

INTERNATIONAL TRIBUNALS

Unravelling the First Three Trials at Indonesia's Ad Hoc Court for Human Rights Violations in East Timor

SUZANNAH LINTON*

Abstract

The trials at Indonesia's Ad Hoc Court for Human Rights in East Timor have been widely condemned. 'Sham' and 'show trial' are the terms frequently used to describe the process, yet to date there has been little substantive assessment that adequately explains or documents the process. This article offers a detailed assessment of the first three trials at the court, namely that of a former governor of East Timor (Abilio Soares), a former police chief of East Timor (Timbul Silaen), and five members of the military, police, and civil administration accused of responsibility for the Suai church massacre. In 2000, the international community gave a shamed nation the opportunity to redeem its honour and reputation by bringing to justice those of its nationals responsible for the destruction of East Timor in a process that met international standards. But the inescapable conclusion for the author is that the cases of Abilio Soares, Timbul Silaen, and the Suai church massacre were not conducted in a way that was consistent with an intent to bring to justice persons responsible for gross violations of human rights in East Timor.

Key words

Ad Hoc Court; crimes against humanity; East Timor; human rights; Indonesia

After great international pressure and threats of the imposition of an international tribunal to examine Indonesia's conduct in East Timor, the Ad Hoc Court for Human

* The author practises international law, and observed the trials on behalf of the Judicial Systems Monitoring Programme (Dili, East Timor), Amnesty International, and the International Platform of Jurists for East Timor (Leiden, Netherlands). The assessments in this article are personal to the author, based on unpublished observations, notes, and assessments, backed up by close analysis of unofficial original-language transcripts compiled by the Indonesian NGO ELSAM, as well as of trial-related documentation. All transcripts referred to in this report have been compiled by ELSAM and kindly made available to the author. The organisation's excellent periodic reports and analysis are available in Bahasa Indonesia at <http://www.elsam.or.id>; the translations into English, which are literal in order to keep as closely as possible to the original, are the author's own. Particular thanks go to Christian Ranheim, Mark Cammack, Pedro Pinto Leite, Ifdal Kasim, Indri Saptaningrum, and the members of ELSAM'S trial monitoring team for support and friendship throughout. Note: the terms 'pro-integration' and 'pro-autonomy' are used interchangeably throughout the article, since this is the way in which they have been used in the proceedings and in ordinary conversation. The territory of East Timor was controversially integrated into Indonesia to become its twenty-seventh province in 1976. As a consequence, pro-Indonesian East Timorese are often referred to as 'pro-integration' and those against are referred to as 'anti-integration' or 'pro-independence'. The UN-sponsored public consultation carried out through the tripartite agreements of 5 May 1999 gave the East Timorese a choice between accepting or rejecting special autonomy within Indonesia. Thus those supporting autonomy have also come to be referred to as 'pro-autonomy' and those rejecting it as 'anti-autonomy'.

Rights Violations in East Timor was established at the Central Jakarta District Court, and commenced its work in February 2002. This was an unprecedented process for Indonesia that should have radicalized justice and the rule of law through the enforcement of individual criminal responsibility in a country that had long suffered from extensive and entrenched impunity. For the first time ever, its military, police, and civil servants were being tried in public before civilian judges on charges of gross violations of human rights. Eighteen defendants – military, police, and civilians – were charged with crimes against humanity in the course of 12 trials.

Six of the accused were convicted, but all remain free pending appeals against sentence.¹ While the minimum sentence prescribed by the relevant law (Law 26/2000 on Human Rights Courts)² is ten years, the penalties meted out were as follows: former Dili military commander Soejarwo five years plus a fine of 7,000 rupiah, former Dili police chief Hulman Gultom three years, former East Timor military commander Noer Muis five years, former Udayana IX regional military commander Adam Damiri three years, former governor of East Timor Abilio Soares three years, and former militia leader Eurico Guterres ten years.

This assessment of the first three trials seeks to provide some insight into the process. Indonesia was provided by the international community with the opportunity to bring to justice those of its nationals responsible for the destruction in East Timor in a process that met international standards. Human Rights Watch declared the trials a sham, and called on the United Nations to examine the failure of the Ad Hoc Court to prosecute those with most responsibility for the violence in East Timor and to conduct credible trials.³ Amnesty International decried the trials as being ‘not honest, truthful or fair . . . It is now time for the UN to find alternative ways to ensure that justice is delivered in an effective and credible process’.⁴ While dropping the issue of justice for East Timor from its agenda (ironically with the support of the government of Timor-Leste), the UN Human Rights Commission did nevertheless express its ‘disappointment’ regarding the conduct of the trials.⁵ The United States was not impressed either: ‘If you look at all of the cases of this ad hoc tribunal

1. The regular situation was explained by the Deputy Attorney-General to the Working Group on Arbitrary Detention in 1999 as being that ‘the vast majority of individuals charged with criminal offences are detained pending trial’. The Working Group found that the percentage of those who remain free, even on bail, is ‘minimal’ on the admission of the authorities themselves, and declared the situation to be incompatible with Article 9(3) of the International Covenant on Civil and Political Rights. See Report of the Working Group on Arbitrary Detention on its visit to Indonesia (31 January–12 February 1999), UN Doc. E/CN.4/2000/4/Add.2 12 Aug. 1999. There are, however, many examples of preferential treatment of accused and convicted persons on the basis of their social standing, wealth, and political support, and the treatment of the East Timor accused fits into the pattern. For a closer study of this issue, see Progress Report No. 11 by ELSAM’s Ad Hoc Court Monitoring Team, ‘Menyoal tidak ditahannya terdakwa dan mereka yang divonis bersalah di Pengadilan HAM Ad Hoc Timor-Timur’.
2. Law No. 26/2000 on Human Rights Courts, Keppres (Presidential Decree) No. 53/2001 as amended by Keppres No. 96/2001.
3. Human Rights Watch, ‘Justice Denied for East Timor: Indonesia’s Sham Prosecutions, the Need to Strengthen the Trial Process in East Timor, and the Imperative of UN Action’, 20 Dec. 2002.
4. Amnesty International, ‘Timor-Leste: International Community Must Press for Justice for Crimes against Humanity’, AI Index: ASA 57/007/2003; 29 Aug. 2002, and ‘Indonesia & Timor-Leste: International Responsibility for Justice’, AI Index: ASA 03/001/2003, 14 April 2003.
5. East Timor Action Network, ‘UN Human Rights Commission Abandons Justice for East Timor; Pretends Sham Indonesian Trials Are Redeemable’, 25 April 2003.

together, I think it's been a very disappointing process in terms of rendering justice onto those who've committed horrible atrocities in East Timor just a few years ago'.⁶ The European Union noted that 'The trials . . . have failed to deliver justice and did not result in a substantiated account of the violence'.⁷

The process will be documented through close analysis of the trials of Soares, Timbul Silaen, and five accused in the *Suai Church Massacre* case, which the author personally monitored in 2002. However, prior to doing so, it is necessary to set out some of the background to the establishment of the Ad Hoc Court and the cases of which it has been seized.

I. BACKGROUND TO THE SITUATION IN EAST TIMOR

Having been invaded by the armed forces of the Republic of Indonesia on 7 December 1975, the eastern half of the island of Timor was on 17 July 1976 declared Indonesia's twenty-seventh province. The vast majority of the international community never acknowledged the legality of the annexation nor Indonesia's presence there. Indonesia's 24-year-long occupation of East Timor was a particularly brutal one, and allegations of planning, ordering, and perpetrating not just war crimes and crimes against humanity but genocide have regularly been levelled at Indonesia.⁸

Indonesia remained in occupation of East Timor until 25 October 1999, when its armed forces were withdrawn in accordance with the outcome of a UN-administered referendum held on 30 August 1999. In that referendum, 78.5 per cent of East Timorese voters made it clear they wanted to be free of Indonesia. It did not take long for the backlash to come. Within hours of the announcement of the result, an already violent situation escalated dramatically throughout East Timor, with widespread murders, kidnappings, rape, property destruction, looting, and the burning and destruction of military installations and state and civilian properties. Around 250,000 civilians were forcibly displaced to West Timor. On 20 September 1999 an international force (INTERFET) mandated by the UN Security Council in its Resolution 1264 (1999) and led by Australia was able to land in East Timor and start restoring order. East Timor is now the independent sovereign state of Timor-Leste.

UN experts investigated the situation: an International Commission of Inquiry⁹ and three Special Rapporteurs¹⁰ reported that crimes against humanity had been

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6. State Department spokesman, quoted by ABC Radio Australia News, 'US Disappointed with Trials of Timor-Leste Crimes', 6 Aug. 2003.
 7. Declaration by the EU Presidency on the Ad Hoc Human Rights Tribunal for Crimes Committed in East Timor, 6 Aug. 2003; Statement by the Presidency of the EU on behalf of the EU on the Ad Hoc Human Rights Tribunal for Crimes Committed in East Timor, 27 Aug. 2002.
 8. See A. Kohen, *An Act of Genocide: Indonesia's Invasion of East Timor* (1979); J. Taylor, *East Timor: The Price of Freedom* (1999); R. Clark, 'Does the Genocide Convention Go Far Enough? Some Thoughts on the Nature of Criminal Genocide in the Context of Indonesia's Invasion of East Timor', (1981) 8 (2) *Ohio Northern University Law Review* 321.
 9. United Nations Office of the High Commissioner for Human Rights, Report of the International Commission of Inquiry on East Timor to the Secretary-General, UN Doc. A/54/726, S/2000/59 (Jan. 2000).
 10. Common Report of the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions, Special Rapporteur of the Commission on the Question of Torture and Special Rapporteur of the Commission on Violence against Women, Its Causes and Consequences, Report Submitted

perpetrated and that the Indonesian military and police had played a significant role alongside the East Timorese militias who had done most of the direct damage. In fact, the violence was found to be part of a systematically planned policy by elements of the Indonesian army (Tentara Nasional Indonesia – TNI; the police formally ceased to be part of the TNI in April 1999, but remained under the Minister of Defence) and the civil administration with the aim of preventing the people of East Timor from freely participating in the referendum, and later of punishing them for voting for independence. Both international investigations called for the creation of an international tribunal to try those responsible for the 1999 East Timor atrocities, yet the international community put its faith in Indonesia's promises to tackle the soldiers, police, and civilians responsible through its own courts.

2. KPP-HAM

Responding to the international outrage over East Timor, on 22 September 1999 Indonesia's National Human Rights Commission (Komnas HAM) established a commission, KPP-HAM, to investigate human rights abuses in East Timor.¹¹ KPP-HAM's task was to investigate violations of human rights in East Timor in 1999, in particular the involvement, if any, of Indonesian state organs in such violations.

To the surprise of sceptics, KPP-HAM issued a very robust report on 31 January 2000.¹² It confirmed the existence of a very intimate relationship between the TNI, police, the civil administration, and the East Timorese militias, and stressed that the violence that arose in East Timor in 1999 was the result of a systematic campaign, and not a civil war. KPP-HAM's investigations into the violence, focusing on several notorious massacres,¹³ found evidence of gross human rights violations, and after considering the evidence of systematic planning and perpetration concluded that crimes against humanity had been committed. These crimes included the systematic killing of members of specifically targeted groups carried out on a massive scale, extensive destruction, a scorched earth campaign, enslavement, forced deportations and displacement, and other inhumane acts committed against the civilian population.

KPP-HAM's report was unequivocal. Members of the TNI and the police, and the militias that they had created and groomed, were responsible for the violence. KPP-HAM stressed the role of senior officials from TNI headquarters in the creation

by the Secretary-General to the General Assembly on the Situation of Human Rights in East Timor, UN Doc. A/54/660 (1999).

11. Resolution No. 770/TUA/IX/99, amended by Resolution No. 797/TUA/X/99 of 22 Oct. 1989.

12. KPP-HAM's Executive Summary of its Report on the Investigation of Human Rights Violations in East Timor released on 31 Jan. 2000 (hereafter 'KPP-HAM Executive Summary') is available in English at the website of the Indonesian embassy in Canada at www.indonesia-ottawa.org/news/Issue/HumanRights/ham-kpp-timtim-01312000.htm.

13. These included the massacre at the Liquiça church on 6 April 1999; the attack on pro-independence leader Manuel Carrascalão's home on 17 April 1999; the attack on the Dili Diocese on 5 Sept. 1999; the attack on the house of Bishop Belo on 6 Sept. 1999; the burning of homes in Maliana on 4 Sept. 1999; the attack on the Suai church complex on 6 Sept. 1999; the murder at the Maliana police headquarters on 8 Sept. 1999; the murder of Dutch journalist Sander Thoënes on 21 Sept. 1999; and the murder of a group of clergy and a journalist in Los Palos on 25 Sept. 1999.

of armed militia groups and the ultimate responsibility of the former Commander of the Indonesian Armed Forces, General Wiranto, for failing to provide security in East Timor, despite Indonesia's international undertakings to do so. Also accused of being responsible were the former governor of East Timor (Abilio Soares), the former East Timor military commander (Brigadier-General Tono Suratman), the former Udayana IX regional military commander (Major-General Adam Damiri), and the former security advisor to the Indonesian Task Force for the Implementation of the Popular Consultation in East Timor (Major-General Zacky Makarim). In all, 33 persons were named.

KPP-HAM's parent body, Komnas HAM, submitted the report to the Attorney General, recommending further investigations with a view to prosecuting the 33 persons named, and investigating all others suspected of involvement in serious human rights violations in East Timor. Among its other recommendations were that full investigations be opened into all human rights violations committed in East Timor since 1975, and that there be substantial reform of the TNI and the police.

3. THE ATTORNEY GENERAL'S OFFICE

On 17 April 2000 the Attorney General designated an 83-member team to focus exclusively on investigating the East Timor atrocities. His selection controversially included members of the police and the TNI, and the team was headed by H. M. A. Rahman, who is now the Attorney General. Investigations commenced, through sub-teams, on five cases identified as priorities. These were:

the massacre at the João Britto church, Liquiça, on 6 April 1999;

the attack on the house of pro-independence leader Manuel Carrascalão on 17 April 1999;

the attack on the residence of Bishop Belo on 6 September 1999;

the massacre at the Ave Maria church, Suai, on 6 September 1999; and

the murder of Dutch journalist Sander Thoenes on 21 September 1999.

Investigators from the Attorney General's Office visited East Timor for three weeks in July 2000 pursuant to a Memorandum of Understanding on Co-operation in Legal, Judicial, and Human Rights Affairs agreed with the UN Transitional Administration. With its assistance, they had access to many victims and witnesses with direct knowledge of the five cases, and were able to carry out visits to crime scenes.

On 1 September 2000, 19 persons were named as suspects.¹⁴ Included among them were Damiri, Soares, Tono Suratman and Timbul Silaen. It was notable that Wiranto, the most senior person identified by KPP-HAM, was not included and neither was Zacky Makarim. In October 2000, three more persons were named as suspects, one of whom was Eurico Guterres.¹⁵

14. See 'East Timor Massacre Suspects Named', *Christian Science Monitor*, 5 Sept. 2000.

15. See 'East Timor Wants Militia Chief Judged in Dili', *Times of India*, 12 Oct. 2000.

The indictments were prepared and lay dormant until the judges of the Ad Hoc Court for Human Rights Violations in East Timor were appointed and the court began to function in February 2002.

4. THE AD HOC COURT FOR HUMAN RIGHTS VIOLATIONS IN EAST TIMOR

The Indonesian establishment has never demonstrated any enthusiasm for a genuine process of legal accountability for the destruction of East Timor and killing of so many people in 1999, let alone to have a light shone on its conduct there over the preceding 24 years. The post-Suharto era of *reformasi* (reform) had weakened but not ousted the forces associated with his New Order government; in particular the military and its allies retained great political and social influence. Yet international pressure was immense: the threat of a full international tribunal was a most powerful tool in the arsenal of those seeking justice on behalf of the East Timorese. Another factor that weighed heavily in favour of the establishment of some kind of mechanism of accountability was the suspension of military aid from the United States pending the adequate resolution of the human rights violations from September 1999.

Under Indonesia's Law 26/2000 on Human Rights Courts, promulgated on 23 November 2000,¹⁶ human rights violations – defined as genocide and crimes against humanity¹⁷ – perpetrated prior to its coming into force may only be prosecuted in an ad hoc human rights court established by presidential decree on recommendation from the Indonesian parliament. The East Timor cases, even if restricted to those from 1999, required such a court. On 21 March 2001, shortly before the annual meeting of the UN Human Rights Commission in Geneva, the Indonesian parliament recommended to the president that an ad hoc human rights court be established to

16. Undang-Undang Republik Indonesia Nomor 26 Tahun 2000 Tentang Pengadilan Hak Asasi Manusia (Law No. 26/2000 on Human Rights Courts), 23 Nov. 2000, published in the Official Gazette of the Republic of Indonesia Year 2000 No. 208 (hereafter 'Law 26/2000').

