “work under” the “relevant principles” from Indonesian Law no.27/2004 on the Commission of Truth and Reconciliation (which was declared invalid by the Indonesian Constitutional Court in 2006) and the Timor-Leste Law no.10/2001 on the Commission of Reception, Truth and Reconciliation (CAVR). Although Indonesian law (in article 1) adopted the definitions used in the Law on Human Rights Courts, the CAVR regulation used a more detailed, sophisticated definition of “human rights violations”: UNTAET Regulation No. 2001/10, s 1(c).

³⁹ See *Per Memoriam Ad Spem*, 161-2 and references to the meeting in Denpasar on May 15, 1999 (pp. 199-200) which are explained in more detail at *Per Memoriam Ad Spem*, Report of the Expert Adviser to the CTF, 305-306..

Timorese pro-autonomy figures who requested assistance from Indonesian institutions.⁴⁰ The CTF avoids dealing directly with the question of whether Indonesian authorities conceived and oversaw the militias' creation and use to perpetrate violence.

More generally, the report does not identify how high up in Indonesian institutions involvement with militias extended, or what the specific nature of this involvement was: Was there merely a failure to prevent violence, an endorsement of the violence, or were senior officials involved in instigating and planning violence? These questions are important because they have implications for responsibility, institutional reform and how such violence should be prevented in the future. KPP-HAM and the OHCHR's reports suggest that senior Indonesian officials not only failed to prevent violence but were actively involved in initiating it.⁴¹ The CTF's work provided an opportunity to test whether evidence from the "four sets of documents" and other sources supports these conclusions.⁴²

However the CTF report avoids addressing these issues. In most cases findings relating to Indonesian institutions are qualified as being "at the operational level" or "at the local level." The roles of more senior levels of government and the TNI are rarely discussed and never clearly resolved. Little attempt was made to use the evidence that was accessed (or accessible) through the document review process to address this important issue.⁴³ Ultimately the nature of institutional involvement in violence is left unresolved.

- *The role of specific sub-institutions*

The CTF's findings on institutional responsibility are weakened by their generality. The findings deal only with institutions at the broadest level. This is most clear in relation to the pro-independence structure, with the CTF recognizing that it had insufficient evidence to determine which part of the CNRT umbrella structure was responsible for crimes.⁴⁴

However the same difficulty applies to the findings on Indonesian institutions. Despite a useful explanation of the formal Indonesian civil, military and police structures early in the report that reveals the complexity of these institutions (pp. 39-48), the CTF's analysis and findings on institutional responsibility treat each of these organizations as discrete and monolithic. The question is perhaps most interesting in relation to the

⁴⁰ See *Per Memoriam Ad Spem*, 162-4, which states that pro-integration leader Tomas Gonçalves went to Jakarta for meetings "to build support for the formation of pro-autonomy militias," that "[t]hese meetings had specific objectives – such as seeking guarantees that the pro-autonomy leaders would receive weapons to arm these groups, and that the TNI would provide additional support." The CTF concludes that "there was an institutional awareness in the Indonesian government and military... that the autonomy movement in East Timor was organizing to arm themselves." (see also p. 268).

⁴¹ KPP-HAM Report, para. 90; Robinson, *East Timor 1999*, 206-208.

⁴² The CTF's expert adviser notes this in his first report to the commission. Referring to the generality of the CAVR's findings on the existence of a high-level plan within the TNI to organize violence, he wrote, "A precise outline of the planned aspects of institutional perpetration of violations in 1999 is a contribution that the CTF has the ability to make," (p. 205).

⁴³ The document review team collected some significant pieces of evidence on this question, yet this evidence was not mentioned in the report. See especially *Per Memoriam Ad Spem*, Report of the Expert Advisor to the CTF, 226-248, but see also more generally the Annex to this paper.

⁴⁴ *Per Memoriam Ad Spem*, 275: "...the ambiguities in the evidence as to lines of command and institutional linkage mandate caution in reaching definitive conclusions as to the role of specific institutions."

military, which at least in theory was divided into territorial and operational structures with distinct roles and also included special divisions such as the Joint Intelligence Unit (SGI). Previous reports on crimes committed in East Timor during 1999, most notably the OHCHR report, draw attention to the particular roles that Special Forces (Kopassus) and the intelligence played in supporting and organizing militia violence. The OHCHR report stated that of the 12 senior military officials it identified as persons suspected of involvement in planning the violence, "...virtually all... were either deployed with Kopassus units in East Timor, or shared career histories in Kopassus or military Intelligence." According to the report:

"The pivotal role of Kopassus and intelligence officers in the 1999 violence is consistent with long-standing patterns of responsibility for grave human rights violations in East Timor and Indonesia, and it suggests a serious, underlying institutional problem in the Indonesian armed forces. Accordingly, a proper assessment of the causes of the violence in 1999, and responsibility for it, must extend beyond matters of individual criminal responsibility, and address broader patterns of command and control within the Indonesian military and state apparatus."⁴⁵

With a focus on institutional responsibility and with a former TNI officer among its members, the CTF was well placed to carry out the assessment recommended by the OHCHR report. However, the CTF report makes no attempt to consider the roles of various parts of the Indonesian military. Despite the CTF's recognition that pre-1999 armed civilian groups, were usually organized by Kopassus,⁴⁶ and despite evidence from the document review repeatedly demonstrating the special roles of Kopassus and SGI,⁴⁷ the CTF makes only passing reference to these units in its findings.⁴⁸ In the absence of findings on these issues, the CTF was unable to make specific recommendations for reform.

- *The veracity of allegations against the United Nations*

Another significant omission from the CTF report relates to the role and responsibility of the UN, especially the United Nations Mission in East Timor (UNAMET). The OHCHR report noted:

"Indonesian authorities have sought to blame UNAMET for the violence in East Timor, especially in the post-ballot period. Criticism has typically focused on allegations of UNAMET bias or foul play in conducting the referendum."⁴⁹

A number of allegations of this nature, as well as some more serious accusations, were made during the course of the CTF's public hearings. For example, allegations were made that UNAMET cheated, was not neutral, and some of its staff committed human

⁴⁵ Robinson, *East Timor 1999*, 208.

⁴⁶ *Per Memoriam Ad Spem*, 46.

⁴⁷ See evidence implicating Kopassus and/or SGI at *Per Memoriam Ad Spem*, Report of the Expert Advisor to the CTF, 17, 23, 27-28, 30, 34, 41, 193, 233, 234, 263-64, 272, 274, 329, 347-61 and *Per Memoriam Ad Spem*, Addendum to Report of the Expert Advisor to the CTF, 28, 60, 61, 62, 70, 95-96, 101, 129, 131, 136, 142, 153, 154, 156.

⁴⁸ *Per Memoriam Ad Spem*, 290: "The Commission's analysis of the evidence in light of the two questions that form the basis of findings of institutional responsibility revealed that militia operations followed various operational patterns, including actions carried out by pro-autonomy militia without any TNI involvement, operations at the instigation or orders of Indonesian officers, and joint operations carried out by TNI, or more specifically, Kopassus personnel together with militia members."

⁴⁹ Robinson, *East Timor 1999*, 218.

rights violations.⁵⁰ These allegations mostly came from people who were either investigated by KPPHAM and/or indicted by the SCU.

Yet regardless of the fact that accusations of UNAMET wrongdoing were made within the CTF's own proceedings, the CTF report does not respond to these allegations and state whether or not they are supported by evidence. The report laments the UN's decision not to participate in the commission's fact-finding work (pp. 143, 265), but states that despite this, "The factual information available to the Commission from all of its others [sic] sources is more than sufficient to base its findings as to the conclusive truth" (p 143).

However statements elsewhere appear to contradict this. In the section on "contextual factors leading to human rights violations," the CTF explains that it received statements questioning UNAMET's neutrality in conducting the popular consultation. Noting that the CTF's ability to uncover the truth about this was limited because the UN would not participate, the commission simply concludes that:

"Because of the limitations of the fact finding process... the Commission was not in a position to be able to carry out the kind of systematic investigation that alone could fully determine whether weaknesses or biases within the UN system might have affected the UN's role in the Popular Consultation. The statements presented to the Commission during the Fact Finding process provide primarily unsubstantiated allegations about the kinds of activities that purportedly reflect a lack of neutrality that could have affected the events in 1999, but other accounts of the Popular Consultation have contradicted these conclusions." (p. 154)

Despite this, the CTF does make one significant, definitive finding on the UN's role:

"The Commission has found that the argument that the violence was the spontaneous result of a perception by pro-autonomy groups that UNAMET had acted without impartiality in the Popular Consultation is not supported by the available evidence." (p. 280, footnote 6)

However it is notable that the extensive documentation reviewed by the CTF did not produce credible evidence of UN fraud or wrongdoing. This is evident from a thorough reading of the report's two appendices. In the light of this, it is regrettable that the CTF did not make a stronger, more comprehensive and more prominent finding regarding the veracity of statements made during its public hearings.

b. Failure to respond to false allegations made during public hearings.

The CTF's public hearings allowed alleged perpetrators to provide self-serving, unsubstantiated accounts of the events of 1999.⁵¹ There is a danger, particularly given the high public profile of some who spoke, that comments made during these hearings – whether correct or not – will continue to resonate with those who heard them, especially in Indonesia. For this reason, ICTJ and local human rights groups recommended that the CTF's report expressly correct the record regarding allegations made during public hearings that the Commission found were untrue.⁵²

On occasion the report sets out in detail the evidence a witness gave during a public hearing and draws conclusions about credibility and testimonial veracity. The clearest

⁵⁰ For example, testimony given by Mateus Carvalho, Domingos Soares, Camilo dos Santos, Noer Muis, Wiranto, Leoneto Martins, Yan Rizal, Joanico Belo, Noer Muis and Kiki Syahnakri.

⁵¹ See Hirst, "Too much friendship, too little truth," 22-36.

⁵² Ibid., 38.

example of this appears in Chapter 7 in respect of two Timorese militia figures: Edmundo da Conceição Silva, the former district administrator of Lautem who was also “guardian” of Team Alpha militia, and Simao Lopes, former commander of Sakunar militia. Their credibility is expressly questioned after more plausible evidence is presented which contradicts their testimony.⁵³ This is a commendable approach.

Unfortunately, that approach is not applied to the many other witnesses whose testimony at the public hearings was equally questionable. Most significantly, the report does not expressly question the credibility of any officials from the TNI, police or Indonesian government institutions - even though a number of these officials gave evidence that was clearly contradicted by the CTF’s findings. In some cases, the Commission strongly implies that some of the information given in a witness’s testimony is not reliable, or indicates that it prefers evidence from another source.⁵⁴ However in many more cases testimony that is inconsistent with the CTF’s findings is simply not mentioned, and the credibility of those who presented it is not questioned at all.

The result was that the self-serving evidence presented by a number of witnesses, some of whom stand indicted for crimes against humanity, was never seriously cross-examined or analyzed, even in the commission’s own final report. This flaw should be an important lesson for future truth commissions to exercise caution before allowing alleged perpetrators to provide unchallenged evidence in public hearings.

c. The Commission’s findings regarding pro-independence crimes are flawed

The CTF report reviews various sources, mostly accessed through its document review, relating to crimes committed by supporters of independence against those supporting of integration. Previous mechanisms have not investigated this issue in detail, principally because of the relatively small number of reports of such crimes.⁵⁵ And yet, because pro-independence crimes are the subject of persistent misconceptions and misinformation in Indonesia, and some level of taboo in Timor-Leste, a well-evidenced analysis of such crimes could have been a worthwhile contribution to truth-seeking.

Unfortunately, the CTF’s work in this area fell short of the careful research and analysis required. In most cases, the previous mechanisms had not focused on pro-independence crimes committed during 1999 since very few such crimes had been reported to them. Because of this, the document review revealed patchy and often inconclusive information about perpetrators’ institutional affiliations, whether victims were combatants or civilians, and whether acts were part of a systematic attack. At the same time, weaknesses in the CTF’s other “fact-finding” processes, which focused principally on accused perpetrators from the pro-integration movement, meant that additional evidence gathered on the activities of pro-independence groups was largely unreliable.

Ultimately the CTF found that independence supporters had committed various human rights violations, but that there was not enough evidence to prove that these amounted

⁵³ *Per Memoriam Ad Spem*, 217, 224 and 225.

⁵⁴ See this most clearly in respect of Adam Damiri and Zacky Anwar (p. 174) and again in respect of Damiri (p. 192).

⁵⁵ This is recognized by the CTF: “the total number of all violations reported as perpetrated by pro-independence groups in 1999 is few (less than 50), whereas there are thousands of reports of violations by pro-autonomy groups (p287).

to “gross human rights violations” for which institutional responsibility existed.⁵⁶ The one exception relates to “illegal detentions,” which the commission concludes were carried out by supporters of independence on a widespread or systematic basis against a civilian population. The CTF therefore finds that pro-independence groups carried out “gross human rights violations,” in the form of illegal detentions, , but does not resolve whether Falintil, CNRT or both were responsible.⁵⁷ There are several difficulties with this finding:

1. It is based on only a small amount of evidence. Chapter 7 documents six cases of detention.⁵⁸ (By contrast, in discussing militia crimes Chapter 7 provides evidence from 22 separate witnesses to post-ballot sexual violence in one district alone, and many of these witnesses describe multiple crimes.) It is certainly possible that the cases of detention the CTF considered represent a wider pattern. If so, it is unfortunate that such a small amount of evidence was collected when more may have existed. If the SCU or the other sources used in the review did not have such evidence, the commission should have sought it out through fact-finding. This did not occur; the CTF made no attempt to locate former victims or perpetrators of pro-independence detentions.⁵⁹
2. The CTF defines “gross human rights violations” as crimes against humanity under customary international law.⁶⁰ But the evidence in the report on pro-independence detentions does not satisfy the elements of this crime.

Most significantly, the act must be a part of an attack “directed against a civilian population”.⁶¹ Yet when discussing pro-independence detentions, the CTF presents evidence relating almost exclusively to the detention of combatants. In five of the six cases discussed in the report, the detainees were militia members (in one case a policeman was also detained). In the sixth, the detainees’ status is not mentioned. The report does not analyze in this context whether militia members qualify as “a civilian population.”⁶² Nor does it discuss whether acts aimed at militias that sometimes also affect civilians qualify as “directed at” a civilian population.

⁵⁶ *Per Memoriam Ad Spem*, xiv, xvii, 250-1, 290; see also 240-1.

⁵⁷ *Per Memoriam Ad Spem*, xiv-xv, xvii, 248, 287, 275, 290, 291.

⁵⁸ One additional case involving the detention of a (possibly former) militia member in Viqueque is mentioned in the second expert report appended to *Per Memoriam Ad Spem*: Addendum to Report of the Expert Advisor to the CTF, 93.

⁵⁹ Information provided by CTF staff.

⁶⁰ See most clearly *Per Memoriam Ad Spem*, pp. 22-4, including footnote 10, as well as 66-70, 146 and 284.

⁶¹ According to the definition of crimes against humanity under international law: see Rome Statute art. 7(1); ICTY Statute art. 5; ICTR Statute art. 3. The commission uses this element as part of its definition of “gross human rights violation”: see *Per Memoriam Ad Spem*, pp. 22, 23, 24, 66-8.