17. Genocide is defined in Art. 8 as 'any action intended to destroy or exterminate in whole or in part a national group, race, ethnic group, or religious group by:

- a. killing members of the group;
- b. causing serious bodily or mental harm to members of a group;
- c. creating conditions of life that would lead to the physical extermination of the group in whole or in part;
- d. imposing measures intended to prevent births within a group; or
- e. forcibly transferring children of a particular group to another group.'

Crimes against humanity are defined in Art. 9 as any action perpetrated as a part of a broad or systematic direct attack on civilians, in the form of:

- a. killing;
- b. extermination;
- c. enslavement;
- d. enforced eviction or movement of civilians;
- e. arbitrary appropriation of the independence or other physical freedoms in contravention of international law;
- f. torture;
- g. rape, sexual enslavement, enforced prostitution, enforced pregnancy, enforced sterilization, or other similar forms of sexual assault; or
- h. assault (persecution) (see discussion at footnote 35).

process cases arising out of East Timor in 1999, and to deal with a massacre of civilians that took place in the Tanjung Priok harbour area of Jakarta in 1984. The Deputy Speaker publicly admitted that they had taken this step to counter international attention and to avoid international intervention over prosecution of the East Timor cases.¹⁸ The Human Rights Commission met in Geneva on 21 March 2001 and turned up the pressure: on 19 April 2001, its president warned that if Indonesia did not move decisively to try military, police, and militia leaders responsible for atrocities in East Timor, the UN might establish an ad hoc international tribunal.

Reacting to this pressure, on 24 April 2001 President Wahid issued the long-awaited decree establishing an ad hoc human rights court. Although initially welcomed, closer inspection revealed that the court was given jurisdiction only to hear cases arising after the 30 August 1999 referendum, which was a time when the vast majority of the atrocities were allegedly committed by Indonesian-trained and -armed militiamen rather than the TNI itself. Only 12 of the persons identified by KPP-HAM as suspects fell within this jurisdiction – excluded from it were the Liquiça church massacre on 6 April 1999, the attack on the house of pro-independence leader Manuel Carrascalão on 17 April 1999, and a variety of serious attacks on civilians that took place between April and September.

The Attorney General's Office promptly abandoned six of the 18 situations it was investigating. Among the cases dropped was that of the murdered *Financial Times* journalist Sander Thoenes, of which it was said there was insufficient evidence. This was a case where KPP-HAM had been able to identify the involvement of members of the TNI's 745 Battalion. Statements from the Attorney General's spokesman indicate an interesting methodology for conducting investigations: 'We are still waiting for evidence and witnesses' testimony. Without that, how can we proceed with the investigation?'¹⁹ Cases against four militia leaders were also abandoned on the grounds that investigators were not able to locate the suspects. Olivio Moruk, one of the notorious leaders of the Laksaur militia who had attacked the church at Suai in September 1999, had been murdered within days of the KPP-HAM report identifying him. Another abandoned case was that of Moruk's compatriot from the Laksaur, Igidio Manek, notorious for allegedly carrying out abduction, rape, and sexual enslavement. Strangely enough, while the Attorney General's Office claimed not to have been able to locate him, TNI soldiers in West Timor's Atambua had no problem in bringing him to meet foreign journalists seeking an interview in April 2001.

The first official act of newly appointed President Megawati Sukarnoputri was to issue a decree widening the temporal jurisdiction of the Ad Hoc Court for Human Rights Violations in East Timor.²⁰ The new decree expressly limited the court's jurisdiction to those cases of human rights violations in East Timor which took place in April 1999 and September 1999. Like her predecessor's earlier decree, President

18. Cited in J. Land, 'Indonesia: Timor War Criminals Remain Free', *Green Left Weekly*, 28 March 2001; L. Withers 'To End Impunity', *Inside Indonesia*, July–Sept. 2001.

19. D. Asmarani, 'Jakarta's East Timor Rights Probe Slammed', *Straits Times*, 19 Sept. 2001.

20. Keppres No. 96/2001.

Megawati's decree was welcomed as a breakthrough, but informed assessment revealed that this too was not what it seemed to be. The new decree did not open up the period from April to September 1999 to the jurisdiction of the court, but simply the month of April 1999. The court's jurisdiction was also specifically limited to incidents in Dili, Suai, and Liquiça, which ruled out major human rights violations across the territory, notably at Oecussi, Maliana, and Same. Thus the workload of the Attorney General's Office was limited to just four cases: the massacre at the João Britto church in Liquiça on 6 April 1999, the killings at the house of Manuel Carrascalão in Dili on 17 April 1999, the attack on the residence of Bishop Carlos Belo in Dili on 6 September 1999, and the massacre at the Ave Maria church in Suai on 6 September 1999.

From August to December 2001, many feeble reasons were given for the delay in establishing the court. The following chronology provides a clear indication of efforts to obstruct the establishment of the court. The selection process was secretive and many confused messages with contradictory information were released by those involved in the selection process. Civil society was allowed no say in the people being considered as judges. In June 2001, Indonesia's Chief Justice, Bagir Manan, claimed that problems in recruiting 30 professional judges with 'excellent capability in both national and international law' meant that the trials would not begin for about four months (September).²¹ He said that the process would be delayed further after recruitment, because selected judges would have to undergo particular training, apparently including an international legal education abroad. Lack of funds to run the recruitment process and establish the tribunal hindered progress. There was then the delay in finding appropriate judges with experience in human rights issues.²² As early as July 2001, 35 judges were apparently identified.²³ In August 2001, the delaying factor became the search for a chief ad hoc judge.²⁴ Then the recruitment of the non-career judges was holding things up.²⁵ On 3 October 2001, the Minister of Justice announced that parliament would select the judges for the ad hoc court in November 2001 and that the court would be up and running in December 2001.²⁶ On 23 October 2001, the message from the Chief Justice was that within ten days the team in charge of establishing the tribunal would have recruited all the judges and the list of names would be given to the president for approval.²⁷ At the same time, the judge in charge of selection, Benjamin Mangkudilaga, stated that 'By November, the team will announce the names of 60 judges, both career and non-career. They will undergo training on human rights tribunals on Nov. 6'.²⁸

Neither the promised court nor its judges materialized in November 2001. In December 2001 it appeared that some judges had been selected but the appointments

21. 'Trial of East Timor Human Rights Cases Delayed', *Jakarta Post*, 13 June 2001.

22. 'Rights Activists Applaud New Decree on Ad Hoc Tribunal', *Jakarta Post*, 9 Aug. 2001.

23. 'Timor Rights Tribunal Should be Ready in September: Judge', *Agence France-Presse*, 2 Aug. 2002.

24. *Ibid.*

25. 'Ad Hoc Tribunal to Start in October?', *Jakarta Post*, 9 Aug. 2001.

26. 'Indonesia to Set Up Human Rights Court for E Timor Atrocities', *Associated Press*, 3 Oct. 2001.

27. T. Z. B. Simanjuntak and T. Siboro, 'Rights Tribunal Judges Will Be Impartial, Bagir Says', *Jakarta Post*, 23 Oct. 2001.

28. *Ibid.*

were awaiting the president's approval.²⁹ The Minister of Justice and Human Rights promised that the new judges would commence work after attending a six-day course on rights issues – they were to be installed by 1 December 2001 at the latest.³⁰ December was after all the month by which Indonesia had promised the Committee against Torture that the court would be established.³¹ December saw finger-pointing, Judge Mangkudilaga and the Supreme Court saying that the list had been handed to the president, and her office denying it; focus then moved to the president herself.³² Posterity must record the chief justice's memorable announcement that in any case, the court could not be established because no one had foreseen that there would be holidays in the month of December.³³ The year closed with no presidential decree on the appointment of judges and no permanent Human Rights Court or Ad-Hoc Court for Human Rights Violations in East Timor and Tanjung Priok.

The judges finally took office in January 2002. They included practising career judges as well as law professors from various national universities. There were concerns, which were ignored, over the selection of judges, in particular one academic judge who had previously advised the military and another who had served as a judge in East Timor during Indonesian rule.³⁴

In February 2002 the first indictments were filed at the court and the trials began in March.

5. THE FIRST THREE TRIALS AT THE AD HOC COURT

5.1. Abilio Soares

Abilio Soares was the last governor of East Timor before it ceased to be the 27th province of Indonesia. He was indicted on 19 February 2002 with two cumulative charges of crimes against humanity: murder as a crime against humanity (Art. 9(a)) and assault³⁵ as a crime against humanity (Art. 9(h)). Soares was specifically charged

29. 'The Human Rights Violations Theater', *Tempo Magazine*, 20–26 Nov. 2001.

30. 'Government to Install 60 Judges for Rights Court', *Jakarta Post*, 6 Nov. 2001.

31. Committee Against Torture, Consideration of Report Submitted by States Parties Under Art. 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture UN Doc. CAT/C/XXVII/Concl.3 (2001).

32. Judge Benjamin told Reuters on 26 November that President Megawati Sukarnoputri's approval was outstanding: 'We are only waiting for that presidential letter. Late December, we will be set to begin trying the first cases . . . Timor and Tanjung Priok', see 'Indonesian Human Rights Court to Start Next Month', Reuters, 26 Nov. 2001. In December, the Chief Justice was saying: 'The technical preparations for setting up the court are complete. Now we are just waiting for a presidential decree'; see 'Indonesia Will Start Timor Trials in January: Chief Justice', Agence France-Presse, 14 Dec. 2001.

33. See T. Siboro, 'Bagir Delays Ad Hoc Tribunal Against Rights Violators', *Jakarta Post*, 1 Dec. 2001: 'Chief Justice Bagir Manan said on Friday that the ad hoc human rights tribunal would be delayed until early next year due to the long holidays: "It is something that we had failed to foresee, that there would be such a long holiday in December – Idul Fitri, Christmas, and the New Year."'

34. W. Manggut, H. Pudjiarti, and D. Arjanto, 'Special Report: Human Rights Court, Tough Battle Ahead', *Tempo Magazine*, 22–28 Jan. 2002.

35. It is unclear whether Art. 9(h) of Law 26/2000 is in fact persecution as international law knows it. The provision is expressed in the commentary to the law as being taken from the Rome Statute of the International Criminal Court, which clearly includes the now well-established offence of persecution as a crime against humanity. However, the Indonesian version of Law 26/2000 refers to 'penganiayaan' – 'assault' – regulated in Chapter XX of the Kitab Undang-Undang Hukum Pidana (KUHP) (Indonesian Penal Code). The fact that the commentary

with civilian command responsibility for the failings and actions of his subordinates, namely the two regents Leoneto Martins in Liquiça district and Herman Sedyono in Covalima district, and Eurico Guterres as deputy commander of PPI (Pasukan Pejuang Integrasi – Pro-integration Forces), as well as for the *pamswakarsa* (volunteer security groups they established) in relation to five major incidents: the massacre at the Liquiça church, the massacre at Manuel Carrascalão's house in Dili, the attack on the Diocese of Dili on 5 September 1999, the attack on Bishop Belo's house in Dili, and the Suai church massacre. The charges were based on the doctrine of civilian command responsibility under Article 42(2) of Law 26/2000. This provides that:

Both police and civil leaders are held responsible for gross violations of human rights perpetrated by subordinates under their effective command and control resulting from a failure on the part of the leader to properly and effectively control his or her subordinates, namely:

- a. the aforementioned leader is aware of or deliberately ignores information that clearly indicates his or her subordinates are perpetrating, or have recently perpetrated, a gross violation of human rights; and
- b. the aforementioned leader fails to act in a proper manner as required by the scope of his or her authority by preventing or terminating such action or delivering the perpetrators of this action to the authorized official for inquiry, investigation, and prosecution.

On 14 August 2002, the former governor was convicted on both charges and sentenced to three years (the minimum sentence by law is ten years).

5.2. Timbul Silaen

Until 5 May 1999, Timbul Silaen was the police chief of East Timor. After that date, he was also in charge of security operations in the run-up to the referendum and served as operational commander.³⁶ Timbul Silaen was indicted on 19 February 2002 with two cumulative charges of crimes against humanity: murder as a crime against humanity (Art. 9(a) of Law 26/2000) and assault as a crime against humanity (Art. 9(h)). He was charged with civilian command responsibility under Article 42(2) (see section 5.1. above).

Timbul Silaen was alleged to be responsible for the actions of his subordinates (the police chiefs of Dili, Liquiça, and Suai) in relation to the attack on Liquiça church on 6 April 1999, the attack on Manuel Carrascalão's house in Dili on 17 April 1999, the attack on Dili Diocese on 5 September 1999, the attack on Bishop Belo's residence on 6 September 1999, the attack on Suai church on 6 September 1999, and the attack on the UNAMET (United Nations Mission in East Timor) office

considers the crime of '*penganiayaan*' as self-evident and needing no clarification indicates the intention that it is indeed meant to refer to 'assault' and not 'persecution'. The proceedings were carried out on the basis that it is in fact '*penganiayaan*' as under the KUHP, and this is followed by the author in this work.

36. Under the Tri-partite Agreement signed by Indonesia, Portugal, and the United Nations on 5 May 1999, responsibility for security and law fell to Indonesia. The Indonesian police took over the responsibility from the TNI. The police chief of East Timor, the accused Timbul Silaen, became operational commander of security operations in the run-up to the referendum.

in Liquiça on 4 September 1999 (note that this incident was charged as part of the second charge of assault as a crime against humanity, but no evidence about it was brought).

On 15 August 2002, Timbul Silaen was acquitted of all charges.

5.3. The five accused in the *Suai Church Massacre* case

The accused in the *Suai Church Massacre* case were Lieutenant-Colonel Herman Sedyono, former regent of Covalima district; Lieutenant-Colonel Liliek Koeshadianto, former commander of Suai subdistrict military command 1635; Captain Achmad Syamsuddin, former chief of staff of Suai subdistrict military command 1635; First Lieutenant Sugito, former commander of Suai military sector command; and Colonel Gatot Subiyaktoro, former chief of police, Suai.

The accused were indicted on 19 February 2002 with crimes against humanity.³⁷ The charges were based on a combination of different heads of responsibility: individual responsibility under Article 41 (indirect perpetration), civilian command responsibility, and military command responsibility (Art. 42). Military command responsibility under Article 42(1) of Law 26/2000 provides that:

A military commander or person acting as military commander shall be held responsible for any criminal action within the judicial scope of a Human Rights Court perpetrated by troops under his or her effective command and control, and for any such criminal action by troops under his or her effective command and control arising from improper control of these troops, namely:

- a. a military commander or aforementioned person acknowledges, or under the prevailing circumstances ought to acknowledge, that these troops are perpetrating or have recently perpetrated a gross violation of human rights; and
- b. a military commander or aforementioned person fails to act in a proper manner as required by the scope of his or her authority by preventing or terminating such action or delivering the perpetrators of this action to the authorized official for inquiry, investigation, and prosecution.

On 15 August 2002, all five were acquitted of all charges.

6. INDICTMENTS

The indictments and the way in which the cases were presented were coloured by the conclusions of the investigators from the Attorney General's Office that the problems in East Timor were caused by local residents fighting each other,³⁸ that the

37. This indictment took the form of subsidiary/alternative charging, with the primary charge against all the accused being murder as a crime against humanity on the basis of military command responsibility. It should be noted that although the accused regent was a serving member of the TNI and allegedly part of the Kopassus (special forces), in his role as regent he was a civilian official and his authority was civilian not military. Gatot Subiyaktoro was police chief of Suai and exercised civilian (police) command authority, not military. There were also subsidiary individual crimes against humanity (all for murder) charges against all accused.

38. Although the investigators only interviewed individuals who supported integration with Indonesia, one of the conclusions reached by the team investigating Abilio Soares's case was that all the events they had examined were in fact quarrels between the East Timorese groups. *Berita Acara Pendapat* (Resumé), 22 Nov.

United Nations had cheated in the referendum,³⁹ and that therefore the outbreak of violence that occurred in September was because of a spontaneous outburst of anger at that deception.⁴⁰ Despite concluding that ‘the reason for the incidents before and after the referendum on 30/8/1999 was because the option for independence was given and the governor as the highest authority in the province was not consulted when the decision was taken etc. and thus could not take action’, crimes against humanity charges were laid against him by the Attorney General’s Office.⁴¹ Despite KPP-HAM’s findings and recommendations, there is no indication from the files that any investigations into the deportation of some 250,000 East Timorese or the scorched earth campaign were conducted. It should however be noted that thanks to limitations in Law 26/2000, a scorched earth campaign in East Timor would not be chargeable in its own right as a crime against humanity or act of genocide, and cannot even be included as persecution, given the fact that Law 26/2000 employs the term ‘*penganiayaan*’ or ‘assault’ to describe what the Rome Statute (from which it draws its subject matter jurisdiction) recognizes as ‘persecution’.⁴² Thus there were no charges relating to two of the most striking human rights violations of September 1999.