⁶² Reference is made to this question in the Report of the Expert Advisor to the CTF (pp. 8 and 219), but the position under international law is misstated there. The expert adviser report claims that “a person’s civilian status is to be determined at the time of the attack” (p. 219) and that the relevant question is whether the person “at the time violence [was] inflicted upon them, [was] not in combat,” (p. 8). It cites several authorities, most relevantly the ICTY Trial Judgment in *Prosecutor v Blaskic* (p. 219). However the law was clarified on appeal in that case, where the ICTY Appeals Chamber explained: “[T]he Trial Chamber’s view that the specific situation of the victim at the time the crimes were committed must be taken into account in determining his standing as a civilian may be misleading. The ICRC Commentary is instructive on this point and states:

All members of the armed forces are combatants, and only members of the armed forces are combatants. This should therefore dispense with the concept of quasi-combatants, which has sometimes been used on

However international law is clear on these questions. Members of “armed organizations” party to an armed conflict do not have civilian status.⁶³ Members of such groups retain combatant status (and thus are not civilians) whether or not they are armed or in combat at a given time.⁶⁴ It is only where combatants have ceased to take part in hostilities altogether (when they have been “permanently demobilized”) that they acquire civilian status.⁶⁵ The CTF itself seems to recognize that militia members were not civilians when it states, “Victims most often appear to be active militia members, but their detainees may have also included non-combatant civilians” (p. 245, see also p. 275). Yet the report does not mention a single case in which detainees held by pro-independence groups were shown to have been “non-combatant civilians.” Much less does it demonstrate, as international law would require, that a civilian population was the “primary object of the attack.”⁶⁶ Even if some civilians were inadvertently detained among with combatants (militia members) this would not suffice since it would not constitute an attack “directed against” a civilian population.⁶⁷

The CTF was not a judicial body. It was not required to undertake detailed analysis of the elements of the crimes it was considering. However the CTF itself – commendably – adopted a framework using international legal principles. This approach should have been applied clearly and consistently. Small details of legal precision might be overlooked in the report of a truth commission not mandated to make binding findings on responsibility, but fundamental questions such as whether or not victims constitute “a civilian population” should not have been disregarded.

Nor should the Commission have disregarded the significant question of whether the laws of armed conflict were applicable. This subject would certainly have been relevant in determining the legality or illegality of detentions. A finding that the laws of war applied would not have justified serious pro-independence wrongdoing where it did occur, but may have provided a better basis for demonstrating criminal responsibility. This is because while isolated pro-independence crimes (such as killings) did not amount to “gross human rights violations in the form of crimes against humanity” (to use the CTF’s terminology), some may have constituted war crimes.

the basis of activities related more or less directly with the war effort. Similarly, any concept of a part-time status, a semi-civilian, semi-military status, soldier by night and peaceful citizen by day, also disappears. A civilian who is incorporated in an armed organization such as that mentioned in paragraph 1, becomes a member of the military and a combatant throughout the duration of the hostilities (or in any case, until he is permanently demobilized by the responsible command referred to in paragraph 1), whether or not he is in combat, or for the time being armed. ...

As a result, the specific situation of the victim at the time the crimes are committed may not be determinative of his civilian or non-civilian status. If he is indeed a member of an armed organization, the fact that he is not armed or in combat at the time of the commission of crimes, does not accord him civilian status.” *Prosecutor v Blaskic*, ICTY Case No. Case No.:IT-95-14, Appeals Chamber Judgment, July 29, 2004.

⁶³ Ibid., paras 110-14.

⁶⁴ Ibid., para.114.

⁶⁵ Ibid.

⁶⁶ *Prosecutor v Kunarac et al.*, ICTJ Case No. IT-96-23&23/1, Appeals Chamber Judgment, June 12, 2002, para. 91.

⁶⁷ For a case of systematic detentions that is analogous in some respects to that dealt with by the CTF, see *Prosecutor v Limaj et al.*, ICTY Case No. IT-03-66, Trial Chamber Judgment, Nov. 30, 2005, especially paras. 205-11. There, the KLA’s policy of detaining Serbian combatants was held not to be part of an attack “directed against a civilian population,” even though numerous civilians were shown to have been mistakenly detained along with the combatants.

The CTF's finding that pro-independence groups committed illegal detentions amounting to "gross human rights violations" is therefore questionable in the light of the evidence provided and international law. The CTF also lists a series of minor offences committed by "pro-independence youth" including a case in which around US \$1.90 was "extorted" from an Indonesian soldier (p. 250).⁶⁸ Reports of such relatively minor crimes seem out of place when included in the context of the egregious crimes detailed throughout the rest of the report.

Together these factors suggest that rather than applying the same standard to all groups, the CTF sought a result in which all parties shared blame. The report thus presents as the result of a political compromise: "If you say you did, we'll say we did." The ultimate embodiment of this is the recommendation that the two presidents "together acknowledge responsibility for past violence and apologize to the peoples of the two nations" which, despite caveats in the report that the scale of violations was not the same on both sides, tries to put the two parties on an equal footing. The wealth of detailed evidence referred to in the report and its appendices does not support such a result..

d. The report is weak on the history and causes of the violence

The commission's mandate related to violence that occurred in 1999 only. However because it was required to reveal the "causes" of that violence, the CTF included a chapter on Historical, Social and Political Context. This demonstrates a commendable recognition that the events of 1999 cannot be separated from the 24 years of conflict which preceded them.

Unfortunately the chapter presents significant problems. No mention is made of some important historical events (such as the December 7, 1975 military operation to take control of Dili) and passing, uncritical mention is made of other significant and controversial events.⁶⁹ The accompanying analysis is weak. One example is the persistent suggestion that the reform of Indonesian institutions was too rapid and actually contributed to the violence.⁷⁰ The result is a patchy history, thinly supported by evidence, and accompanied by questionable analysis. Although this chapter "is not meant to convey final conclusions about the period of history prior to 1999" (p. 61) there is a danger that it will mislead readers who are unfamiliar with the period in question.

These weaknesses largely arose because events before 1999 were "not the subject of its research or fact-finding" (p35). As a result minimal evidence was available to resolve differences of opinion among the commissioners about this period. Because only those points which "could be agreed on by both countries" were included (p. 61), many facts were left out. Meanwhile assertions which could have been disproved or questioned,

⁶⁸ A TNI telegram reported that the soldier was threatened into giving youths Rp.15,000: *Per Memoriam Ad Spem*, 250. (Equivalent to about US \$1.90 according to the average exchange rate for 1999 accessed at www.measuringworth.org/exchange/global.)

⁶⁹ For example the Balibo Declaration (p. 37) and the "East Timor Popular Assembly" (p. 38) that are said to have demonstrated a desire to integrate with Indonesia are mentioned, but the report does not discuss the well documented allegations that these events involved coercion and manipulation and thus should not be seen as acts of self-determination by the Timorese people.

⁷⁰ See at 63, 277, 278 including the statements that "The structural security sector reforms ... weakened the capacity of the security forces to fulfill their role in providing security."

had adequate research been done, were left in. And in the absence of independent research, too much reliance was placed on the views of accused perpetrators.⁷¹

These difficulties are significant not only because they produced a poor history chapter. More significantly, weak historical research and analysis regarding earlier periods of conflict undermined the commission's ability to analyze the causes of violence and therefore to respond with appropriate and detailed recommendations.

IV. THE CTF'S RECOMMENDATIONS

A. Creation of the recommendations

According to the CTF, its recommendations reflect the views of participants in the commission's fact-finding process, input from a series of workshops, and research (p. 295). One weakness of this approach is that it resulted in minimal input from the victims of human rights violations. The CTF's workshops and seminars focused almost exclusively on senior members of state institutions and academics (pp. 30 and 343-4).⁷² Statement-taking, interviews and hearings all involved a far greater number of alleged perpetrators than victims.⁷³

On the other hand, the commission did endeavor to gather information from experts about best practice and sought input in areas such as security sector reform and conflict resolution. It hired another adviser to assist with researching and writing the recommendations. Unfortunately that adviser did not produce useful inputs, and the commission's staff had to research and prepare draft recommendations in a short period of time as the report neared completion. Ultimately, the process suffered from a lack of detailed research. This, and subsequent compromises among commissioners reduced the final recommendations to areas of common ground that are sometimes vague and lack detail. Despite this, the CTF's recommendations have the potential to make a worthwhile impact if they are implemented.