The accused in these cases, perhaps with the exception of the accused Sugito in the *Suai Church Massacre* case, were middle-ranking officials of the category described by KPP-HAM as those who ran the field operations in the civilian bureaucracy, including regents, the governor, and local military and local police officials. Given that the Attorney General’s Office had the luxury here of first developing the cases against the direct perpetrators and then using the evidence to prosecute the higher echelons, it is interesting to note that they instead chose to go for the middle level first. By doing so, and by the form of drafting that they chose for the indictments, they created for themselves multiple burdens of proof: that the accused were superiors of certain persons who committed crimes; that those persons committed crimes against humanity; and that the accused were criminally responsible for failing to exercise proper command responsibility over those subordinates. The significance

2000, *Bekas Perkara* (Prosecution Dossier) for Abilio Soares (hereafter ‘*Soares Prosecution Dossier*’), at 52: ‘The incidents that occurred whether before or after the referendum were fights between groups, abduction, killing, burning, threats, terrorisation, extortion etc. These were carried out by competition/intimidation between pro and anti Integration even through there had been peace deals/truces . . .’

39. An independent electoral commission examined pro-integration complaints about the referendum and rejected them, and the Indonesian government publicly accepted the results of the referendum as free and fair. Yet in their recommendations on 22 Nov. 2000, the investigative team in the Abilio Soares case concluded that UNAMET did cheat during the referendum process, for example by recruiting only local staff; siding with CNRT (National Resistance Council of Timor) and supporting anti-autonomy campaigns; taking steps to influence people and force them to choose CNRT; not calling witnesses from pro-autonomy; advancing the announcement of the result without consultation; removing the ballot boxes without security and against regulations; failing to count the votes at the stations in the regencies, but rather counting them in Dili without witnesses; and ignoring the protests of pro-autonomy. See *Soares Prosecution Dossier*, *supra* note 38, at 51.
40. In their recommendations on 7 Nov. 2000, the investigative team in the *Timbul Silaen* case concluded that UNAMET had ignored complaints about the referendum. Their assessment was that as a result of the defeat of pro-integration caused by the cheating conduct that occurred during the referendum process, there was deep disappointment expressed in a mass riot. See *Berita Acara Pendapat* (Resumé), *Timbul Silaen Bekas Perkara* (Prosecution Dossier) (hereafter ‘*Silaen Prosecution Dossier*’), at 47.
41. *Berita Acara Pendapat* (Resumé), 22 Nov. 2000, at 52, *Soares Prosecution Dossier*, *supra* note 38.
42. See discussion at note 35 *supra*.

is that failure of such cases at the middle level will have a negative impact on cases at the higher echelon of senior commanders, for it cuts the link between direct perpetrators and policy-makers.

Although laying charges of crimes against humanity, all the indictments depicted the situation in East Timor as encompassing a number of ordinary and unconnected incidents in April and September 1999 where the East Timorese were involved in spontaneous mass brawling (*bentrokan*), even rioting (*kerusuhan*) with the odd rogue soldier taking part. They painted a situation of civil war between the East Timorese, with the Indonesians as a neutral party standing in the middle, trying to keep the brawling factions apart and rescue civilians. For instance, the *Suai Church Massacre Indictment* states that after the referendum on 30 August 1999, 'there arose a volatile situation and tension and brawling between the groups identifying themselves as pro Integration and pro Independence, causing the government to declare a state of emergency in East Timor'.⁴³ The same is depicted in the *Abilio Soares Indictment*, which describes the 'enmity, quarrelling and disagreement between pro Independence and pro Integration'.⁴⁴ The only indication of any 'grooming' of militias was in the *Suai* indictment, where allegations were made that the accused regent and *Suai* subdistrict military commander had created, paid, and trained the *pamswakarsa*, *Laksaur* and *Mahidi* groups, but there were no charges that arose from this. This picture is grossly at odds with the findings of KPP-HAM and the two UN reports that the crimes against humanity were widespread and systematic, arising from extensive planning by many players at multiple levels. KPP-HAM explicitly ruled out the civil war scenario. In relation to the September 1999 incidents, KPP-HAM found that members of the TNI, the police, and the militias were the key figures responsible for this campaign, which involved the creation of conditions and the choice of acts committed, as well as the scheduling and planning of the forced deportation. It found that this campaign was initiated to convince the international community that the results of the popular consultation were unsafe as evidenced by the 'fact' that the East Timorese fled to West Timor rather than live in an independent East Timor. Nothing of the sort was presented in the indictments examined here or other cases which were to follow. KPP-HAM had identified the contours of a major conspiracy and common plan involving the institutions of state and high levels of authority in East Timor and Jakarta that was transmitted down the ranks for implementation at the field level. But the Attorney General's Office was only prepared to allege that the most senior civilian authority in East Timor, the governor, summoned his officials and told them to prepare for the referendum, after which they went back to their districts and established volunteer local security groups known as *pamswakarsa* (*Abilio Soares Indictment*), and that in *Suai* there was a meeting at the residence of the regent on 6 September 1999, when the *Laksaur* militia leadership met with three of the accused, namely the regent, the *Suai* police

43. Surat Dakwaan, Nomor: Reg. Perkara: 03/HAM/TIM-TIM/02/2002, 19 Feb. 2002 (hereafter '*Suai Church Massacre Indictment*'), at 4.

44. Surat Dakwaan, Nomor: Reg. Perkara: 02/HAM/TIM-TIM/02/2002 19 Feb. 2002 (hereafter '*Abilio Soares Indictment*'), at 4.

chief and the Suai subdistrict military commander, after which the militia headed off to the Ave Maria church in Suai to carry out the attack. Even so, there were no clear and specific charges based on common purpose or conspiracy (note that Art. 41 of Law 26/2000 permits charges based on ‘plotting’), simply crimes by way of omission via the doctrine of command responsibility. Furthermore, of these three cases, those accused whom KPP-HAM had identified as direct perpetrators (regent Herman and Sugito) were not charged accordingly, and where the indictments did make allegations that there was a direct role (Syamsuddin), the individual was not charged with direct perpetration but with the lesser form of individual criminal responsibility for attempting, plotting, or assisting the perpetration of crimes within the jurisdiction (in fact, all the accused in that case were charged with this).

The indictments did not reflect the strength of KPP-HAM’s findings on the relationship and linkage between the TNI, police, local government bureaucracy, and the militias, and the findings that the violence that occurred in East Timor was not caused by a civil war but was the result of a carefully planned and systematic campaign of violence. Such relationships and linkages form vital evidence showing the existence of a state policy. State policy is an integral component of the crime against humanity and is regarded as a distinguishing feature of this particular type of international crime. For crimes against humanity prosecutions in relation to East Timor to succeed, international law requires that there be convincing evidence that attacks on the civilian population were either part of Indonesian governmental policy, sponsored by it, or at least tolerated by it.⁴⁵ To be systematic, the attacks will need to be shown to be ‘thoroughly organized and following a regular pattern on the basis of a common policy and involving substantial private or public resources’.⁴⁶ The policy need not be explicitly formulated, nor does it need to amount to the actual policy of a state.⁴⁷ It need not be formalized and can be deduced from the way in which the acts occur; if the acts occur on a widespread basis, that suggests a policy to commit those acts, whether formalized or not.⁴⁸ KPP-HAM found such evidence and gave it to the Attorney General’s Office, which chose not to use it. Thus the prosecutions have been limited by the indictments themselves, which provide no illustration of anything beyond ordinary crimes in East Timor and certainly no state policy to commit crimes against humanity there. What was charged in all these cases was criminal negligence, crimes by way of omission, such as failure to anticipate or react, or to control subordinates. This is not to say that there were no allegations of grooming militias: the regent of Covalima, Herman Sedyono, was accused of being responsible for the formation of the pro-integration forces and for gathering the various pro-integration groupings (*pamswakarsa*, Mahidi, Laksaur) at an official inauguration ceremony at the Gedung Wanita in Suai and paying them

45. *Prosecutor v. Zoran Kupreskić* Case No.IT-95-16-T, Trial Chamber, 14 Jan. 2000 at para. 552; *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-T, Trial Chamber, 7 May 1997 at para. 648. It is not a separate element of the crime, and is invariably to be found where there are widespread or systematic attacks on civilians.

46. *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, 3 Sept. 1998, at para. 580.

47. *Kupreskić* case, *supra* note 45, at para. 551.

48. *Tadić* case, *supra* note 45, at para. 653.

salaries, thus making them part of the establishment in Suai.⁴⁹ The TNI commander in Suai, despite having been in office for about a week when the attack on the church took place, was accused of providing training to the militias along with the accused Sugito.⁵⁰ But despite the allegations, the individuals were not specifically charged with these alleged offences.

With the indictments having been deliberately structured, none of the cases gave cause for the various official and unofficial operations in East Timor to be examined. All the focus was on irrelevancies and small details of particular incidents, and nothing linked up to form the big picture. Non-governmental organizations (NGOs) have long alleged that the violence in early April in Liquiça district leading up to the massacre at the church was part of the TNI's major military operation known as Sapu Jagad, aimed at wiping out the East Timorese resistance forces, FALINTIL, and their supporters. Yet this has never been investigated, and the picture that emerged was of East Timorese battling it out with each other. One would have thought that a primary focus of the investigators looking into the conduct of Timbul Silaen would be why it was that the East Timor police focused their energies on taking hundreds of thousands of civilians to West Timor in a remarkably well-organized fashion, rather than on dealing with the law and order issues arising from the much 'anticipated' troubles after the referendum. It was not part of the case against Timbul Silaen, even though the police operational plans Hanoen Lorosae I and II were included in the *bekas perkara* (prosecution dossier) submitted to the court. It is, however, fair to observe that at the trial there was some focus on the referendum-connected operational plan – Hanoen Lorosae I – which dealt with the lawful responsibilities of the East Timor police in relation to the referendum. Nevertheless, no one noted the strange fact that the front page of this operational plan preparing for the referendum was in fact entitled 'Control of Public Order and Security: Evacuation of Foreign Nationals and Indonesian Nationals out of East Timor after the Referendum of the People of East Timor'. Hanoen Lorosae II, issued on 31 August 1999, the exceptionally detailed police plan for the 'anticipated' civilian exodus to West Timor, received scant attention. It is also most peculiar that the TNI's Operasi Cabut I and II were not made the subject of indictment. The terminology is in itself strange, in that '*cabut*' means to pull out or withdraw and, like Hanoen Lorosae I, the first of these orders was activated when Indonesia was meant to be focusing on ensuring that the law and order situation was suitable for the successful holding of the referendum rather than planning for 'worst case scenario' emergency evacuations. Cabut II was the full evacuation plan introduced with the change of command for security operations in the aftermath of the referendum, when command flowed from police to military on 5 September 1999. There seemed to be a deliberate attempt to skirt around and avoid tackling the operational plans. Both the Hanoen Lorosae and Cabut operational plans linked into big-picture issues of policy, and the individual criminal responsibility of their authors – what the East Timor crimes against humanity trials were meant to be uncovering. It is fair to observe that the structure of the indictments rendered

49. *Suai Church Massacre Indictment*, *supra* note 43, at 9.

50. *Ibid.*, at 6.

close scrutiny of such operational plans irrelevant, and questions such as why the security forces were not focusing on restoring law and order as a priority instead of evacuating people did not need to be asked.

The *Suai Church Massacre* Indictment is illustrative. As with the other indictments, it painted a picture of the East Timorese fighting each other. This particular indictment alleges that crimes against humanity were committed in Suai, but lists only one incident – the 6 September 1999 attack on the church. No allegations were made about other incidents in Suai which would form part and parcel of a widespread systematic attack against the civilian population, let alone link it to what was happening across East Timor at the time. The prosecutors chose the most conservative figure of 27 victims, which were those remains recovered by KPP-HAM in West Timor. This is surprisingly limited, since the memorial outside the church at Suai, which would have been viewed by the investigators in July 2000, contains at least 100 memorial stones placed by family members commemorating those they lost in the massacre; East Timor's General Prosecutor's indictment in relation to the massacre sets out charges relating to up to 100 deaths. The Attorney General's Office also failed to lay charges in respect of any of those who had been wounded in the attack.

In its report, KPP-HAM described a backdrop of ever increasing violence in Covalima District and specifically named Sugito as one who took part in crimes before the Suai church incident: 'The Suai subdistrict military commander, 1st Lieutenant Sugito, took part in the burning and pillaging.' KPP-HAM found that he and the regent had played a major role in the Suai church massacre: the commission concluded that 'the attack [by Laksaur, Mahidi, TNI and police] was directly led by the *Bupati* [regent] of Covalima, Herman Sediono [sic] and the Suai subdistrict military commander, 1st Lieutenant Sugito'.⁵¹ However, the Attorney General's Office did not see fit to make such allegations in the indictment, and neither Sugito nor the regent was charged for their alleged direct participation. The accused Sugito was in fact one of numerous Indonesian officials whom the Head of UNAMET specifically wanted removed for his role in terms of the militias and of the violence in the district (a fact never brought up by the prosecution as part of its case against him).⁵² What they did do was to allege that regent Herman had been at the church, had just stood around and watched, and had failed to take preventive steps or assist the terrified and wounded civilians; in fact, he left in the midst of the killings.⁵³ As for Sugito, rather than being accused of participating in the rampage, he was faulted for removing the bodies from the church without co-ordinating with the correct authorities and for not doing enough to prevent the attack.

It should be noted that the Attorney General's Officers worked in additional subsidiary charges for all accused, charging murder as a crime against humanity, relying

51. KPP-HAM Executive Summary, *supra* note 12, at para. 43.

52. Letter from Ian Martin to Agus Tarmidzi, 19 Aug. 1999, in D. Greenless and R. Garran, *Deliverance: The Inside Story of East Timor's Fight for Freedom* (2002), 184.

53. *Suai Church Massacre* Indictment, *supra* note 43 at 5, 11. Note that although Herman Sediono was a serving military officer in Kopassus (special forces), he had no command authority over the police or the TNI in his capacity as regent of Covalima.

on non-direct participation under Article 41 (individual criminal responsibility for attempting, plotting, or assisting the perpetration of crimes within the jurisdiction), but it was never clear to which, out of the several allegations made about the accused, this was meant to apply to. For example, given that a policy decision had clearly been taken not to charge Sugito with direct perpetration, his removal of 27 of the bodies from the crime scene should have at least been addressed as an attempt to remove and destroy evidence, and thus aid and abet the perpetration of the crime. But while the removal was described in the main charge against him, which in fact only charged him with command responsibility and not with aiding and abetting the crime, it did not appear in his own specific subsidiary charge (based on Art. 41 allowing attempts, plots, and assistance to be charged), which just made the general allegation that he failed to anticipate or take preventive measures to deal with the situation.

In another striking omission in this case, one of the key players in Suai, the Suai subdistrict military commander 1635 Lieutenant-Colonel Infantry Achmad Masagus, was not charged. He had been in charge of military operations in Suai until shortly before the referendum was held. The head of UNAMET had in fact demanded his dismissal because of his role in supporting, training, and equipping the militias in Suai, and Masagus was withdrawn to Dili as a result (the prosecution failed to use this fact to challenge those witnesses who denied any TNI relationship with the militias).⁵⁴ Even more revealing is the fact that not a single militia member who participated in the attack on the Suai church was tried before the Ad Hoc Court.

None of the three indictments linked the incidents in Dili, Liquiça, and Suai, and none described a situation which justified the charges against the accused or the claim of a deliberately planned, widespread, and systematic attack on the civilian population. The only charges brought in these cases were murder and assault as crimes against humanity. None of the indictments (including those for other cases in addition to these three) charged any accused with responsibility for deportation or gender-based crimes, such as rape and other sexual assault. Temporal and geographic limitations imposed by the Megawati *Keppres* (decree) explain to a certain extent why the indictments do not pick up on events between April and September 1999. Yet the *Keppres* does not prevent incidents during this period from being used as evidence of the widespread or systematic attack, or from using incidents beyond the five that are regularly used for Dili, Liquiça and Suai. For example, in the case of Timbul Silaen, the former police chief of East Timor, the prosecution could have used the rescheduling of the voter registration for security reasons as evidence of how he failed in his duties during this period, and used the incidents to link April and September and justify the claim of a widespread systematic attack on the civilian population. Similarly, other incidents in Dili beyond the attack on the diocese and

54. I. Martin, *Self-Determination In East Timor: The United Nations, the Ballot and International Intervention*, International Peace Academy Occasional Paper Series (2003), 76–7. Some of the allegations in the *Suai Church* Indictment relate to the period when Achmad Masagus was in Suai (for example during the period when the Laksaur and Mahidi militias were allegedly developed and trained by district military headquarters 1635). His successor, Liliek Koeshadianto, in the job for a week when the massacre took place, was instead made to stand trial and one of the allegations against him was that he was responsible for training the militias.