B. Substance of the recommendations

The CTF recommendations address a number of clearly important areas for action. They also attempt to learn from the challenges faced in Timor-Leste after the completion of the CAVR report, by recommending mechanisms to ensure dissemination and implementation. In many other respects the recommendations are remarkably similar to the CAVR recommendations. However, the CTF does not refer once to the CAVR recommendations, or how the two sets of recommendations should be prioritized or integrated.

⁷¹ The CTF stated that these "interpretations of the historical experience of violence may be seen as providing insight into why certain types of human rights violations accompanied political differences in 1999" (p. 151). Conveniently, these "interpretations" emphasized the *reformasi* itself as a cause of violence, coinciding with the CTF's mandate to "bear in mind the complexity of the transitional situation in 1999."

⁷² Victims attended some of the "friendship workshops, but not as speakers.

⁷³ See the report's list of 119 people who gave statements or interviews. Fifty-six were suspected perpetrators while only 24 were victims. The remaining 39 were categorized as witnesses. Of the 28 people who spoke in public or closed hearings but did not provide statements or interviews, only two were victims, nine were accused perpetrators, and 17 were other witnesses.

1. The CTF recommendations and justice for past crimes

The CTF's own TOR prevented it from recommending any new judicial body.⁷⁴ But the commission does make an important recommendation to strengthen mechanisms for the investigation and prosecution of human rights violations. Unfortunately, it is not clear whether these mechanisms were intended to focus on future violations or those that occurred in 1999.

The commission made a clear decision not to recommend amnesty or measures for the rehabilitation of anyone wrongly accused of human rights violations.⁷⁵ An important reason for this was that the CTF did not establish a fair process open to all for receiving and processing amnesty applications, or a process for investigating individual cases. However in respect of amnesty the CTF also recognized that the alleged perpetrators who appeared in the hearings had not provided "full cooperation," reflecting the commission's view that these witnesses had either failed to "testify truthfully, or had not shown any remorse."⁷⁶ Perhaps most importantly, the CTF stated "Amnesty would not be in accordance with its goals of restoring human dignity, creating the foundation for reconciliation between the two countries, and ensuring the non-recurrence of violence within a framework guaranteed by the rule of law," (p. 297). This is a clear, commendable statement against amnesty in general. Together with the CTF's recommendations for institutional reform to enhance accountability, it expresses a strong position on individual criminal accountability.

The CTF's recommendations do, however, contain one section that seems contradictory to its emphasis on strengthening accountability. This is the recommendation that efforts be taken to enable "safe crossing" of the border, including for people currently outside Timor-Leste who are the subject of criminal investigations, outstanding indictments, and/or arrest warrants (p. 300). The CTF recommends that relevant institutions, including the Timorese Supreme Council of the Judiciary, should be consulted on "the legal feasibility and implications" of a "safe crossing" policy for people suspected of committing crimes in East Timor. It states that "[r]esolution of these legal issues may constitute a first step towards a development of a more comprehensive joint policy on formal and informal reconciliation processes" (p. 300). It is not clear how this recommendation is reconcilable with those calling for the strengthening of accountability mechanisms or with the commission's position on amnesty.

2. The CTF recommendations and institutional reform

Given the CTF's mandated focus on "institutional responsibility," the two governments should view the recommendations on institutional reform as particularly important. At the core of these recommendations is recognition that a fundamental transformation of "military doctrine and institutional practices and mentalities" within security institutions is required. This includes:

- moving from the use of armed civilian groups to a military reserve system regulated by law;

⁷⁴ TOR, art. 13(e).

⁷⁵ As it was expressly permitted to do by its terms of reference: TOR, art. 14 (c).

⁷⁶ See the CTF's definition of "full cooperation": *Per Memoriam Ad Spem*, 15.

- clearly delineating in law the roles of policymaking civil authorities from the respective military and police authorities that have operational responsibilities; and
- completing the legal separation between the roles of the police and the military.

In addition, the report recommends various training programs to increase human rights awareness not only for defense and security institutions but also civil government bodies.

These recommendations are general enough to be relevant to both Timor-Leste and Indonesia, and the report does not differentiate between the steps to be taken in each state. Unfortunately it seems that weaknesses in the CTF's research process undermined its ability to make specific and concrete recommendations. The results are recommendations that set out general goals for the reform of key institutions. Many of these will already be familiar to those working in the field. However their re-statement by an official report of this kind is significant.

Given their generality, the recommendations should be viewed as a starting point. They need to be developed significantly in order to be meaningfully implemented. Some specific measures that would be consistent with the tenor of the CTF's recommendations and that could be taken to support their implementation include:

- Measures for the vetting of security institutions to remove the people most responsible for human rights violations. In line with the CTF's general aversion to dealing with the role of individuals, it does not expressly recommend such a process. However vetting would be complementary to the measures it proposes and necessary to achieve the goals it sets out. In the absence of such programs and while past violators in both countries are seen publicly to be promoted rather than censured, it is doubtful how much impact human rights training programs can have on institutional culture.⁷⁷
- An independent investigation in Indonesia into the role of specific military agencies and the specific military practices within the TNI that contributed to violations in Timor-Leste. For example, the use of territorial units and the role of Kopassus (special forces) and intelligence agencies should be considered. A thorough review of ongoing efforts at security sector reform would be useful, including the recent legal prohibition of TNI involvement in private businesses. Such investigations could provide a level of detail that the CTF report lacks in order to make clear how the goals identified by the commission can be met.

More broadly, the CTF's recommendations should be understood as supporting the more detailed sets of recommendations that other bodies have already made (and with which they fundamentally agree).⁷⁸ Although more specific and concrete recommendations from the CTF may have been preferable, that level of detail is available

⁷⁷ In a recent example, Major-General Sunarko was promoted to the position of Regional Military Commander for Aceh (Iskandar Muda Military Area). Sunarko was named in the OHCHR report as one of those who appears to bear both individual and command responsibility for crimes committed in East Timor in 1999. In another case, Burhanuddin Siagian, who was not only named in the OHCHR report but was twice indicted in Timor-Leste for crimes against humanity (Case nos. 2/2003 and 18/2003), was later promoted to the post of Regional Military Commander in West Papua and then again to his current position as Inspector General for the Brawijaya Military Command (East Java). Numerous other examples exist.

⁷⁸ A recent example for Timor-Leste is International Crisis Group, "Timor Leste: Security Sector Reform," ICG Asia Report No. 143, Jan. 17, 2008.

elsewhere, and its absence in the CTF report should not be taken as a reason not to pursue the broad goals set out there..

3. The CTF recommendations and gender-based violence

The CTF makes strong, clear findings that militia groups and Indonesian security forces systematically committed sexual crimes against women in East Timor. However the recommendations for addressing gender-based crimes are disappointingly sparse.

The commission recommends “specialized training programs for military, police, and civilian officials” that address the need to protect women, children and other vulnerable groups from sexual violence. It also recommends the creation of special mechanisms within the police and prosecution institutions to deal with “gender crimes committed in the context of conflict, civil unrest or political disturbance” (p. 298). In addition victims of sexual violence are specifically mentioned in the context of recommended programs for reparation (see further below).

These recommendations are worthwhile but do not go far enough. They fail to place sexual violence in the broader context of violence against women and instead treat it as a phenomenon that begins and ends with a conflict. Thus no measures are recommended to address the culture of gender-based violence that survives after conflict and occurs more frequently in private homes than it does at the hands of state officials.

4. The CTF recommendations and reparations for victims

The commission does not make discrete recommendations for a reparations scheme but does recommend a number of measures which have reparative value. Many constitute reparations in the broad sense in so far as they are directed at achieving a guarantee of non-repetition.⁷⁹ Other forms of reparations included in the CTF’s recommendations include:

- Creating a documentation and conflict resolution center which would, among other things, develop “survivor healing programs.” This includes “therapeutic programs for victims of violence, and particularly specialized workshops for individuals who have experienced sexual violence or torture” (p. 302).
- Establishing a commission for disappeared persons to investigate the fate of disappeared persons and provide information to their families.
- The proposed commission for disappeared persons would also seek and share information on the whereabouts of children separated from their families.
- Programs should be continued to ensure the protection of separated children’s rights, including to access identification and citizenship procedures. Education and scholarship programs should be established for “these children who were victims of the violence.”
- The making of a joint statement from the presidents of Indonesia and Timor-Leste acknowledging responsibility for past violence and apologizing to the people of both countries, “especially to the victims of violence.”

⁷⁹ See the UN’s “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,” GA Resolution 60/147, March 21, 2006, para. 23.

Some confusion is created by the CTF's insistence that it "makes no recommendations for individual reparations" (p. 295).⁸⁰ The report does not explain this position,^d⁸¹ nor does it clarify how this fits with the commission's specific recommendations for trauma counseling, scholarships and other such measures that usually target individuals. It seems possible that what the CTF sought to avoid was payment of individual monetary compensation, rather than the provision of individual benefits of other kinds.

The CTF's efforts to include reparative measures in its recommendations are commendable, and each of the measures recommended is worthwhile. However it is unfortunate that the CTF did not go further and make recommendations for a coherent and comprehensive reparations package. Most significantly, the report gives insufficient attention to symbolic reparations and their fundamental role in providing recognition to victims. The recommendations' lack of detail and somewhat piecemeal approach put them in danger of overlooking some groups of victims who are very much in need, most obviously the dependents of those killed, women who gave birth as a result of rapes, and those who suffer continuing physical disability as a result of violence.

However nothing in the report indicates that the commission wished to neglect such groups or that it consciously avoided mention of symbolic reparations. The spirit of the recommendations reflects a desire to assist victims of human rights violations to regain their dignity and self-sufficiency. Where the recommendations in some respects fail to detail the steps necessary to achieve this outcome this is likely due to the commission's process for developing its recommendations, which focused on input from official institutions and neglected input from victims themselves.

For this reason, it is hoped that those responsible for implementing the recommendations will focus on their spirit and intent, and develop them further through the sorts of research and consultation that the CTF did not conduct itself. The detailed recommendations on reparations made by the CAVR would assist greatly in this process.

c. Implementation and impact

A truth commission report may have some intrinsic value as the repository of a historical record. However the impact of even the most credible, comprehensive report depend on the steps taken after its completion, in particular how it is made available and how its recommendations are implemented. In the case of the CTF these processes have yet to begin in earnest.

1. Dissemination and impact

The CTF's own recommendations for dissemination recognized the need for a variety of methods of dissemination including activities at a grassroots level.

Unfortunately the CTF did not make all possible efforts to ensure that dissemination occurred quickly and effectively. The report has not been translated into Tetum, the

⁸⁰ The CTF states that its recommendations "will take the form of collective reparations, which will require material and other forms of support from the relevant government and institutions" (p. 295).

⁸¹ The Commission states "the obligation to provide support for collective reparations arises from the conclusions on state and institutional responsibility." But it does not explain why it fails to address the obligations to provide individual reparations that are well established under international law.

national language of Timor-Leste, despite an express requirement to do so under the TOR.⁸² An abridged, accessible version of the report (a “popular version”) is recommended (p. 305), but the CTF did not itself create one. The report’s detailed appendices, which contain the most thorough and convincing collation of evidence in support of the CTF’s findings, will be distributed in English only.⁸³ Since the commission no longer exists, it is not clear who will take responsibility for addressing these issues, and what institution could have the power to certify a translation or popular version as a true representation of the CTF’s work. This is particularly problematic given the report’s many ambiguities.

In order to overcome these and other challenges, the two governments should ensure that they learn from the lessons of the CAVR process. The challenges in achieving effective and widespread dissemination, particularly to victims and to rural communities, should not be underestimated. As the experience of the CAVR report has revealed, this requires a significant commitment of time and resources.

2. Political will

One of the CTF’s clearest potential advantages is that both governments support its work and results. This has given some hope that the commission’s findings will be publicized and its recommendations implemented.

Upon the submission of the report the Indonesian and Timorese heads of state and government committed to the “faithful implementation of the Commission’s recommendations” and to making the report available to the public.⁸⁴

However the same statement gives the first indications that the leaders may not intend to comply fully with the CTF’s recommendations. The presidents did not follow the recommendation to “acknowledge responsibility for past violence and apologize to the peoples of the two nations and especially to the victims of violence for the suffering they have endured” (p. 304). Instead the statement “express[ed] remorse,” but did not expressly acknowledge responsibility. In addition, the statement indicated that recommendations would be implemented through the Joint Ministerial Commission for Bilateral Cooperation. This diverges from the CTF’s recommendation to appoint a special advisory group to oversee dissemination and to provide input on the creation of a specific implementation body.

The signs indicating political will are thus at this stage mixed. In Indonesia, the foreign ministry has been supportive throughout the process, and (retired) General Agus Widjojo, one of the CTF’s key commissioners, is deputy leader of a presidential advisory unit on reform (“UKP3KR”). Other institutions and parts of the Indonesian government may be less supportive, including the attorney general’s office (strongly criticized in the report) and the TNI.

On the question of justice – not recommended by the CTF but demanded by human rights groups as a necessary response to its findings – there is less indication that

⁸² TOR, article 14(b).

⁸³ This is despite the fact that an almost final version of the appendices already exists in Indonesian. The commission estimated that finishing that version would take about around one month more of translating and editing. Information supplied by CTF staff.

⁸⁴ Joint Statement of the heads of state of the Republic of Indonesia and Democratic Republic of Timor-Leste, July 15, 2008, paras. 9 and 12.

progress will occur in the short term. Both countries' leaders have talked in terms that suggest political will does not yet exist for prosecutions.⁸⁵ It seems likely that progress on implementing the commission's recommendations in Indonesia, and on going beyond them to seek justice for the crimes covered by the report, depends on how much impact the report's evidence and findings have and whether they generate any support for reform and justice.

In Timor-Leste, carrying out the CTF's recommendations may be more an issue of capacity in the context of a state already overloaded with yet-to-be-implemented recommendations from commissions and international bodies. Implementation there will particularly need to take into account the CAVR's recommendations, which are more detailed and comprehensive, but otherwise similar to the CTF's. Given the significant public support in Timor-Leste for the CAVR report and the similarity between the two sets of recommendations, there are good grounds for the government and parliament to implement the recommendations together. Unfortunately, calls from some Timorese political parties to debate the CAVR and CTF reports in Parliament have so far been ignored or, on one occasion, defeated by Parliamentary vote.⁸⁶

V. THE WAY FORWARD

The CTF's final report is a mixed result. It has a number of positive contributions to make, particularly in the context of Indonesia, but also includes some questionable analysis, findings and recommendations. Given the scope of the CTF's funding and the amount of time available to it, much more could have been achieved and it is understandable that some, including victims, are disappointed.⁸⁷ However in the light of the commission's problematic TOR and flawed public hearings, the report is in many respects a surprising success.

⁸⁵ Indonesian Foreign Minister Hassan Wirayuda and Timorese Prime Minister Xanana Gusmao both said they considered that the CTF report closed the case of human rights violations from 1999. Wirayuda elaborated: "It's hoped that the problem of human rights violations prior to and during the referendum has been resolved and does not need to be followed up by legal processes." Presidents Yudhoyono and Ramos Horta respectively commented, "We cannot move forward and reach our dreams if we always focus our attention on the past" and "Justice is not and cannot be only prosecutorial in the sense of sending people to jail." Indonesian Defense Minister Juwono Sudarsono said, "There is no intention on either side of taking the matter to a Human Rights Court." Sutradara Ginting, a member of the Indonesian Parliament's Defense and Foreign Affairs Committee, said, "We reject any plan to bring the case to international justice." Abdul Khalik, "RI, Timor Leste pledge better relations after report," *Jakarta Post*, July 16, 2008; Olivia Rondonuwu, "Interview – E.Timor PM Satisfied with Indonesia's regret," *Reuters*, July 16, 2008; "Timor-Leste and us," *Jakarta Post* (editorial), July 16, 2008; Stephen Fitzpatrick, "Jakarta 'regrets' E Timor atrocities," *The Australian*, July 16, 2008; "E Timor report should not prompt prosecutions: Indonesian MP," *AFP*, July 15, 2008; "Regret but no apology yet from SBY over Timor violence," *AAP*, July 15, 2008; Karen Michelmores and Stephanie March, "Prospects for justice over Timor violence fading by the day," *AAP*, July 17, 2008.