Bishop Belo's residence could have been raised. UNAMET offices across East Timor were devastated and several of its local staff murdered, yet only the attack on the UNAMET office in Liquiça was charged and the charge was for assault (no evidence about this incident was in fact submitted at trial).

There was precious little in the indictments that reflected the findings of KPP-HAM or the two UN inquiries on the extensive involvement of the Indonesian authorities in the development, training, and equipping of the East Timorese militias, their attempts to manipulate the outcome of the referendum, and the planning/implementation of a scorched earth policy, massive deportation, and extensive attacks against the civilian population in the event that the pro-integration group should lose. The former governor, Abilio Soares, was specifically charged with civilian command responsibility for the failings and actions of his subordinates, namely the two regents Leoneto Martins in Liquiça and Herman Sedyono in Covalima, and Eurico Guterres as deputy PPI (militia) commander, as well as for the actions of organizations or public groupings such as *pamswakarsa*. The indictment alleged that Abilio Soares was criminally responsible for the acts of his subordinates because he knew or deliberately ignored information that clearly showed that his subordinates were committing or had just committed the identified crimes, he did not command his subordinates correctly and lawfully, and he did not coordinate with the security/law and order forces to prevent or stop the actions of his subordinates or surrender perpetrators to the legitimate authorities for investigation, prosecution, and punishment. He was not charged with planning or ordering the alleged crimes to be committed, or any form of direct participation, even by way of aiding and abetting. This is noteworthy, because as part of the general background, the indictment alleged that Abilio Soares met with his regents to instruct them to deal with 'all possibilities', to develop political organization to promote pro-autonomy participation in the referendum, and also to form security groups known as *pamswakarsa*, which were lawfully permitted under Law 20 of 1982. As a result, the indictment alleged, *pamswakarsa* were formed at the district level, funded by the regents. The indictment is very mild compared to what is widely alleged against the governor, which is that, as the supposedly neutral head of the civil administration in East Timor, he authorized at a meeting the direct funding and support of violent militia groups across the province in an effort to terrorize pro-independence supporters and to manipulate the outcome of the referendum. This meeting, which was called by him, brought together all the key players – the regents, the Suai subdistrict military commander, local police chiefs, the East Timor chief of police, the East Timor military commander, and so on – and could have been cited as evidence of a common plan or conspiracy to take all steps, lawful and unlawful, to ensure that pro-autonomy won the referendum and to plan steps that would be taken if they should lose. In fact, it is striking that there were major meetings (known as *muspida*, an acronym for *musyawarah pemimpin daerah*) between the key local players (TNI, police, civil servants, militias) shortly before the major attacks at the Liquiça church and the Suai church, yet joint criminal enterprise by way of common purpose was not at the heart of this or any of the indictments. In fact witness statements in the prosecution dossiers examined revealed that the top military (including Kopassus,

the TNI's special forces) and police leadership were in Liquiça on the day of the attack itself, and some, such as the East Timor military region deputy commander (Mudjiono), were at the local TNI base during the massacre. The case against the governor (and for that matter the case against the police chief of East Timor) was not constructed to maximize such evidence. What was used was the indirect form of criminality, namely failure to control subordinates; the governor was not charged for attempting, plotting, ordering, or assisting in the perpetration of crimes against humanity.

The *Abilio Soares* Indictment also illustrates the overall fuzziness in the indictments. It claimed that the former governor had information that clearly showed that his subordinates, namely the regents of Liquiça and Suai, and Eurico Guterres as deputy commander of PPI and organizations under his or their control, such as *pamswakarsa*, were committing or had committed gross violations of human rights, and that he failed to take the necessary steps against them. This indictment portrayed the governor as a negligent supervisor, rather than a master-planner of atrocities. The indictment did not make the divisions of responsibility clear and did not illustrate how it was that East Timor's top civilian authority should be made responsible for law and order issues which were the responsibility of the police, and for security issues which were the responsibility of the TNI. It presented the major incidents as separate stand-alone incidents, and as spontaneous outbursts where the East Timorese were fighting each other. Only in relation to Liquiça was there any allegation of participation by the security forces (TNI and police); this was presented as the actions of a small number of rogue elements, rather than a result of operational instructions. In fact, none of the descriptions of the incidents supported the allegations that subordinates of the accused participated in widespread systematic attacks directed at the civilian population. The claims that the named subordinates had roles in the indicted incidents were vague. Given that the charges against the governor were for the lesser crime of failing to control his subordinates rather than issuing unlawful instructions to them, it is implicit that the prosecution case was that the subordinates acted contrary to his instruction. But it was never clear whether the regents were acting according to or contrary to instruction. In the case of the Liquiça church massacre, the regent in question (Leoneto Martins) was allegedly too afraid to involve himself in resolving the increasingly volatile situation at the church. The indictment does not indicate anything beyond cowardly behaviour; by way of contrast, an indictment by the UNTAET Deputy General Prosecutor for Serious Crimes places this regent at the heart of the Besi Merah Putih (BMP) militia, and testimony from a convicted Serious Crimes accused has him playing a key part in directing operations during the attack on Liquiça church.⁵⁵ So it was not clear why cowardly behaviour by a subordinate should make the governor liable for

55. See discussion below on the testimony of Armando dos Santos to the Special Panel of the District Court of Dili that the regent told militiamen who were leaving the scene of the carnage at the church to go back and carry on attacking pro-independence supporters. Also see UNTAET Indictment, *General Prosecutor v. Leoneto Martins et al.*, Case No. 21/2001, 22 Nov. 2001, available at <http://www.jsmp.minihub.org>. Twenty persons are accused of 18 charges of crimes against humanity related to the Liquiça church massacre. The crimes include murder, torture, persecution, inhuman acts, forced deportation, and extermination.

crimes against humanity. For Suai, the indictment portrayed regent Herman as doing nothing to help out when he went down to the killing field at the church, although it alleges that he had responsibility for the development of militias in Suai in accordance with instructions from the governor. By way of contrast, the KPP-HAM report placed regent Herman as actively directing the attack on the civilians at the church.⁵⁶ The indictment also does not substantiate the allegation that the governor knew or should have known about regent Herman's misdeeds in Covalima: the governor was in fact on the other side of East Timor in Dili as the territory was descending into chaos and his administration crumbling with it. Telephone landlines were already down on 6 September 1999. Objectively it was not clear what he could have done even if he had known that his subordinate had been involved in serious criminality and had had the will to do something about it. Eurico Guterres's provocative speech inciting the pro-autonomy gathering on 17 April 1999 was cited in the indictment, but nothing was said of his alleged role in the attack, whether in terms of ordering, aiding and abetting, or even direct participation, or indicating that the attackers were persons actually under his command and control. Guterres's speech at a rally on 26 August 1999 threatening an 'ocean of blood' if pro-independence won was widely reported in the media. But the charges did not connect the maelstrom of violence with Guterres's prophetic words two weeks earlier. The indictment was also not clear as to the way in which this militia leader should be a subordinate of the governor of East Timor.

In the *Timbul Silaen* indictment, an oft-repeated phrase was that attacks or conflicts between the pro- and anti-autonomy groups took place without any preventive measures or measures of control being taken by the security authorities and that the security apparatus did not try to take measures to confiscate or seize sharp weapons or home-made guns. Prosecutors seemed not to be aware of the inherent contradiction between this and the other main allegation, namely that there was a widespread and systematic attack on the civilian population committed by those under the accused's power and control. In any event, neither allegation was adequately substantiated through the provision of details of police misconduct (the description of the Liquiça massacre was the only place containing allegation of direct police involvement: two of the local police, Alfonso and Chico, were said to have joined up with the pro-integration forces). The basic complaint regarding Liquiça was that there were no attempts to prevent or halt the attack or disarm the sides. Yet the indictment went on to list various examples of the steps that the accused and his subordinates did in fact take. At the time of the attack on the Liquiça church, the accused was in Jakarta. While on the one hand claiming that the police did nothing

56. The depiction of his role as presented in Jakarta can also be contrasted against the investigations by Yayasan Hak, East Timor's leading human rights NGO, in its report, 'Laporan Investigasi Lima Kasus Besar Pelanggaran HAM Timor Lorosae 1999', 30 Nov. 2001, as well as against UNTAET's two major Covalima indictments. The first Covalima Indictment, *General Prosecutor v. Egidio Manek et al.*, Case No. 9/2003, charges 11 Laksaur militia members with 51 counts of crimes against humanity, including the killing of 27–200 persons at the Suai church. The second Covalima indictment, Case No. 14/2003, charges 16 higher-ranking accused, including the five accused in Jakarta's *Suai Church Massacre* case, Case No. 03/HAM/TIM-TIM/02/2002 (hereafter '*Suai Church Massacre* case'), with 27 counts of crimes against humanity. The indictments are available at <http://www.jsmp.minihub.org>.

to deal with a tense situation in Liquiça, the indictment describes elsewhere how the local police chief, Adios Salova, monitored and reported on the situation to Dili, and how in the absence of the accused Timbul Silaen his deputy, Muafi Sahudji, sent reinforcements to Liquiça and ordered the police to 'back up' the situation. The indictment alleged that on his return, Timbul Silaen was told of the incident at the church and instructed Adios Salova to carry out the necessary investigations to find the perpetrators, whether pro-independence or pro-autonomy supporters.⁵⁷ Similarly, while claiming that the accused and his subordinates did nothing to prevent or respond to the Carrascalão attack, the indictment also states that when Manuel Carrascalão went to the local police station in Dili to report the movement of militias towards his house, the officer on duty reported the matter to Timbul Silaen's deputy Muafi Sahudji, since the accused was in Jakarta. Muafi Sahudji gave orders for preventive steps to be taken, but the order was not enforced and the militias were able to attack Carrascalão's home. On the accused's return from Jakarta shortly after the attack, his deputy told him what had happened and the indictment complained that he *only* ordered that there be a thorough investigation into both pro-autonomy and pro-independence supporters.

The descriptions of events given in the indictments at times differed considerably from that provided by KPP-HAM, the two UN inquiries, and the indictments that have been issued by the General Prosecutor of East Timor.⁵⁸ The Attorney General's Office downplayed the seriousness of what happened and at times ignored the role of the security forces in its indictments. As already noted, the *Suai Church Massacre* indictment was for just 27 deaths out of what is generally considered to be as many as 100 (KPP-HAM estimated that at least 50 had died). Yet in relation to Liquiça the indictment did not take up the 'official' figure of five fatalities originally cited by the Indonesian authorities, but cited 22 fatalities and 21 wounded (Abilio Soares) and 18 deaths and seven injured (Timbul Silaen). One of East Timor's most serious massacres was that at Manuel Carrascalão's house in Dili on 17 April 1999. Yet, in the *Abilio Soares* case, the only charges arising out of this massacre were for *penganiayaan* (assault) as a crime against humanity. Another illustration is the description in the *Suai Church Massacre* Indictment of the notorious massacre at the church on 6 September 1999:

After the referendum was won by pro Independence the situation became more heated and there was tension between the two groups. As a result, pro Independence fled to the church in Suai. On 6 September 1999, there was an attack on the complex by persons using *rakitans* [home-made guns] and sharp weapons belonging to pro Integration

57. The evidence in the *bekas perkara* (prosecution dossiers) at trial was that the accused himself travelled to Liquiça the next day with Bishop Belo and other officials, and eventually had the Liquiça police chief (Adios Salova) transferred.

58. This refers to indictments issued after 2002. Prior to this, the Serious Crimes Unit was grossly under-resourced and had only been able to pursue one case as a crime against humanity (Lospalos). The rest were prosecuted as regular crimes under the Indonesian Penal Code. Since then, the General Prosecutor has been consistently issuing crimes against humanity indictments, including major indictments against individuals such as General Wiranto, the then head of the armed forces and Minister of Defence, as well as leading officials, some of whom were among the 18 tried in Jakarta. Comparison can be made of indictments issued at the District Court of Dili by reference to the website of the Judicial Systems Monitoring Programme at <http://www.jsmp.minihub.org>.

(Izidio Manek, Olivio Mendoza Moruk alias Olivio Mou, Martinus Bere, Motornus, Vasco da Cruz) who were members of Laksaur under the leadership [sic] of Olivio Moruk. As a result, 27 persons died.

This is a striking retreat from the version of the situation in Suai as described by KPP-HAM in its report:

On September 4, the Laksaur militia and members of the TNI in Debos Hamlet caused the death of a high school student. Consequently, villagers fled for refuge in the Nossa Senhora de Fatima church and the Ave Maria Suai church, where many refugees had been staying for a while. On the evening of September [sic], residences and government buildings in Suai were burned down by the Laksaur militia and members of the TNI. Commencing September 6, Villagers [sic] were forced from their homes. The Suai subdistrict military commander, 1st Lieutenant Sugilo [sic] took part in the burning and pillaging.

On September 6, at around 14.30 the Laksaur Merah Putih and Mahidi militias and members of the TNI and POLICE attacked refugees staying in the Suai church complex. The attack was directly led by the Regent of Covalima, Herman Sediono [sic] and the Suai subdistrict military commander, 1st Lieutenant Sugito. Before this, the militias threatened to kill all of the priests and both male and female refugees. At the time there were approximately 100 refugees staying in the church complex and an unknown number of refugees outside the complex. Father Hilario was shot once in the chest and Igidio Manek a Laksuar [sic] militia member stepped on the priest's body. Father Francisco was stabbed and sliced by Americo, also a member of the Laksuar [sic] militia. Another witness [sic] Domingos [sic] dos Santos, saw Father Dewanto killed in the old church. At the time of the attack, the Police, the Loro Sae Mobile Brigade Contingent and members of the TNI were outside of the fence shooting refugees who tried to flee outside the church complex. It is though that at least 50 people were murdered in this incident.

Twenty-six of the corpses were hauled by a truck and two cars and were buried in Alas Village, Wemasa District, Belu Regency. The burying of the corpses was directed by Suai subdistrict military commander, 1st Lieutenant Sugito along with three members of the TNI and a contingent of Laksaur militia. The corpses were transported from Suai at around 08.30 by 1st [sic] Lieutenant Sugito and his cohorts, after passing by the Metamauk Police Post in the Wemasa, West Timor area. The exhumation of the mass grave of the Suai church victims found there to the [sic] 16 males, 8 females and 2 corpses whose gender could not be determined ranging in age from 5 to around 40 years of age.⁵⁹

7. TRIAL OBSERVATIONS

7.1. The court environment

Trials before the Ad Hoc Court for Human Rights Violations in East Timor were held in the Central Jakarta District Court. The building is highly unsuitable from the witness protection aspect – for example, there are no separate witness waiting rooms with private entrances and exits and which are secured from the public. Nor are there separate washroom facilities. The court rooms are very hot and uncomfortable, and are poorly equipped: amplification equipment was often faulty and there were many occasions when the public could not follow what was being said in the courtroom.

59. Unofficial English translation, KPP-HAM Executive Summary, *supra* note 12, at paras. 42–44.

There were no official transcripts; private transcripts such as those used for this report were made from my notes and unofficial NGO transcriptions of tape and video recordings of the proceedings. Documents were difficult to obtain and court administration was poor, with no public notices of the time and location of hearings. There were no security precautions, not even weapon checks.

Throughout the trials, the TNI attended in strength, particularly in the *Suai Church Massacre* case, where four of the five accused were TNI members. Legal advisers from the TNI and the police attended regularly and followed the process. From the TNI units that attended, and from conversations with some of them, it was clear that the TNI was sending personnel in order to show its presence and support. This was about having uniformed personnel present – different faces and units would appear on successive days, and the individuals in question seemed to have no knowledge of the cases or interest in the proceedings. Lunch was provided for them in the court building itself. The TNI accused arrived in a military bus with outriders and sirens; this was not provided for the other accused. By contrast, police did not attend the majority of the trials to show support for the police accused, Timbul Silaen and Gatot Subiyaktoro, in the way in which the TNI sent teams of uniformed staff to fill the courtroom. However, they began to attend towards the final stages; this may or may not have been after the author made an observation to defence counsel. East Timorese pro-integration supporters regularly attended the hearings to support Abilio Soares, and to a lesser extent attended the cases involving TNI and police accused.

Accused persons would often attend the hearings in other cases; witnesses were usually to be found in the courtroom listening to the evidence that was being given in the case where they were to testify, or following it outside in the corridors through the loudspeakers. Intelligence officers were regularly present. Foreigners, of whom few came regularly, were openly regarded with suspicion, and were filmed and photographed. Local media and NGOs were present on a daily basis.