⁸⁶ Fretilin and the National Unity Party (PUN). In his address to the Parliament on Oct. 9, 2008, President José Ramos Horta also called for the reports to be debated.; PN Adia Debate Rekomendasaun CAVR-CVA, PUN-Fretilin Konsidera AMP Lakoi Justisa," *Timor Post*, Nov. 11, 2008; "Kansela Debate Relatoriu Chega, Plenaria Paradu," *Suara Timor Lorosae*, Nov. 11, 2008. "PN Adia Diskusaun Relatoriu CAVR-CVA: Sei Halo Kontaku," *Jornal Nasional Diário*, Nov. 11, 2008.

⁸⁷ See the views of Nunato Soares (a victim who gave evidence to the CTF): "Korban 99 Kecewa Dengan Hasil KKP," *Suara Timor Lorosae*, July 19, 2008.

Ultimately the commission's legacy, and final judgment on whether it was a success or failure depends on what is made of the report, what processes for reform and justice it manages to spark, and how it is used or misused. With this in mind, the ICTJ recommends:

In Timor-Leste:

1. That the recommendations of the CTF report be implemented together with those of the CAVR report as part of a single comprehensive implementation program, which:
 - deals with crimes from 1999 and those from earlier periods of the conflict (starting from the Indonesian annexation of 1975) in an integrated manner;
 - is overseen by the Parliament but involves key government ministries (including the Ministry of Foreign Affairs where bilateral issues arise) and civil society;
 - prioritizes the creation of a comprehensive national reparations program for victims of the conflicts from 1975 to 1999 funded by contributions from the national budget and by voluntary contributions from international sources (including Indonesia); and also prioritizes the establishment of an independent institution to implement this reparations scheme and assist in the implementation of other recommendations;
 - involves ongoing consultations with victims and communities.
2. That actors and stakeholders currently engaged in the process of security-sector reform read and learn from the CTF report.

In Indonesia:

3. That the CTF and CAVR reports both be widely disseminated, and government and civil society undertake programs to teach and inform the Indonesian people about the two reports' key findings and recommendations.
4. That an honest re-evaluation be undertaken of Indonesian efforts at accountability to date and that new mechanisms be established for trying those most responsible for crimes in East Timor. These would be in line with the CTF's recommendation to strengthen mechanisms for accountability and the CTF's comments on the failures of the ad hoc process.
5. That actors and stakeholders engaged in ongoing security-sector reforms read and learn from the CTF report.
6. That Indonesia officially supports a Timor-Leste instituted national reparations program for victims of the conflicts from 1975 to 1999, contribute financially to such a program, and learn from this process in order to establish reparation programs for victims within Indonesia.

Internationally:

7. That the international community continues to press Timor-Leste and Indonesia to implement the recommendations of both the CTF and CAVR, and to prosecute those suspected of committing international crimes.
8. That the United Nations take concrete efforts to establish the "solidarity fund" referred to by the former secretary-general in his 2006 Report on Justice and

Reconciliation for Timor-Leste and that the objectives of this fund be widened so that any reparations measures it supports relate not only to 1999 but to the entire period between 1975 and 1999.

9. That states, NGOs and international organizations provide funding, whether bilaterally or through a UN “solidarity fund,” for the reparations programs the CAVR and CTF recommended.

Annex A: Extracts from the Report of the Expert Advisor to the CTF

3The CTF final report recognizes that militia groups and members of Indonesian security institutions “at the operational level” committed crimes against humanity in East Timor in 1999. But the report does not answer questions of whether senior Indonesian military and civilian officials were involved in committing these crimes. If so, were they complicit and were they part of the planning or instigation?

These questions are important in part because they relate to the nature of systematic problems in Indonesian security institutions. Were those institutions merely unable to control unruly elements at the field level? Or did they actively condone or organize human rights violations? The questions are also important because they are relevant in determining the individual criminal responsibility of the most senior members of the security institutions, whether through command responsibility¹ or another form of participation such as planning, assisting or participating in a joint criminal enterprise.²

While the roles senior Indonesian officials played in the violence of 1999 are not discussed in the CTF report itself, that question is addressed in some parts of the report’s two attachments. These attachments constitute the two reports from the commission’s expert advisor. The first report (presented in mid-2007) analyzed documents including those that the Serious Crimes Unit collected while formulating its indictments including against a number of senior members of the Indonesian security forces and civilian officials. This report to the CTF contains the beginnings of valuable research that indicates that senior officials at least knew of crimes being committed in East Timor; it may also show that they were able to control the violence, or that actually they planned or enabled it. The expert advisor explained:

“The case files as they were summarized in briefs are most effective in showing the TNI had knowledge of crimes committed by the militia and its own members at the highest levels of command. There is also significant evidence that suggests the highest levels of military command had the ability to control the actions of their own members and the militia, but chose not to exercise this control to prevent the commission of crimes.”
(p. 226³)

¹ Subtle differences exist between the specific legal definitions of command responsibility in various legal regimes, but the fundamental elements are the same. Namely, a superior is responsible for crimes committed by his or her subordinates when:

- the superior was in effective control of the subordinate;
- the superior knew or should have known that the subordinate was going to commit or had committed a crime; and
- the superior did not take steps to prevent the crime or punish the subordinate.

For specific provisions under Indonesian and Timorese law see: Indonesian Law 26/2000 Concerning Human Rights Courts, article 42; UNTAET Regulation 2000/15 On the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offences, section 16. For other international instruments see Rome Statute for the International Criminal Court, article 28; Statute of the International Criminal Tribunal for the former Yugoslavia, article 7(3); Statute of the International Criminal Tribunal for Rwanda, article 6(3).

² See Indonesian Law 26/2000 Concerning Human Rights Courts, article 41 and UNTAET Regulation, section 14.3.

³ All page references in this Annex relate to the first report attached to the CTF Final Report, *Seeking Truth and Responsibility: Report of the Expert Advisor to the CTF*, April 2007.

Evidence demonstrating knowledge

The CTF's expert advisor refers first to witness statements provided by "senior UN officials who met regularly with the diplomatic and military leadership of Indonesia in 1999." The advisor explains:

"These witness statements provide sound and credible evidence that the senior leadership of the TNI and other sectors of the Indonesian government had knowledge of ongoing human rights violations in East Timor in 1999." (p. 226)

Some extracts from the expert advisor's report explain this testimony:

...One senior official in the UN gave testimony to the SCU that shows both ABRI and the civil government of Indonesia had knowledge of human rights violations committed by militia, police and the TNI in both the pre and post- ballot periods. This official met on a regular basis with senior officials in the Indonesian military and civilian government, including the Commander of the Armed Forces of Indonesia and the Minister of Foreign Affairs.