Apart from observers and journalists, the judges usually had to look out onto a sea of TNI, police, and militia in the public gallery. From the start, the presiding judges failed to assert the authority of the court.⁶⁰ There were days when they allowed the proceedings to be railroaded by witnesses playing to the audience, and days when it seemed as if the United Nations and its Special Representative in East Timor (Ian Martin) were on trial. Hearings involving high-profile witnesses such as Wiranto and Adam Damiri were volatile, marked with noisy outbursts from the audience. On such occasions the public gallery would be dangerously packed and the atmosphere particularly charged. The TNI in full camouflage clothing attended sporadically, but the vast majority of military personnel would attend in formal uniform. Apart from some failings in relation to court etiquette (talking in the court, taking telephone calls, etc.), the TNI and police were generally well behaved and disciplined. The East Timorese were markedly more vocal and noisy in court.

60. Note, however, that towards the end, the presiding judges in all three cases began to assert that authority, issuing warnings of contempt to defence counsel, threatening to eject noisy members of the public, sending those who took telephone calls out of the courtroom, and so on.

There were occasional demonstrations by uniformed pro-autonomy supporters; there would be militias in camouflage, attendees dressed in the national colours (red and white), East Timorese dressed all in black with T-shirts saying 'Korban Penipuan PBB' ('victim of the deception of the United Nations'), and anti-UN banners, and so on.

When interviewed, the judges said they liked to see international observers present. They acknowledged that pressure tactics were being used in the public gallery, but denied that this was having any effect on them. It is difficult to assess what effect this intimidating environment has actually had on the judges. Their performance at the trials was not a factor which directly affected the credibility of the process, although it contributed. KUHAP (the Indonesian Criminal Procedure Code) assigns primary responsibility for examination of witnesses to the court. But the practice of the panels of judges differed: the judges on one panel questioned a witness first, while those on the other two had the party calling the witness carry out the initial questioning. Likewise, the practice of the panels on non-direct evidence was mixed. There were times when judges and counsel specifically asked witnesses about what they heard about an incident or a situation, and other times when they required the witnesses to speak only about what they had personal knowledge of. In this context, it should be noted that there is no prohibition of hearsay evidence in Indonesia, but the evidence of non-expert witnesses must be based on first-hand knowledge. In general, the panels permitted witnesses with no direct knowledge of events to speak at length as though they did have such knowledge. They were relatively passive for civil law judges; questions were asked, but often they were irrelevant and missed the point.⁶¹ Several judges were active participants, and placed good and pertinent questions, often making up for the inadequacies of the prosecution. Examples included attempts to link the weapons used at the various sites of killing, such as the Liquiça church and Carrascalão's house, and asking why the authorities, with all their intelligence services, were not able to anticipate the post-referendum violence of September 1999. Good questions were, however, rarely pursued to their logical conclusion, and those few judges who tackled issues head-on provoked negative reactions in the gallery, including the making of hostile and threatening remarks.⁶² Termination of relevant lines of questioning may in some instances have arisen as a result of blatant audience hostility.

It is also difficult to assess whether the prosecution's abject performance (see below) was because of intimidation. There are reports that the prosecutors received

61. There was often much repetition on points of no consequence, and often no questions on what really mattered or questions that skirted around important points. For example, none of the Suai church judges asked accused Liliak Koeshadianto about the role of the district military headquarters in arming and training the militias, or if the TNI or the East Timor Police took part in the attack on the church. Not one judge in the *Timbul Silaen* case asked the police chief of Liquiça a single question about the BMP militia group in Liquiça.

62. One such example was when a judge – the prosecution had not done so – questioned Eurico Guterres as to how he obtained his weapons and was trained in their use. Defence counsel disputed the relevance of the questioning, and the judge ended his questioning forthwith. A judge challenged the police chief of Suai who had said that it was not possible to distinguish the two groups: he asked how it was then possible for him to claim that UNAMET hired pro-independence supporters only. Another challenged Abilio Soares, to loud heckling and audience mutterings about killing the judge, about his claims of fraud by UNAMET: he was speaking extensively about what he had heard, but what did he actually know from personal experience?

threatening phone calls. However, relations between prosecution and defence were observed to be particularly warm and friendly. This was very much the case with prosecution witnesses and the accused, who would often be seen jovially in discussion together before and after proceedings, also during intervals. As noted below, this should be no surprise, given that bar the three East Timorese victim-witnesses, the prosecution witnesses all testified in favour of the defence.

7.2. An apathetic prosecution uninterested in proving the charges against the accused

As has already been noted, the process of seeking justice for atrocities committed in East Timor was fundamentally hampered by limitations of the applicable law, and by extremely weak indictments that seemed designed to minimize the seriousness of the crimes that were committed and the responsibility of the accused. Thus the trials began with the odds stacked against a meaningful process.

The prosecutors of the Ad Hoc Court were strikingly inept in meeting the requirements of the burden of proof. The weak indictments, formulated in terms requiring proof of crimes by way of omission, specifically command responsibility for failure to control subordinates or to act appropriately in response to crimes committed by subordinates, required that the prosecutors show that the actions or inaction of the *accused* fell short of an objective standard, namely that set out in the provisions of Law 26/2000 for civilian and military command responsibility. This was not done. The indictments also required that the actions or inaction of the *subordinates* be shown to have failed an objective standard of behaviour. For example, with the police accused of not taking the necessary steps in relation to criminal acts committed in Dili, Liquiça, and Suai, one would have to test that conduct against an objective standard. What did or didn't they do? What could they have done? What were the options? What should diligent police in that situation have done? This exercise was not undertaken by the prosecutors.⁶³

7.2.1. Witnesses

Perhaps the most striking aspect of the trials was how from the very start, apart from the three witnesses who came from East Timor, all the prosecution witnesses testified against the indictments. In the course of its investigations, KPP-HAM conducted six field trips to Kupang and three visits to East Timor, and inspected the mass grave in West Timor where victims from the Suai church killings were buried. An expert forensics team accompanied KPP-HAM to inspect the mass grave. KPP-HAM interviewed 123 individuals in Dili, Suai, Liquiça, Maliana, Maubara, Kupang, Atambua, and Jakarta. After the full report and supporting evidence were submitted to the Attorney General, his assigned officers spent a month in East Timor in July 2000. UNTAET provided them with access to many witnesses and they were able to visit crime scenes in Dili, Liquiça, and Suai.

63. Note that there were several instances of judges asking about standard operational procedures, such as during the testimony of Timbul Silaen at the trial of Abilio Soares. It should also be noted that in his own case, Timbul Silaen usually tried to introduce some objectivity by referring to standard procedures and normal policing practices.

It is therefore very strange that the Abilio Soares dossier submitted to the court did not contain a single victim statement. Each and every person interviewed in the course of this investigation was an ardent supporter of integration with Indonesia (all were civil servants or military and police personnel).⁶⁴ Thus the investigators built this case with absolutely no victim testimony from the major killing scenes which formed the basis of the *Abilio Soares* indictment. The dossier for the *Timbul Silaen* case submitted to the court reveals just seven victim statements on file in relation to six massacres. Two of these seven testified at the court in Jakarta, the statements of three went on the record after the witnesses refused to attend, and two statements seem to have been ‘overlooked’.⁶⁵ None of these persons offered evidence on the Carrascalão massacre, the Suai church killings, or the attack on UNAMET in Liquiça. In other words, the prosecution built its case making allegations about the three incidents without having any evidence whatsoever in the dossier.

There are many key witnesses and victims who could have been called to testify for the prosecution, but were not. One notable omission was Father Rafael dos Santos of Liquiça church, who spoke at a press conference after the attack about the role that the military and police took in the massacre.⁶⁶ KPP-HAM had interviewed him, but apparently not the Attorney General’s Office, for his statement was not in the dossier presented at court. While he was not called to testify in the case against the former governor and police chief of East Timor, it is interesting to note that this witness was later summoned to testify in the case against the lower-ranking Leoneto Martins, Adios Salova, and Asep Kuswani (all acquitted).⁶⁷ Several militia members told KPP-HAM about clandestine burials of those murdered at the church carried out at the instructions of the TNI, but they were not called as witnesses (note that this destruction of evidence also occurred following the Suai church massacre, when the TNI and the militia removed 27 bodies from the crime scene and buried them in West Timor). Another useful witness who could have been summoned but was not, was Armando dos Santos. This former militiaman was convicted by Dili’s Special Panel for Serious Crimes earlier in 2002, and testified about his activities with the BMP.⁶⁸ He spoke of participating in attacks on local anti-autonomy supporters, under the direction of TNI soldiers: ‘Each time we were gathered at the command

64. Interviews in the prosecution dossier were from Suprpto Tarman (former regent of Aileu), Herman Sedyono (former regent of Covalima), Mateus Maia (former mayor of Dili), Guilherme dos Santos (former regent of Bobonaro), Leoneto Martins (former regent of Liquiça), Domingos Soares (former regent of Dili), Adam Damiri (former Udayana IX regional military commander), Tono Suratman (former military commander of East Timor), Noer Muis (former military commander of East Timor), Timbul Silaen (former police chief of East Timor), Mudjiono (former deputy military commander of East Timor), and the accused.

65. Emilio Bareto (Liquiça massacre survivor, testified), Joao Perreira (Liquiça massacre survivor, testified), Jose Menezes Nunes Serrao (Liquiça massacre survivor, did not testify and his statement was not read into the record); Nelio Mesquita da Costa Rega (diocese of Dili massacre survivor, did not testify and his statement was read into the record), Maria Ferreira Soares (survivor of the Dili Diocese and Bishop Belo’s residence massacres, did not testify and her statement was read into the record), Joao Bernardino Soares (Dili Diocese massacre survivor, did not testify and his statement was read into the record), Vincente A. G. de Sousa (Dili Diocese massacre survivor, did not testify and his statement was not read into the record).

66. Reported in *Suara Timor Timur*, April 1999, and by the NGO Yayasan Hak in May 1999.

67. Fr Raphael dos Santos testified from East Timor by video link. He said that Indonesian soldiers and policemen were among the attackers of his refugee-packed church in the town of Liquiça in April 1999; ‘East Timor Clergyman Says Soldiers Among 1999 Church Attackers’, *Jakarta Post*, 24 Jan. 2003.

68. Unofficial transcript of the testimony of Armando dos Santos, JSMP observer, 29 and 30 Jan. 2002.

place they only explained to us that we had to go to certain places and kill people and if we didn't we would be killed together with our families.' Before the massacre at the Liquiça church, he claims that he and other militia members were taken to Maubara, where they were made to participate in a blood-drinking ceremony when the blood of a sacrificed animal was mixed with drugs and hard liquor. They were told they would go to Liquiça to kill people there. Thereafter, the men were taken to Liquiça by four or five soldiers. They met up with other soldiers in Liquiça who were all dressed in civilian clothes. The militias from Maubara arrived in Liquiça in the morning but could not get into the church; they sat around at the military district headquarters. 'It was only when the TNI fired shots, with cloth over their faces, that we the militia could get into the church . . . It's true that there were lots of people there – militia from Maubara and Liquiça and soldiers and BRIMOB [mobile/riot police]. They covered their faces with a cloth and we followed them.' The attack commenced with shots and tear gas. 'The soldiers were firing tear gas.' Dos Santos claimed that he killed one person and then fled the tear gas, only to be told by regent Leoneto Martins to go back and attack pro-independence supporters: ' . . . we met him on the road and he instructed us to go back and surround or besiege the pro-independence people in the church'. After the militias returned to their villages, they were summoned to the military post and paid 250,000 rupiah. Armando dos Santos should have also been a vital witness about the April 1999 massacre at the home of Manuel Carrascalão: he testified before the Special Panel of the District Court of Dili that he and other militia members were gathered by TNI soldiers at the Maubara military subdistrict command and then taken to Dili to participate in the attack on the house of Manuel Carrascalão along with other militia: 'They took us to Dili on that day and we gathered there with other militias and Joao Tavares and Eurico Guterres stood in the road and gave us orders.' They were taken to a house near the Tropical hotel [Aitarak militia headquarters] by soldiers who went first, covering their faces and weapons with cloths. 'If you looked quickly they looked like militia but they were soldiers . . . There were lots of militia and TNI around it firing.' After the attack was over, the militia members were taken to Eurico Guterres's house, where an animal was slaughtered for them to eat, and then they were taken home.⁶⁹

Any investigators seeking to build a watertight case against the police and their chief in East Timor, the accused Timbul Silaen, who were claiming that they had done a fine job in handling the events in Dili on 17 April 1999, should have looked into the allegations of one Santiago dos Santos Consela, survivor of the Carrascalão massacre. He told the NGO Yayasan Hak that he and other survivors were arrested by the police in Dili and questioned.⁷⁰ After explaining to them that he saw militia members from the BMP, military from the Maubara military subdistrict command, and *kamra* (volunteer public security who assist the police) taking part in the attack using firearms and home-made guns, the police threatened to beat him if he did not change his story. He claimed that he was told not to say that the attackers had

69. *Ibid.*

70. Yayasan Hak, 'Kasus Besar Pelanggaran Ham Timor Lorosae 1999', 30 Nov. 2001, 45.

automatic weapons or that any military took part in the attack, and that he was not to reveal that *kamra* were involved, but to say that only militias carried out the attack and did so using home-made guns or G3 (older type of gun). He also alleged that he and the others were forced to say that the East Timorese resistance forces (FALINTIL) shot first from the house of Carrascalão, causing the militias to attack. There is no indication that this person was even interviewed.

The already abysmal witness selection of the Attorney General's officers was further adversely affected when as a result of the experiences of the first three East Timorese victims who testified (Dominggas dos Santos Mouzinho, Emilio Bareto, and Joao Perriera), other potential witnesses who had earlier agreed to testify refused to travel to Jakarta. The experience of dos Santos Mouzinho in the courtroom is examined later in this study. Other key areas of concern relating to witness protection were that the police permitted Eurico Guterres and an East Timorese member of the Abilio Soares legal team to enter the room where one of the witnesses was waiting and speak to him; that the 'safe house' was located in the middle of a police compound; and that large numbers of uniformed security forces were deployed.⁷¹ While the East Timorese Prosecutor General was very willing to assist with video conferencing from East Timor – used in the *Akbar Tandjung* case, when the former president B. J. Habibie was permitted to testify before an Indonesian court by video link from Germany – the prosecution did not support the request and in spite of defence protests about the admissibility of witness statements, preferred to have them read into the record.

Some of the individuals whose statements were contained in the prosecutors' dossiers submitted to the court were not summoned as witnesses and no explanation was given. For example, in the case of Timbul Silaen, Vicente de Sousa was interviewed and his statement is part of the dossier. He alleged that following the announcement of the result of the referendum, Indonesian soldiers were right next to the Diocese of Dili, guarding the Mahkota Hotel. They did nothing to help the people under militia attack. He also alleged that the militia and army burned his and other homes. De Sousa was able to identify at least one civil servant (the former village chief of Hera) shooting with a long-barrelled military standard issue weapon at the Diocese along with Aitarak militia (dressed in black tops with the word 'Aitarak' printed on them and wearing red and white bandannas tied around their heads). This witness was not called to testify, no other witness provided such evidence, and his statement was not even read into the record.

At trial, just one East Timorese witness provided survivor testimony about the Suai church massacre (this witness, Dominggas dos Santos Muzinho, was not called to testify in the cases of Abilio Soares or Timbul Silaen, who were also charged with responsibility for the massacre). Two individual survivors provided direct eye-witness testimony about the Liquiça church massacre – they had been summoned in accordance with KUHAP for the *Timbul Silaen* case and at the last minute appeared in the *Abilio Soares* case without a proper summons. There was no victim testimony about

71. In cases where a protected witness is testifying about the participation of the police and the military in atrocities, to surround the witness with 'security' from the same forces, who also regularly appeared in court to show support for their colleagues, is inappropriate and strongly suggests intimidation.

the killings and assaults at the home of Manuel Carrascalão (who repeatedly conveyed through the East Timorese Prosecutor General that he was willing to testify), the Diocese of Dili, and Bishop Belo's residence, which formed bases of indictment in the case of Abilio Soares and Timbul Silaen. Rather than drawing from the large pool of witnesses, including survivors of the main incidents, UN staff, journalists, and independent international observers, the prosecutors preferred to 'build' their case through Indonesian officials who had served in East Timor (TNI, police, civil servants, and so on) and thus had an interest in securing acquittals for the accused. These witnesses defended the innocence of the accused—all but three of the witnesses (the victims who came from East Timor) refuted the prosecution allegations. The fact that a large number of these witnesses were themselves facing trial for crimes against humanity made it unlikely that they would incriminate themselves by providing 'proof' for the indictments against their commanding or superior officers, or subordinates. To prove allegations against the superiors, such as Timbul Silaen and Abilio Soares, the prosecution chose to call the accused's subordinates and their superiors. The first witness presented by the prosecution in the *Timbul Silaen* case was the head of the armed forces and Defence Minister in September 1999, General Wiranto, despite the fact that Indonesian law requires that the first witness be a victim of the crime. Rather than testify in support of the prosecution's allegations, he sang the praises of the accused and denied that the TNI, police, or district administration had any role in the East Timor violence. Another good example of unusual witness selection for the prosecution was former Udayana IX regional military commander Adam Damiri, a witness who appeared in all three cases, who has himself since been convicted of crimes against humanity in East Timor. According to Adam Damiri, the fault was that of the East Timorese, who were emotional and had always been fighting with each other, and the United Nations, which held a fraudulent referendum which cheated the vast majority of East Timorese of their right to a fair vote to remain part of Indonesia. His testimony in all three cases was consistent: all the accused did the best they could, they did their '*maksimal* [utmost]', and the charges were not correct. Twice he appeared as a prosecution witness to say this; once he was called to speak for the defence. The impact of this witness was consistent: the accused did not do anything wrong and did not deserve to be tried.