In his testimony he detailed the content and specific occasions on which he provided information regarding the commission of grave violations of human rights in East Timor and evidence that suggested the Indonesian military and police were involved in these violations ...” (p. 227)

It is likely that knowledge of such operations on the ground regularly extended farther up the chain of command via the usual military channels of communication. Testimony from the UN senior liaison [*sic*] staff provides evidence that senior institutional military leadership was aware that they had the duty to monitor events in East Timor closely, especially if a possibility of human rights violations existed, through their own institutional means, in addition to the meetings with the UN. There are the usual means of communicating via telegrams and daily operational reports, but in addition the military had appointed a senior officer to monitor the situation on the ground in East Timor, Zacky Anwar Makarim. Therefore, it is unlikely that the senior leadership knew nothing of the actions of its troops on the ground and even more so, the actions of its commanders at the level of the KOREM. A portion of this witness' statement reads,

“Gen. Wiranto said that he was following the situation closely and that the morning reports from Dili, from Maj. Gen. Anwar and the Government task force, had become his daily ‘breakfast.’” (pp. 228-9)

In addition ... there is evidence that suggests senior military leadership was aware that TNI soldiers could have been engaging in human rights violations with the militia. According to the high-level UN witness:

“I then met with Gen. Wiranto in Jakarta on 7 July... At this meeting my main concern was to put to him this pattern of threats towards UNAMET, and I gave him a frank account of the incidents and general security climate. I put directly that we had mounting evidence that TNI soldiers were closely involved in militia activities. I made it clear that the problem was the lack of control of the behavior of the pro-integration militias. I urged that immediate action be taken against those responsible for these incidents and those that were roaming around the territory carrying out illegal activities.” (p. 231)

Evidence from other witnesses and from documentary sources also demonstrates that senior military officials were aware of gross human rights violations the militias were committing, including the attack on Manuel Carrascalao's house that followed the April 17 Aitarak rally in Dili:

In his interviews with SCU investigators, [a] witness narrated the video footage he took of the ... April 17th pro-autonomy rally. In this video he points out to the investigators that the rally, which was held at the Governor's Palace (*Palacio do Governo*) was patrolled not only by the civilian government, but also senior TNI officers. Kiki Syahnakri, Tono Suratman, Edy Soenadi and six other senior TNI officers are visible on the balcony but dressed in civilian clothes.

We have obtained a copy of the military telegram that reported those days' events and the content of the rally through the normal military chain-of-command. From this telegram we can surmise that that "pro-autonomy militias" were referred to by the military as synonymous with Aitarak and that the leadership of this group was clearly identified as Eurico Guterres (lines 2-4, Point 1). We can also surmise that the rally demonstrated to the military the systematic coordination between the different militia groups across East Timor, as indicated by the report's inclusion of the exact number of members (*anggota*) and origins of each militia group at the rally (BMP - 400 people from Liquica, Laksaur - 75 people from Suai, Mahidi - 75 people etc.). Joao Tavares inspected the "troops" and was also clearly identified as the leader of the PPI (Perang Pembela Integrasi). Note that both of these leaders had been personally selected by the military to coordinate and support a pro-autonomy campaign at the meeting in November, and less than six months later were conducting a demonstration in front of military and civilian leaders of the results of their efforts.

Furthermore, it is clear the military understood that these militia leaders were armed and had the intent to threaten and use violent tactics. One section of the military telegram reports the content of Guterres' speech as follows:

"The Aitarak Force will carry out sweeping operations towards the civil servants who have eaten and used official facilities that have been traitors to the Integration Struggle (stop)

The Aitarak Force will wipe out anyone whether they be official or community figures or business people who have already helped the struggle of the Anti-integration group. (stop)

The Aitarak Force will not hesitate to finish Mario Viegas Carrascalao and his group that are traitors to the Balibo Declaration."

A copy of the telegram's first page in the original language appears below. A more clear electronic version is in our index, along with the English Translation. A copy of the original has been turned over to the CTF archives in Bali:

...

The telegram goes on to report the subsequent disturbances that occurred, including the destruction of the Carrascalao house, and an alleged confrontation between a pro-integration group and the pro-autonomy militias after this attack. The telegram notes "cleaning" was conducted and reports the number of pro-integration members who were killed and injured, and instructs the following of usual procedures via the police forces.

The key element of this telegram that ties it into the SCU witness testimony is it indicates all people who attended the rally, including the military leadership, understood that the pro-autonomy groups were militia, and that these militia intended to persecute and

intimidate those who were not pro-autonomy supporters. They also understood that the militia groups were acting in a coordinated and systematic way as part of a larger campaign across the entirety of East Timor. The military's presence at this rally combined with the additional documentary evidence of their official version of events, shows the TNI should have had no reason to give additional support to these militias following this rally, because they had already been made aware of the dangers the group presented." (pp. 234-7).

The CTF's expert advisor also cites some pieces of evidence which refer to the role played by the Supreme Commander of the armed forces, General Wiranto:

...there is evidence that in accordance with the May 5th Agreement the TNI publicly announced on numerous occasions that it was increasing the capacity of the police force and decreasing the troop numbers in East Timor. Testimony verifies that General Wiranto reported these measures:

"General Wiranto also informed us that he had taken concrete steps to enhance the capacity of the police. He informed us their numbers were being increased and they had been provided with extra vehicles to improve their mobility."

Later in the same conversation General Wiranto allegedly indicated to the witness that the military was responding to the reports of TNI and Police perpetration in the killing of civilians at Liquica. General Wiranto reportedly said:

"he hoped that Liquica would be the last such incident, and he would take the necessary steps by 'rearranging' security in East Timor." (p. 231)

In the post-ballot period, there is one witness testimony that suggests Wiranto sought information about the violence occurring and gave direct orders to stop the violence. One witness statement recounts hearsay evidence:

"On 10th September I recall that a UN delegation was meeting with General Wiranto in Jakarta. Due to the security situation in Dili at that time the UNAMET compound was being guarded by a cordon of TNI soldiers...someone from amongst the civilian UN employees made a call to Tamrat Samuel who was meeting with Wiranto to inform him that the compound was under siege. Wiranto then immediately called Syahnakri to find out whether the reports were correct. Tamrat Samuel later told me that he had observed Wiranto on the phone telling Syahnakri to sort things out and bring an end to what was happening. When this was happening I could see TNI soldiers and militias breaking the windows of UNAMET vehicles that were parked in the school and removing property from the vehicles." (pp. 231-2)

Evidence relating to control or participation

Other evidence contained in the expert advisor's report is relevant to the question of what role senior military and civilian officials actually played in relation to those who were committing crimes on the ground in East Timor. This encompasses in part the question of how much control senior officials had over their members in the field and over militia groups. It also involves evidence showing that the supply of money and weapons to militia was controlled from high up in Indonesian institutions.

Some evidence shows that senior officers not only knew about the supply of weapons to militias, but also were confident that they could control militia access to weapons:

Another statement from a Senior UN Official who met with Wiranto regularly to give briefings confirms that the senior leadership of the military at least believed they exercised control over the militias and their weapons supply:

“The militias were not given unrestricted access to modern firearms. Rather, the weapons were stored... and distributed to militias in advance of particular military operations. After an operation, the weapons would be returned to the military. Speaking to Indonesian investigators in late 1999, Gen. Wiranto made precisely this point: “Sometimes weapons were provided,” he said, “but this does not mean that [militias] carried weapons wherever they went. The weapons were stored at Sub-District military headquarters.” (p. 230)

[A senior UN official testified that he] had multiple conversations about measures that could be used to prevent future human rights violations. One of these suggestions was the disarmament of militias in East Timor, especially considering that according to the May 5th Agreement no organization other than the Police can exercise a security function. In response to these suggestions, senior military institutional leadership indicated their ability to take away weapons from the militias, but refused to do so without the reciprocal disarming of the Falantil forces.

“During this meeting I clearly recall Gen. Wiranto telling me that if Falintil was ready to surrender its weapons to the Indonesian Police, he could guarantee that the militia would be disarmed within two days. I regarded this comment as a significant indication of the degree of control the TNI had over the militia. I believe this was not the only occasion Gen. Wiranto said this. However, this was the only occasion he said this to me directly.” (p. 229)

Other evidence supports the claim that military officials, at least to the regional command level, participated directly in the organizing and funding of militia:

According to a key witness whose identifying information has been redacted, on 27 November 1998 he attended a meeting at the KOREM, with pro-autonomy leaders at the invitation of Eurico Guterres. The Panglima of Udayana (Adam Damiri), Tono Suratman (Commander of the KOREM), the Panglima’s Intelligence assistant (Edy Soenadi) and General Simbolon (currently the Panglima of Irian Jaya Province) also attended the meeting. Other autonomy supporters at the meeting included Eurico Guterres, Joao Tavares, Tomas Goncalves, and three others whose identity is protected. Adam Damiri allegedly facilitated the meeting and began it with a discussion of how to organize a pro-autonomy campaign.