The following is a closer scrutiny of the unusual witness selection by the prosecution teams in the three cases.⁷²

7.2.1.1. *Timbul Silaen case.* Prosecution witness Gatot Subiyakto was police chief of Suai under the command and control of the accused, that is, one of those subordinates

72. There was a problem with witnesses changing their testimony at trial to what was more favourable to the accused and revoking what had earlier been recorded in their *berita acara pemeriksaan* (records of interview) – what would in common law be termed turning into a 'hostile witness'. This is discussed in section 7.2.4 below. Yet the *bekas perkara* that have been examined indicate that the thrust of the testimony at trial was generally consistent with what had been said during interrogation. All the subordinates denied that they did anything wrong and that the accused were blameworthy; likewise all the commanders denied that their subordinates did anything wrong. Thus the prosecution would have known what these persons would say if summoned as witnesses. The changes that were being made to statements did in fact bring inconsistencies into line with the version being told by the majority.

for whose actions the accused was being held criminally responsible, and himself on trial for crimes against humanity. Asked if his commander had been neglectful as alleged in the indictment, he replied, 'There never was any negligence and it is a lie if that is said', and that the accused 'always gave instructions that were clear for the smooth functioning [sic] of all police tasks and we performed them, including prevention when there were quarrels including easing every implementation of the referendum. And he got very angry when staff did not carry out their jobs'.⁷³ The witness spoke of the instructions that the accused would give during his meetings convening all the local police chiefs, providing them with directions and advice on how to carry out their policing duties. He also gave examples of instructions from the accused on how to deal with the brawling East Timorese: stop the incident and protect the stability (*kekondusifan*) of society, particularly by co-ordinating and direction, and arrange truces/peace agreements.⁷⁴ The witness spoke of at least three such peace agreements to which he (the witness) had been party, such as that at the Suai regent's house on 3 September 1999. According to him, the locals had agreed not to quarrel, not to fight, to keep the peace, and to carry out joint activities whether in relation to the socialization of autonomy or independence. 'Kapolda [Silaen] always told us we should be neutral, not to take sides, not to follow politics, that was what he said and I conveyed that to my own staff'.⁷⁵ The police carried out plenty of raids for weapons. Speaking of his own role in the Suai church massacre, this subordinate of the accused claimed that he rushed to the scene, was halted by the shooting, tried to stop the killings, called for reinforcements from the mobile/riot police and others, issued instructions to stop the fighting, and so on. The mobile/riot police fired warning shots in the air to stop the rioting. He testified that afterwards he gave orders for patrols to secure the crime scene, so that there would not be more brawls in other places, then to investigate the incident, but at the time it was getting dark and it was dangerous, with shots being fired and a lot of burning all over the place. He testified that he reported on the incident to Dili, but the accused was out dealing with the erupting violence in the capital. He spoke to the deputy of the accused, who told him to 'carry out his policing duties, protect the refugees and carry out the evacuation' – the accused could not personally come to Suai because the situation prevented it.⁷⁶

Prosecution witness Adios Salova, the accused in another case, was the former police chief of Liquiça, under the command and control of the accused. He testified about all his efforts at dealing with the developing violence among the locals in his district, how police under his authority carried out plenty of raids for weapons, and how they had attempted to negotiate a peaceful end to the situation that arose at the church. No police were involved in any criminal actions at the church; on the contrary they had rescued many people from certain death. Rather than doing nothing, on his return from Jakarta and on learning what happened, the accused

73. Gatot Subiyaktoro, *Timbul Silaen case*, Case No. 01/HAM/TIM-TIM/02/2002 (hereafter '*Timbul Silaen case*'), Transcript, 16 May 2002, at 54.

74. *Ibid.*, at 56.

75. *Ibid.*, at 61.

76. *Ibid.*, at 21.

Timbul Silaen had 'ordered that the crime scene be secured, the perpetrators be caught so the investigation could be completed and sent an investigation team from police headquarters'.⁷⁷ 'Kapolda [the police chief of East Timor – Silaen] ordered us to investigate the crime; secure the scene; catch the perpetrators and carry out an exhaustive investigation. POLDA [East Timor Police] sent a team of investigators. Eleven were arrested. Kapolda [Silaen], Bishop Belo and Danrem [East Timor military commander] came to Liquiça'.⁷⁸ The witness was asked the following: 'The accused is charged with ignoring the situation and failing in his duties. At the time you asked Wakapolda [deputy police chief of East Timor, Muafi Sahudji] for back-up was it given?' He answered:

Yes. They sent us BRIMOB and investigators. Wakapolda came to check up on the internally displaced. POLRES [local police] fed them. We did not just ignore things. People were cared for. If we hadn't been at the church, 2,000 people would have been killed. The police ringed the church. I ordered them to build a chain to calm the situation and prevent a clash. At the time, we were doing our *maksimal* [utmost]. The brawl happened because of the reaction to the shooting. We did not have the capacity to prevent the brawl. We tried our best.⁷⁹

Prosecution witness Hulman Gultom, former police chief of Dili, also faced trial for crimes against humanity. He was under the command and control of the accused and one of the subordinates for whose actions the accused was being held criminally responsible. In examination in chief, he described how as soon as he heard that there was trouble brewing at Manuel Carrascalão's house, he sent back-up forces there immediately to deal with the situation. The accused was away in Jakarta on official business and Gultom dealt with the accused's deputy. 'He ordered me to deal with the incident, localize the incident, not to let it spread to other places'.⁸⁰ 'The incident occurred, BRIMOB were sent, and they took steps to save 42 people. If we didn't do anything, they would probably have all died. They were saved from the attack by the platoon of BRIMOB . . . When BRIMOB got there, they chased the attackers with warning shots. My reports say there were about 600 of them . . . BRIMOB went in and took preventive measures, with the result that 42 people were saved, sir, if we hadn't done anything they would have all been killed'.⁸¹ 'Several hours later, I went to the airport to meet Kapolda [Silaen] and reported in detail on the day's incidents to him. Kapolda told me to carry out an investigation and secure the homes of pro-independence leaders so there would be no repeat'.⁸² This witness claimed to have arrested seven persons.⁸³

Examined by the prosecutor about the response of the accused Timbul Silaen to the attack on the diocese of Dili on 5 September 1999, witness Salova said that the accused had heard on the open radio about trouble at the diocese and, on his own

77. *Ibid.*

78. Author's own notes, *Timbul Silaen* case, Testimony of Adios Salova, 2 May 2002.

79. *Ibid.*

80. Hulman Gultom, *Timbul Silaen* case, Transcript, 2 May 2002, at 10.

81. *Ibid.*, at 22.

82. *Ibid.*, at 10.

83. *Ibid.*, at 23. See earlier discussion concerning allegations that the police tortured those arrested so that they would deny that any members of the security forces took part in the attack.

initiative, sent reinforcements to assist the local forces.⁸⁴ ‘Kapolda [Silaen] ordered me to keep carrying out police duties, even though with very few personnel. Even with the few forces we had, we could do good . . . That day, Kapolda took to the air in a helicopter to monitor the situation in Dili and around. He gave orders to me by HT [‘handy-talkie’, hand-held radio] even though there was bad reception, the orders were the same, keep doing your job, especially humanitarian tasks even though you’ve only got a few personnel’.⁸⁵ Defence counsel put the charges in the indictment to this witness: ‘It is alleged against the accused that you as police chief of Dili took no steps in relation to the attack on Bishop Belo’s house’.⁸⁶ It was not true, answered the witness, *Kapolda* put the safety of Bishop Belo as a top priority.⁸⁷ To the question ‘Please explain, and also about how Bishop Belo was saved and taken to Australia?’, the witness replied:

Its [sic] like this, the staff who told me about the attack were closer to the scene so I sent them there to carry out police duties. A POLDA [East Timor police] team was already there, dispatched to save Bishop Belo. Then, we took the survivors to the coast to calm them to await evacuation. About the confiscation of weapons – we couldn’t disarm them. Our priority from *Kapolda* [Silaen] was to save Bishop Belo. And then it was the IDPs [internally displaced persons]. I saw the POLDA team dealing with rescuing the bishop, so we worked on saving the internally displaced. It was not possible to disarm them. We would have had to abandon the internally displaced if we had done that.⁸⁸

7.2.1.2. *Abilio Soares case*. Prosecution witnesses Tono Suratman, former military regional commander for East Timor, and Adam Damiri, regional commander of the Udayana IX military command, faced crimes against humanity charges himself. He was asked the following by defence counsel: ‘you are brought as a witness against the accused, did you hear the results of the investigation and examination about the involvement of the accused? Was the accused involved or not?’. To this he replied: ‘As far as I know, the accused was not involved’.⁸⁹ The charges against the accused were untrue, he said.⁹⁰ Asked by a judge who had attacked whom in the course of the events charged in the indictment, he replied that they were not attacks but *bentrokan* (brawls).⁹¹ He never received any reports from his subordinate commanders that the TNI had been involved nor that the accused had committed human rights violations in East Timor.⁹² There were no reports that the accused committed or provoked any murders, said Adam Damiri.⁹³ ‘I can confirm that as far as I know the governor did a lot for the people of East Timor. What I know is that he went beyond the call of duty

84. *Ibid.*, at 15.

85. *Ibid.*

86. *Ibid.*, at 24.

87. *Ibid.* Prosecution priorities are revealed by the summoning of the police chief of Baucau to testify as a prosecution witness about the arrival of Bishop Belo in Baucau following his rescue by air from Dili and how, at the orders of the accused Timbul Silaen, the bishop was eventually airlifted out of East Timor to Australia. The witness had no other relevant information to provide.

88. *Ibid.*, at 24, 25.

89. Author’s own notes, *Abilio Soares case*, Case No.02/HAM/TIM-TIM/02/2002 (hereafter ‘*Abilio Soares case*’), Testimony of Tono Suratman, 18 April 2002, at 18.

90. *Ibid.*, at 22.

91. *Ibid.*

92. *Ibid.*

93. Author’s own notes, *Abilio Soares case*, Testimony of Adam Damiri, 8 May 2002.

for a governor, compared to governors in other provinces. For example, he visited the most remote areas along with the *muspida* [local leadership] and carried out endless reconciliation'.⁹⁴ Damiri had never heard that the regents of Covalima and Liquiça or Eurico Guterres had committed murders.⁹⁵

Militia leader Eurico Guterres, eventually to be one of the few accused convicted for crimes against humanity at the Ad Hoc Court, was called to support the prosecution's allegations against Abilio Soares. The accused was said to have been responsible for the acts of Guterres. The prosecution dossier indicated that this witness had not been interviewed by the prosecution team in relation to this case, even though the accused was charged with responsibility for him as a subordinate. It was virtually at the end of the prosecution's case that the prosecution made the unexpected announcement that Guterres would be called. It is noteworthy that Guterres testified immediately after the testimony of the only two witnesses from East Timor. The witness himself told the court that he should be a witness for the accused, rather than the prosecution. The court held that it would assess the kind of witness he was once he had testified. As anticipated by the witness, his testimony was for the accused and against the party that had called him, that is, the prosecution. In relation to the attack on Liquiça he said that he went there as a peace envoy of Bishop Belo and brought 10 kg of rice for those displaced by the fighting. He went to Maubara to view the damage resulting from earlier fighting and the church attack was over when he got back to Liquiça: 'I don't know because at the time I got there the incident was over but I knew when I got there'.⁹⁶ The church was empty, everyone was either at the district military headquarters or the regent's residence.⁹⁷ Likewise, he claimed that he was not present when Manuel Carrascalão's house was attacked.⁹⁸ He was apparently at Dwikora Matalang dealing with arson at his mother's home, and it was only on returning to Dili that he heard that Manuel Carrascalão's home had been attacked; the house was sealed off by the police and he was not able to go inside. Asked about the 'attacks by pro-integration on 4 and 5 September 1999 on the civilian population that sought refuge at the Diocese of Dili resulting in 40 deaths', he replied: 'If anyone says that pro-integration attacked that is not true'.⁹⁹ Nobody asked this witness how it was that East Timor turned into the 'ocean of flames' that he had threatened would occur should pro-independence win, when he addressed the final pro-autonomy rally on 26 August 1999. He did not know what happened in Suai because he was in Dili. Not surprisingly, the defence closed its questioning of the witness by observing that he did not know anything about the charges, let alone took part in the killing and assault that was being blamed on Abilio Soares.¹⁰⁰

94. Author's own notes, *Abilio Soares* case, Testimony of Tono Suratman, 18 April 2002.

95. Author's own notes, *Abilio Soares* case, Testimony of Adam Damiri, 8 May 2002.

96. Eurico Guterres, *Abilio Soares* case, Transcript, 30 May 1999, at 33.

97. *Ibid.*, at 12.

98. *Ibid.*, at 5–6.

99. *Ibid.*, at 34.

100. *Ibid.*

7.2.1.3. *Suai Church Massacre case.* A number of the lower-ranking police and soldiers who were at the scene of the bloodbath at the Ave Maria church were called as prosecution witnesses. Prosecution witness Sony Sanjaya was a member of the mobile/riot police, under the command and control of one of the accused, former Suai police chief Gatot Subiyakto. Asked if the five accused in the case did do what was being alleged against them, he replied: 'It would be better to make me an accused, sir, if that really occurred. I did the best that I could do, I would be at fault for not being able to overcome the situation, but I tried sir'.¹⁰¹ In response to the question: 'Were there gross violations of human rights committed by the accused?', he denied it, saying that he had never received orders to ignore the plight of those being attacked at the church:

Until this second there were no orders to ignore the situation. In fact, I was ordered to try to secure sir. Tried my very best that is what I can say . . . Absolutely no orders, let them die, no such orders sir. In fact, I was ordered to stop it sir. Not just then, but many times during the incident, we tried to stop it, stop it.¹⁰²

Prosecution witness I Wayan Suka Antara was a member of the TNI's district military headquarters 1635 Suai, and one of those named by KPP-HAM as a suspect in relation to his alleged participation in the attack on the Suai church. His superiors Achmad Syamsuddin and Liliek Koeshadianto were being held responsible for his actions. In answer to questions from the judges and prosecution, he spoke of the efforts that he and his colleagues made to stop the fight and to prevent the masses of people from swarming into the church. He even spoke of how he, his colleague Sony Iskandar and the accused Achmad Syamsuddin went into the church to rescue people and take them to safety at the district military headquarters. He denied that he and other TNI and police had attacked the church and said: 'When I got to the scene, there were masses. Kasdim [Syamsuddin] was already chasing them away, blocking them'.¹⁰³

Prosecution witness Sony Iskandar was a member of district military headquarters 1635 Suai, and was himself accused of having taken part in the attack on the Suai church. His superiors, Achmad Syamsuddin and Liliek Koeshadianto, were being held responsible for his actions. He gave extensive evidence of heroic rather than criminal behaviour by the accused Achmad Syamsuddin, whom the indictment depicted as having actively participated in the attack:

In the market, Kasdim [Syamsuddin] ordered me to take my weapon and follow him. I followed Kasdim who headed to the police post. There, Kasdim shouted, blocking the masses who were trying to get into the church by waving his hands. I shouted too, and so did KODIM [district military headquarters] members who came, to chase away the masses so they couldn't get into the church. Because the crowd was too large, Kasdim and I and another member went into the church, the church square. After the church square, there were women and children crying out for help. At the time it was Kasdim and me and Sertu Wayan. Kasdim took the women and children who were in front of the church to a safer location and Sertu Wayan was ordered by Kasdim to take them to

101. Sony Sanjaya, *Suai Church Massacre case*, Transcript, 13 May 2000, at 33.

102. *Ibid.*, at 34.

103. I Wayan Suka Antara, *Suai Church Massacre case*, Transcript, 23 April 2002, at 19.

the KODIM. After that, Kasdim ran to the nunnery, at that time he called Sersan Muis. After he called him, Kasdim ordered him to guard it, not to let anyone in, to shoot if anyone got in. Kasdim then went up to the nunnery and shouted out 'Sister, it is Kasdim' several times but there was no response. Kasdim opened the door and went into the house. Kasdim shouted 'Sister, this is Kasdim, Sister this is Kasdim'. A nun and several others emerged. 'Mr Kasdim, thank you', 'It was not me that saved you Sister, it was Lord Jesus'. Kasdim asked the nun if anyone else was there and the nun shouted out in Timorese. There were several men, and women. After that, Kasdim and I took the nun out to the KODIM . . .¹⁰⁴

7.2.2. *Physical evidence*

The use of documentary evidence was virtually non-existent. Extensive materials exist but were not presented. Very little of the material that came from KPP-HAM's investigations was submitted to support the charges against the accused, and evidence that was submitted was not maximized (sometimes the material was not even used) by the prosecutors. The dossiers submitted to court with the indictments comprised primarily interviews conducted with suspects and witnesses and documentation concerning the Attorney General's efforts to seize evidence from the various agencies such as the TNI and police. There were also documents such as the operational plans Hanoen Lorosae I and II, data on the exhumations of the Suai church massacre victims buried in West Timor and data on the hand-over of militia weapons in West Timor. But missing were key documents that were sent by KPP-HAM to the Attorney General's Office. For example, 17 documents were taken from the TNI headquarters, but they did not form part of the cases examined here. Various records of interview in the dossiers referred to official documents of which copies were provided to the interviewers, but these were not submitted to court.¹⁰⁵ The leaked report – only the Executive Summary was officially released – of KPP-HAM referred to documents such as the following:

Weekly telegram Dandim [subdistrict military commander] 1627/Dili to Danrem [East Timor military commander] 164/WD of 27 November 1998, classified secret;

Decision of Regent of Dili, Domingos Soares, no date, no reference;

Plan of Action to Face the Full Contingency for Failure of Determination of Opinion in East Timor, Opsi 1, issued August 1999;

Letter from Minister of Defence/Commander of TNI No. K/362/P/IV/1999 dated 15 June 1999, classified confidential;

104. Sony Iskandar, *Suai Church Massacre* case, Transcript, 23 April 2002, at 5, 6.

105. For example, Timbul Silaen handed over a police report on investigations into Liquiça case (Laporan Penanganan Kasus Liquisa, No.pol.R/355/IV/99/Ditserse). This document is also one of those referred to by KPP-HAM, so it was in the hands of the Attorney General's Office on at least two occasions, but did not make it to court. The investigator who compiled the report, Carlo Brigs Tewu, had spoken to the investigators in his interview on 14 June 2000 about the obstruction by the Liquiça military district command. In answer to question 9 (at 3), he said that the investigation of the Liquiça case 'couldn't get to the Prosecutor because the situation was not conducive, besides that, the handling of the case was blocked, because there were several suspected perpetrators (*koramil* [military subdistrict command] members) who didn't want to comply with summonses from investigators, even though they were sent and an officer was despatched from Polda Timor Timur [East Timor Police] to convey it personally to the commander'.

Report from Udayana IX regional military commander Adam Damiri to the Minister for Co-ordinating Political and Security Areas, Development of the Situation and Conditions in East Timor on the Eve of the Opinion Poll, Dili, July 1999, signed 11 July 1999, classification Secret;

Doc. Pol:R/355/IV/1999/Ditserse, Carlos B. Tewu; and

Garnardi Report of 3 July 1999 to Coordinating Minister of Politics and Security, Report of the Politics and Security Team in Dili, Subject: General Assessment if Option 1 Loses.

These documents were submitted to the Attorney General's Office but were not included in the prosecution dossiers, and no mention was made of them in court. When interviewed by the Attorney General's Office,¹⁰⁶ General Wiranto provided copies of the TNI's contingency plans for East Timor (this was not submitted to the court) and operational command for referendum security change documents¹⁰⁷ (not submitted to court). Other materials, such as data about arms surrenders in West Timor showing the extent of weapons held by militias including automatic weapons, were on the file but were not used by the prosecution in court to challenge witnesses who said that the militias were not armed, even though these did form part of the prosecution dossiers submitted to the court. The prosecution in the three cases had no problems with witnesses claiming that the militias only had home-made guns or those from the Portuguese era. KPP-HAM had found that 'The militia's connection with the military can also be seen from the weapons used. Besides the assembled weapons and the weapons said to be left by Portugal, it is apparent that the general types of weapon which they used were the SKS, M16, Mauser, G-3, grenades and pistols'.¹⁰⁸

The prosecution did not follow up on leads available in NGO reports, such as those of Yayasan Hak on Liquiça and Suai, and others detailing violence in the build-up to the referendum.¹⁰⁹ UN documents reporting on state collusion with militias between April and September 1999 were not used. There was no mention of the work of the two sets of UN investigations: the Commission of Inquiry and the Special Rapporteurs. Plenty of claims were made about police investigations into the Liquiça and Carrascalão killings, but no effort was made to substantiate this by documentary evidence. Many records were indeed burnt in the torching of Dili and Liquiça, but there is no evidence that the prosecution made any effort to locate these records missing from police or TNI headquarters in Jakarta (in fact some of these documents seem to have been handed over during interviews, but still they did

106. Record of examination, Wiranto, *Silaen* Prosecution Dossier, *supra* note 40, Response to Question 7, 16 May 2000, at 5.

107. Surat Telegram Panglima TNI Nomor: STR/904/1999, to Pangdam and Kapolda, 5 Sept. 1999; and Surat Telegram Panglima TNI Nomor: STR/906/1999 to Panglima Udayana as Pangko Ops Nusra, 5 Sept. 1999.

108. KPP-HAM Executive Summary, *supra* note 12, at para. 50.

109. See, for example, Yayasan Hak, 'Gelombang Kekerasan Adalah Sabotase Terhadap Jajak Pendapat: Laporan Pemantauan', 22 Aug. 1999; MateBEAN news service, cited in H. McDonald *et al.*, *Masters of Terror: Indonesia's Military and Violence in East Timor in 1999*, Canberra Papers On Strategy and Defence 145 (2002), 278; and the International Federation for East Timor Observer Project, Media Release 'IFETT-OP Warns of Ominous Signs of Renewed Paramilitary Violence in Aftermath of Vote', 1 Sept. 1999.

not find their way to the court). Furthermore, it is important to observe that many relevant documents survived the violence in East Timor, such as Laporan Harian Seksi Intelijen Dim 1638/Lqs Periode tgl. 5–7 April 1999; Salinan Laporan Harian KODIM 1627/Dili dated 18 April 1999, Mengenai keadaan dan penyerangan yang terjadi tanggal 17 April 1999 terhadap rumah Manuel Carrascalão, both to do with the Dili rally and Carrascalão attack.¹¹⁰ The UN mission in East Timor is known to possess a large amount of documents recovered from various key locations including the Aitarak headquarters. Several were used by KPP-HAM but were not used by the prosecution in the trials examined here. One such relevant document was a schedule showing payments made by the civil administration to *pamswakarsa* (one of which identifies Aitarak as *pamswakarsa* and a recipient of such funds). This should have been a key document in building the case against Abilio Soares, for it demonstrated the link between the civil administration and the militia groups, and in particular provided some evidence in support of the claim in that indictment that the governor should be responsible for the actions of the commander of Aitarak, Eurico Guterres. As it was, the prosecution did not use this evidence at trial.

There was no use of films – no documentaries, no camera footage, no filmed (or tape-recorded) interviews, no photographs. Since the 17 April 1999 militia rally in Dili was pleaded in the indictments of Abilio Soares and Timbul Silaen, it was highly relevant to have examined the readily available film footage of the rally; this was not done in either case. This material would have directly shown many witnesses to be lying, for example, those claiming that no one was armed at the meeting. Photos of militias wearing regalia and red-and-white and other clearly identifiable markings were not shown to challenge those who said that it was not possible to distinguish pro-autonomy supporters from the rest of society.¹¹¹ Film footage was not shown to challenge those who said that the 17 April rally in Dili was peaceful and those there were not armed. No use was made of footage of another Guterres rally on 26 August 1999, when he told a gathering of 15,000 that the city would become a sea of fire if East Timor declared independence from Indonesia. An Indonesian cameraman was able to film the aftermath of the Liquiça church attack and the terrified survivors and wounded victims sheltering at regent Herman's residence, yet neither he nor his film footage were submitted as evidence.¹¹²

It should, however, be noted that in one case, the *Suai Church Massacre* case, remains taken from the bodies exhumed in West Timor were regularly used as 'evidence'. Sadly, the way in which these were handled was abysmal. The several items of clothing and wrappings used to cover the bodies were treated with disdain: they were disrespectfully thrown into a cardboard box which was hauled over by the prosecution to virtually every witness in the *Suai Church Massacre* case. The

110. Reproduced as annexes in Yayasan Hak, 'Laporan Investigasi Lima Kasus Besar Pelanggaran HAM Timor Lorosae 1999', 30 Nov. 2001.

111. This applies to all the killing sites, with the prosecution witnesses (bar the three East Timorese) claiming that it was not possible to distinguish the political affiliations of the East Timorese through what they wore. For example, Adios Salova, the former police chief of Liquiça, claimed: 'I couldn't distinguish [the people at the church]; what was clear was that they were from the community.' Adios Salova, *Timbul Silaen* case, Transcript, 2 May 2002, at 12.

112. See Greenless and Garran, *supra* note 52, at 121.

witness would be asked to identify them, whether or not he or she had any first-hand knowledge of the burial or the incident at the church on 6 September 1999. The objects were not separately packed or labelled, and would be pulled out and picked over by hand irreverently. There was no discussion on chain of custody, although the witness would eventually be told that the items came from the mass graves.

7.2.3. *Advocacy*

Indonesia's system is that of the civil law, where judges are more active and not mere arbitrators of the facts. Nevertheless, the prosecution is still required to prove its allegations against the accused. The quality of advocacy in these three cases was exceptionally poor. The prosecution did not develop their cases in a way that demonstrated any intention of proving their allegations and did not challenge witnesses who harmed their case or ask probing questions, even when what was being said was inconsistent with the statements that the witnesses had given earlier and which had been filed as part of the dossier.

There was, for example, a local police chief in Suai who claimed in court that he did not know of the notorious Laksaur militia group until after the massacre at the church.¹¹³ The police chief of East Timor (accused Timbul Silaen) had in his statement claimed that he instructed the police to keep an eye on their local militias, and there is ample independent information in circulation about the trouble that Laksaur had been causing in Suai in the months leading up to the referendum. The prosecution did not question him on his change of testimony and the new claim not to know about the militias. Not once did it bring forward the wealth of independent observation about the Laksaur militia and its leaders prior to the referendum, to challenge the claim of the local police chief in Suai that he did not know who they were at the time. This witness had also been the sole source of evidence for the allegation in the indictment (Indonesian law requires that there be two such pieces of evidence) that the regent established and developed the Laksaur militia at the Gedung Wanita in Suai. He retracted the statement during questions from the bench – he did not know about Laksaur at the time, and gave an incoherent reason: 'The truth, I said earlier, that they were built by the people themselves. My earlier explanation was my own opinion, because I didn't know, because in Covalima . . .'. The judge pursued the issue: 'But this is your signature, it says that they were consolidated at the Gedung Wanita by the Bupati [Regent] Drs Herman Sedyono, then equipped and trained by Kodim [district military headquarters] and Koramil [military subdistrict command]'. It is all untrue, said witness Jehezkiel Berek, and withdrew the statement on the grounds that 'At the time, according to what I thought and believed, because I didn't see it directly, I cannot say it was true'.¹¹⁴ The former police chief of Suai told investigators on 9 June 2000 about the *muspida* (meeting of local authorities) at the regent's house on 6 September 1999: some pro-integration arrived and spoke to the regent: 'as far as I know the Bupati told them not to do

113. Jehezkiel Berek, *Suai Church Massacre* case, Transcript, 30 April 2002, at 14, 15.

114. *Ibid.*

anything that we did not wish them to do so they left'.¹¹⁵ Testifying in his own case, he told the court that he said that he did not hear anything of that conversation.¹¹⁶ This inconsistency with the earlier statement was not challenged by the prosecutor.

A very frequent claim allowed to go unchallenged in all three cases was that it was not possible to distinguish the East Timorese. The police chief of Suai was just one of the many who made such claims. He had confirmed the accuracy of the Record of Examination at the start of his oral testimony. In his original interviews, the police chief of Suai had no problem in distinguishing pro- and anti-integration. For example, he said that he rushed down to the church on hearing shots, and 'From a distance I stopped because I saw there was a crowd gathered and pro Autonomy had entered the church with shouts that I could not understand . . . Seeing that, I ordered my staff to protect the people and take them to the places of refuge whether at MAKODIM or at POLRES so there would not be efforts by Pro Autonomy to take the women forcibly'.¹¹⁷ Yet when he testified in the case of his commander, Timbul Silaen, he was no longer able to identify the groups.¹¹⁸ Asked if he could identify the groups, he said no, but there were two groups in Suai. The judges spotted the inconsistency but did not push it. The prosecutor asked if he could identify the people outside the church; he answered that it was not possible because it was a time of exodus. The prosecutor did not challenge him on the inconsistency here or at any stage of his testimony.¹¹⁹ A judge referred to what he had told investigators; the witness claimed: 'I couldn't assess if they were pro-integration or pro-autonomy'.¹²⁰ There is in fact an abundance of photographs, including those from the media and from international observers of the election in the months leading up to the mayhem, showing how clearly distinguishable pro-integration supporters in Suai were from pro-independence or ordinary citizens, for example wearing red-and-white insignia and T-shirts with militia names printed across them. It would have been very easy for a diligent prosecution to have obtained such materials. Another such claim was that the East Timorese supporters of integration with Indonesia were not armed – all they had were home-made guns. At no stage did the prosecution challenge these claims with the list of weapons that had been confiscated from the militias in West Timor in late 2000, or all the complaints from the international community about the use of weapons in the build-up to the referendum.¹²¹

Indeed, the questions that were asked appeared to be designed to draw out evidence of the innocence of the accused. An example is the questioning of witness Ludo Fikus Ulu Manek, a member of the TNI in the *Suai Church Massacre* case and directly subordinate to the accused Achmad Syamsuddin.¹²² Instead of being asked

115. Record of examination, Gatot Subiyaktoro, *Silaen Prosecution Dossier*, *supra* note 40, Question 13, 9 June 2000.

116. Author's own notes, testimony of Gatot Subiyaktoro, *Suai Church Massacre* case, 5 July 2002.

117. *Ibid.*, at 6.

118. Gatot Subiyaktoro, *Timbul Silaen* case, Transcript, 16 May 2002, at 11, 25, 27, 35, and *passim*.

119. *Ibid.*, at 11.

120. *Ibid.*, at 25.

121. Daftar Lampiran Surat Perintah No. PRIN-02/E/EJP/08/2000, contained in the dossiers, shows that the following were confiscated from West Timor: 36 SKS, 4 G2 SKS, 2 G3 SKS, 3 Mausers, 1 SNP SSI, 1 Pistol FN 45, 1 Pistol L. Lana, 2 Pistol PL, 2 Pistol P1 Pindad, 186 home-made guns, ammunition, and 18 grenades.

122. Ludo Fikus Ulu Manek, *Suai Church Massacre* case, Transcript, 11 June 2002, at 19.

an open-ended question about what orders were given, the prosecution asked him if there were orders to protect or help or to deal with the victims and the dead. The witness predictably answered: 'There were orders from Kasdim [Syamsuddin] to help the people who had fled to the KODIM [district military headquarters], give them medical treatment, assist with food and cooking equipment'.¹²³ The impression given was that prosecutors were acting out a role and mechanically asking irrelevant and unfocused questions that deliberately skirted around the key issues such as the role of the accused, the role of the subordinates, and the roles of the TNI, the police, intelligence services, Kopassus (special forces), civil authorities, and the militias. There was particular focus on the local security groupings, *pamswakarsa*, as opposed to the militias which KPP-HAM identified as having been essentially created and nurtured by the military. This deflected attention from what should instead have warranted particularly close scrutiny – what these militias were, where they came from, who their members were, what their objectives were, who trained, equipped and funded them, to whom they were structurally responsible and from whom they took orders, and so on. The prosecution repeatedly referred to brawling and rioting between the East Timorese 'two factions', rather than the attacks on civilians who had sought shelter in places of refuge. It regularly posed questions such as: 'Do you know that in East Timor there were two factions, namely pro-integration and pro-independence?'