He appointed Eurico Guterres the leader of Gadapaksi at this meeting, but Guterres complained that he had no money. In response Damiri reportedly promised Guterres to support Gada Paksi by giving him 50 billion rupiah.⁴⁷⁶ Tono Suratman also allegedly issued a statement of moral support to the pro-integration leaders: “Tono Suratman said that he was there to support the invited pro-autonomy leaders and said that he, like us, was also a pro-integration fighter.” (p. 233)

Further evidence explains how Indonesian government development funds were systematically used for funding militias and suggests that this was known and approved at the highest level of the Indonesian civilian administration. One witness is cited as explaining how a plan was created and implemented to divert funds from the Provincial Development Budget (which would have been used for such development activities as creating small businesses, paying family supplements to the poor, and repairing housing) (p. 237). Instead this money went to the Socialization of Autonomy Plan; a Socializing Autonomy Team that oversaw the plan included one unit for security that was responsible for organizing militia.

The Korem Commander and another higher-level Indonesian bureaucrat who was appointed to the team were included in part because they wanted to ensure that they were refunded money they had acquired to fund a pro-autonomy event, the April Aitarak rally in Dili, a few days before this first planning meeting was called. One witness explained:

“Also during this meeting, [name protected] stated he and Tono Suratman had borrowed 250 million rupiah for the pro-autonomy event, which had taken place on the 17th of April in Dili. [Name protected] did not say what the money had been spent on, or from where it had been borrowed. [Name Protected] said that the Governor should seek permission to divert the development funds as soon as possible so that he and Tono could pay back their debt. I remember clearly [name protected] saying this because I was surprised that such a large amount of money had been spent.”

After this meeting, the plan ensued. The team’s bureaucrats composed a budget proposal and forwarded it to the Governor (Abilio Soares) for him to sign within a matter of days, which they expected to be approved quickly.

One witness saw a letter from the Governor that asked for special permission from the Central Ministry to divert the development funds. [REDACTED] was able to provide a technical explanation and written documentation (see Annex for a copy of one of these documents) of why this letter was important to the provision of funds. According to Presidential Decree no. 52 and other written government policies, development funds cannot be used for any other purposes without the express permission from the Central Government in Jakarta. In cases where an extremely large sum of money was to be diverted from the development budget for another purpose (in excess of 25 billion rupiah), Presidential authorization of the proposal was required, and the Minister of Finance had to seek this authorization from the President. The total amount of funds requested for the diversion to the Socialization of Autonomy campaign was 53 billion rupiah. Therefore, both the Minister of Finance and the President of Indonesia had to be notified of the use of these funds and issue written approval. The full amount of funding requested was approved, however one witness’ testimony indicates the approval for the funds was issued orally, over the phone from the Central Department of Finance in Jakarta to the Chair of the Provincial Treasury Department. (pp. 238-9)

The expert adviser recommended a follow-up investigation into the receipt of this letter by the Finance Ministry and the President. But this was not done by the CTF during its mandate. Despite this, the expert advisor’s report points to evidence showing that the diversion of development funds was in fact officially approved, raising at least a presumption that senior officials in a wide range of Ministries knew of the funding of the militia groups, such as Ablai.

We have not yet been able to locate a copy of [the] letter from the Governor to the Minister of Finance. However, we do have copies and several different versions of his budget proposals and directions issued to the Bupatis in May after the funds were approved. These documents indicate the diversion of funds from development at the local level occurred at the rate of 10-20% to the Pro-Autonomy campaign, 492 including specific instructions to make payments to the locally stationed Kodim, Police Chief, Special Forces (Tribuana) the Village Chief, the “FPDK”, the BRTT and militia groups, such as Ablai. The budget also provides for vehicles, drivers, food and the fixing of houses in support of the Pro-Autonomy campaign. These budget instructions were CC’ed to the following people in Jakarta: the Minister of the Interior, The State Minister for National Development and Planning, Minister of Finance, Minister of Defense (General Wiranto), as well as to the Regional Military Command (Adam Damiri), the Head of the Provincial Assembly in East Timor and local Council members. (p. 239)

The expert adviser additionally points to several further important aspects of the evidence relating to the funding of militias:

- the evidence demonstrates that systematic funding was provided after it was clearly known that the funded militia groups were committing serious crimes.
- senior civilian officials in Jakarta not only knew about the funding, but had the ability to stop and restart it, which they only eventually did in order to avoid media scrutiny:

One of the most important aspects of [the witness’] testimony is the pattern of timing of the budget requests and approvals. He was first asked to become involved in diverting monies set aside for development projects to “Socialization of Autonomy” projects a few days AFTER the Aitarak rally in Dili and the attack on the Carrascalao house. Therefore, it is crucial to understand that the support of the militias was facilitated by the civilian government in a period when there was common knowledge about the violent methods used by the militia in their pro-autonomy campaign. He also reports that after a BBC story ran on television about UNAMET’s discovery of Indonesian provision of funds to the militia, a telegram was sent from Jakarta to the Provincial Treasury that instructed them to stop payments previously set aside for the “Socialization” campaign. The witness was given a copy of this telegram as part of his official duties, which we have obtained. However, the witness was called to the Chief of the Treasury’s office the same day, and allegedly told that the payments would only be temporarily ceased and had been officially stopped according to the telegram because UNAMET and the UN Headquarters had found out about the funding mechanism. Several weeks after this meeting, the witness was orally instructed to resume payments of the funds to the districts:

“Two weeks later [name protected] called me and told me that there had been a verbal request from Jakarta, without saying specifically from whom, to continue the payments but confidentially. We did not receive any written instructions to this effect because there was concern that any documentation would be leaked to UNAMET because there was strong suspicion that East Timorese civil servants were supportive of the independence side.”

The witness was able to confirm that the distribution of the funds to the districts occurred from June to August, and provided documentation of the exact amounts spent by the districts on the pro-autonomy campaign (62, 315, 781, 300 Rupiah). The funds provided by the Central Government in Jakarta were supplemented by a private contribution by an

individual affiliated with BPD Bank. The witness provided several payment slips with his testimony.⁴

Thus, the timing of the distribution of funds adds additional weight to the institutional responsibility of the Indonesian civilian government, because the evidence clearly shows that the funding mechanism was used secretly and with the knowledge that it was unethical, and contributing to activities that were illegal. (p. 244-8)

Finally the expert advisor noted the failure of Indonesian officials to try to stop the human rights violations they knew were occurring and to punish those responsible:

The Indonesian military never issued cantonment orders to its troops, or removed their arms. Although there were some instances of leadership changes that can be interpreted as a measure to prevent or improve the control of troops, these leadership changes never resulted in orders that indicated a tighter control of troops by its commanders. In some instances, those in key leadership positions who failed to prevent violence were promoted. Thus, a strong, but not closed, case can be made ... for the institutional responsibility of the Indonesian military based on its knowledge of human rights violations, its ability to control the perpetrators and planners of these violations and failure to take the necessary actions to bring perpetrators of these human rights violations under control and punish them when appropriate. (p. 232)

These pieces of evidence and analysis, based on research conducted in the SCU archive, should have been seen as merely the beginning of an investigation into the question of senior level involvement in gross human rights violations in East Timor. In a number of places the expert advisor recommended that the commission conduct more research on these issues.⁵ However the commission did not; instead it asked the advisor to prepare a second report focusing on other issues.⁶

Despite this, the parts of the expert advisor's first report extracted here provide a glimpse of what evidence may exist relevant to high-level civil and military involvement in gross human rights violations. This same evidence is relevant not only to "institutional responsibility" but also to the question of individual criminal responsibility among Indonesia's then most senior civil and military leaders.

⁴ Copies of the documentation are included at pp. 245-47.

⁵ See for example at pp. 159, 239, 265 and 364.

⁶ *Seeking Truth and Responsibility, Part II: Addendum to Report of the Expert Advisor to the CTF*, October 2007. See p. 2 of that report for the research areas which the commission asked the expert advisor to focus on.