Prosecutors routinely asked very leading questions that were phrased as statements-cum-questions, when the witness was essentially invited to agree with the prosecutor.¹²⁴ Ironically, instead of focusing on proving the guilt of the accused, these statements-cum-questions described anything but blameworthy conduct. Witnesses were invited to pontificate at length about East Timor, which they willingly did, without interruption.¹²⁵ Damaging testimony was not challenged, although there was one occasion when the claims were so blatantly untrue (former regent of Dili Domingos Soares claiming there had been no trouble in East Timor when testifying during the *Abilio Soares* case) that the prosecution was obliged to ask the court to instruct the witness not to lie. No evidence was brought to persuade the court that a witness was not telling the truth, the irony of course being that this was in relation to prosecution witnesses testifying as de facto defence witnesses.

Obtaining evidence to prove the charges did not appear to be an objective. For example, the prosecution in the *Abilio Soares* case asked Eurico Guterres if he did indeed say what the indictment attributed to him at the 17 April 1999 meeting in front of the governor's residence.¹²⁶ Did he call for all CNRT (National Resistance

123. *Ibid.*

124. See, for example, the prosecutor's question to former regent of Covalima Herman Sedyono: 'There was already *pamswakarsa*, but in order to protect the local vicinities, the governor instructed the Bupatis to activate them, give them incentives, to them, *pamswakarsa* because they left their regular jobs, that was the instruction from the governor. Did you not feel there were such instructions?' Herman Sedyono, *Abilio Soares* case, Transcript, 17 April 2002, at 7.

125. See, for example, the Prosecutor's question to former regent of Covalima Herman Sedyono: 'For the period that you were Bupati or held the office of Bupati Kovalima from 1994, until Nov. 1999, could you explain the incidents in your district, what happened in your district, mainly about the people or East Timorese society, or the sociological or political situation?' Herman Sedyono, *Abilio Soares* case, Transcript, 17 April 2002, at 3.

126. Eurico Guterres, *Abilio Soares* case, Transcript, 30 May 2002, at 14.

Council of Timor) leaders to be 'finished off', for pro-independence leaders to be killed? Defence counsel objected to the line of questioning on the ground that Guterres was appearing in this case as a witness, not an accused, but the court ordered that the questioning be resumed. Guterres gave a vague answer – he could not recall exactly what he said, it was probably a report of what he said, but all he knew was that Manuel Carrascalão was a traitor. He did not know about the rest. 'It would be very cruel of me to order killings, madam', he told the presiding judge.¹²⁷ 'So you didn't say it?' she asked. 'Maybe . . . *Eee yaa*', was the reply.¹²⁸ The prosecution, meant to be proving that this individual incited serious criminal acts for which the accused was by law to be held responsible, was satisfied that the line of questioning had been exhausted: 'Enough, enough', said the prosecutor.¹²⁹ The widely available film footage showing exactly what this witness said was not put into evidence.¹³⁰

In the *Suai Church Massacre* case, evidence emerged from the testimony of accused Herman Sedyono that the leading militia figure, Olivio Moruk, head of the Laksaur, had in fact been a village head. Regent Herman had received complaints about him (how he misused funds, intimidated people, and so on) and dismissed him, but he remained on the payroll of the district administration as a civil servant, albeit in the general sector. Martinus Bere, another leading militiaman and one of those said to have buried the victims in West Timor, was also a Covalima village head. This man was named as a TNI soldier, but the issue was allowed to drop. As civil servants, both would have been formally subordinates of regent Herman. The prosecution did not pursue this crucial link – that the head of Laksaur and another leading militiaman were civil servants drawing salaries, which linked the regent directly to the Laksaur. The prosecution also failed to ask regent Herman a single question about the allegation in its indictment claiming that he established the Suai militias at the Gedung Wanita in Suai.

Also in the *Suai Church Massacre* case, a policeman from West Timor testified how earlier in 1999 people in Suai had told him that Laksaur were always to be found at KODIM (the district military headquarters), and sure enough when he went to Suai he found them there. This was never developed to show the connections between militia and the military, or even put to the accused commander of the district military headquarters, his chief of staff (also accused), or the many other witnesses who said that they had never heard of this group until after the church massacre.

There was little structure in the line of questioning, although there were set formulas used. For example in the *Suai Church Massacre* case, the prosecutors found it necessary to ask every witness what they knew about the referendum, if they had heard about the 5 May 1999 Agreement, what it said, how the process went, and so on. Prosecutors spent a great deal of time on these and other less important issues, rather than on the linkages between militia and the security and civilian apparatus, and the

127. *Ibid.*

128. *Ibid.*

129. *Ibid.*

130. Given that they were able to quote what the witness allegedly said in the indictment, it would seem reasonable to assume that the prosecution used this in preparing their case. They should therefore have been able to present it at trial without much difficulty.

massacre. An example may be cited from the *Suai Church Massacre* case hearing on 7 May 2002. Three police witnesses from West Timor who had witnessed the burial of some of the victims from the Suai church killings testified. Although they were asked some questions about what they saw that was relevant to the Suai church incident, excessive attention was paid to what these West Timorese witnesses knew about the referendum, why people were fleeing East Timor, when they started to come across the border, if they had heard that TNI/police/civil authorities had forced the people to flee, if they had heard about what happened in Suai, whether they knew how many had died, the kind of weapons carried by the group burying the bodies from Suai, the difference between home-made guns and automatic weapons (referred to in Bahasa Indonesia as ‘organic’), the orders received by the police in West Timor in general and in relation to the referendum, how they dealt with the internally displaced persons (IDPs) coming across from East Timor, the law and order issues arising from the IDPs being in West Timor, sweeping operations in West Timor, where the IDPs stayed in West Timor, and so on and so on.

7.2.4. *Changes in testimony*

A striking feature of the trials was the number of witnesses who made changes to statements earlier given to the Attorney General’s Office. This was particularly so in the *Suai Church Massacre* case. The amendments or retractions made were always to the benefit of the accused, and generally involved:

- changing the description of the incident from an attack by one side on another to a brawl between the East Timorese;
- denying that there was any TNI or police participation;
- insisting that shots were fired from the church compounds (in both the Suai and Liquiça cases) and there was provocation from those inside (Manuel Carrascalão’s residence), causing those outside to charge on those inside;
- denying that the TNI or police had any connection with the militias; and
- denying knowledge of the existence of militia groups or of the identity of their leaders.

From time to time, the judges did question inconsistencies, but they did not sufficiently probe the frequency and the strange consistency of the changes that suggested an attempt to pervert the course of justice. The issue of inadequate recording of statements is certainly something to consider and it was raised by some witnesses, including East Timorese witness Dominggas Dos Santos Mouzinho (see below). Yet one must also note that witnesses claimed that they read their statements at the time and signed them. In all but a few cases, oral testimony began with the witness having no objection to the statement, and the objection arose after inconsistency with the *viva voce* testimony was pointed out. Sometimes the only change to be made was that the reference to ‘attack’ should be changed to ‘brawl’.

Witness Jehезkiel Berek (former deputy of the accused Gatot Subiyakto) withdrew some statements that had clearly pointed to a TNI role in the massacre at the Suai church. This witness made the usual change of description of what happened from an attack to a brawl. He had also made several references to a relationship

between district military headquarters (KODIM) and Laksaur in his record of examination, at times suggesting that the police could not do anything about the Laksaur because the district military headquarters was protecting them, even commanding them. The prosecution was uninterested in this claim, which should have been a key element of its case, but one of the judges pursued it. The witness had told investigators that:

preventive measures and investigation of the case could not be carried out by the police because of the relatively small strength of personnel if compared with the armed masses whose strength was increased several-fold when counting KODIM [district military headquarters], that commanded and directly developed the armed groups Laksaur and Mahidi.¹³¹

He denied this in court, saying: 'Actually it wasn't like that sir. Actually at the time I was picturing that the police couldn't investigate at that time because there were too many people, while we had a few members. So the possibility of carrying out an investigation was not likely'.¹³² The judge persisted, pointing out that this was just one of several references indicating that there had been a confrontation between the police and soldiers from the district military headquarters. 'Here it is repeated again, "meaning the police had to fight against people who had joined with the strength of TNI". This is your explanation when you were questioned then you signed it, so what is true?'¹³³ The witness answered: 'Actually, not with the addition of TNI, sir, I meant to compare the TNI forces with the crowd that was fighting at the time was not equal, the question of joining forces maybe I was confused'.¹³⁴

The testimony of Julius Basa Bae indicated that he had come under improper pressure. This witness was a police officer from Metamauk, where 27 of the victims from the Suai church were buried. In his interview with the Attorney General's Office, he had said that one of the accused – Sugito – commanded the people from Laksaur who were burying the bodies and was their leader. In court his version became that Sugito was just standing around doing nothing. He said he had not been pressured during the interview. He was not asked if he had been pressured to change his testimony. The defence tried to push the witness as to which version was correct. After several long silences, he said that he could no longer answer which version was the right one. At the end of his testimony, the presiding judge asked if there was anything he was uncomfortable about and wanted to say. The witness hesitated, and eventually said that he felt afraid being there because of what he was saying, and that he had not done anything wrong or been involved in what happened. The presiding judge spent time assuring him that his testimony was appreciated and told him how he had 'done his duty' to Indonesia with his testimony. At no point did the judge ask him if he had come under pressure to change his testimony, or why it was the witness felt threatened.

¹³¹. Jehezkiel Berek, *Suai Church Massacre* case, Transcript, 30 April 2002, at 19.

¹³². *Ibid.*

¹³³. *Ibid.*

¹³⁴. *Ibid.*

There were a number of inconsistencies between what prosecution witness Sony Iskandar told the court in the *Suai Church Massacre* case and his record of examination with the Attorney General's Office, for example over whether the people at the church were being attacked or brawling with each other. He retracted his entire record of examination on the grounds that he had been threatened with dismissal if he did not sign it, and named a military investigator who had allegedly threatened him. The prosecution and defence did not pursue this, and the court did not order an investigation into the allegations of intimidation of the witness.

In the *Suai Church Massacre* case, the accused Gatot Subiyaktoro, the former police chief of Suai, began his testimony in his own case by confirming that he was satisfied with the accuracy of his record of examination by the Attorney General's Office. Yet he gave testimony that was at odds with numerous points in his record of examination. Having earlier claimed to have seen the local militia leader armed before the attack at the church, he denied it in court because 'When I was summoned by the prosecutor, I was afraid. I was being accused of doing wrong when I was defending my nation.'¹³⁵ He was not questioned on what he meant by 'defending my nation'. The judges pursued various inconsistencies, such as the earlier statement in paragraph 6 where he had said that the police had been under psychological pressure to respond in a certain way, implying that the military had put them under that pressure; earlier statements where he had been able to identify pro- and anti-independence supporters; and how it was that the militia leader Olivio Moruk was allowed to carry a gun. He decided to withdraw his entire statement given to the Attorney General's Office, explaining that the inconsistencies were 'because I was a suspect, I was trying to save the lives of people, carrying out the orders of the state and then I became a suspect. I was upset. I discussed it with them. They said it was the order of the government. I answered as directed'.¹³⁶

Responding to questions from the bench, Yopi Lekatompessy, former local police chief in Covalima, also retracted earlier descriptions of the events at the church as an attack. He had, for example, in his record of examination of 11 May 2000, claimed that after shots were fired, pro-integration forces attacked the church. In court, he claimed: 'Actually it wasn't an attack but a brawl'.¹³⁷ He also denied his statement in the record of examination that he knew the leadership of the Laksaur militia (Olivio Moruk and Martinus Bere) and that he saw the commander of the Laksaur carrying an M16 (military issue) gun.¹³⁸ Questioned about why there were so many inconsistencies, he replied: 'It was late afternoon and hot and I was called suddenly to be examined, I didn't have time to think what was true and how ... at the time it really was not an attack. What should be used is brawl'.¹³⁹

135. Author's own notes, Gatot Subiyaktoro, *Suai Church Massacre* case, 5 July 2002.

136. *Ibid.*

137. Yopi Lekatompessy, *Suai Church Massacre* case, Transcript, 30 April 2002, at 9.

138. *Ibid.*

139. *Ibid.*

7.3. The treatment of East Timorese witness Dominggas Dos Santos Mouzinho

Dominggas Dos Santos Mouzinho was the first witness who was brought from East Timor to testify. She is a survivor of the Suai church massacre. Language was a key issue with this witness, whose Bahasa Indonesia was limited, and who had arrived in Jakarta with an interpreter provided by the ETTA (East Timor Transitional Administration) in accordance with negotiations with the Attorney General's Office.

The prosecution informed the court that because the witness was not fluent in Bahasa Indonesia, they had arranged for a UN interpreter to be used. The presiding judge said that the court would endeavour to use Bahasa Indonesia, but did not rule out the use of the interpreter if the witness did not have sufficient command of the language. Defence counsel made an issue of the lack of accreditation of the interpreter, a requirement which does not exist in KUHAP. After approximately 17 introductory questions to the witness (relating to identification) to which the answers were virtually monosyllabic, the presiding judge determined that the witness spoke Bahasa Indonesia sufficiently well and dismissed the interpreter.

Witness Dominggas was questioned for about five hours in Bahasa Indonesia, with no break, or even a glass of water. Virtually from the start it was clear that she had serious difficulties in understanding the language. When she was later interviewed in East Timor, the witness informed the author that while she was at the bench explaining locations on a map to the judges, she twice asked the presiding judge to be permitted to use the interpreter. On both occasions the presiding judge reassured her that her Bahasa Indonesia was good enough. According to witness Dominggas, she told the judge that she could not provide full information about the event in Bahasa Indonesia and the judge said that that was fine.

Article 177 of KUHAP requires the presiding judge to appoint an interpreter if the defendant or witness does not understand the Indonesian language; the only requirement is that the interpreter take an oath or pledge to promise to interpret truly all that has to be interpreted. It seems that the presiding judge understood Article 177 to mean that it does not apply when the witness has some basic knowledge of Indonesian. A cynical view would be that the interpreter issue provided an opportunity to limit the damage that the witness could cause to the version of events in East Timor that had until then been spun by all the preceding prosecution witnesses. This would explain the failure of the prosecution to act when its witness's credibility and effectiveness was minimized by her inability to express herself or understand the questions correctly, and also the bullying and harassment by defence counsel that was permitted (see below). Hence, too, the refusal of the presiding judge to allow her to use the interpreter. In the context of judicial responsibilities, it should be noted that KUHAP spells out that the presiding judge leading the examination is 'obliged to see to it that nothing shall be done or that no question shall be asked that will cause the defendant or witness to be not free in giving his answer' (Art. 153). In other words, where the language barrier is such as to cause the witness not to be free in answering, the judge is under a duty to act to remedy the situation. Why did this presiding judge not act accordingly? A more generous interpretation is that

the presiding judge really thought that the witness could understand and express herself fluently in Bahasa Indonesia. This conduct is consistent with the overall lack of training. Generosity is difficult, however, given how extreme and obvious the witness's lack of comprehension was.

Witness Dominggas is a villager from a remote part of East Timor, who survived one of the worst massacres in post-referendum East Timor. It was striking that the prosecution permitted its vulnerable star witness to be subjected to harassment and intimidation by defence counsel, going well beyond legitimate cross-examination, without making any objections to the court. For its part, the court saw nothing amiss with the line of questioning from defence counsel and permitted extensive harassment by way of aggressive, patronizing, ironical, and bullying questions. To compound matters, at times even some judges participated in her personal humiliation.

Under Article 173 of KUHAP the presiding judge has discretion to hear the testimony of a witness on a certain matter without the presence of the defendant. Under Article III, Section 5 of the Witness Protection Regulations,¹⁴⁰ the witness should apply to the court for such witness protection measures 'at the stage of examination' or directly to the security apparatus. Before the start of proceedings, witness Dominggas had asked the prosecution via the United Nations/ETTA not to have to testify in the presence of the accused. It appears that this request was not conveyed to the court in chambers or in open court. In fact, the witness was repeatedly asked to look at the accused to identify them, and had to look in their direction when answering questions from defence counsel. One of the defence counsel instructed her to look at the accused Sugito's eyes, with no objection from the prosecution or the court.

The following examples illustrate the treatment of Dominggas dos Santos Muzinho.

Example 1. The witness said that her son had been shot in the church but had managed to survive. The presiding judge continued with questions:

Q: What was his name?

A: Fatimah.

Q: A girl? I repeat, was it a girl or boy who got shot, was it a boy or girl?

A: Boy.

Q: What was his name?

A: Fatimah. I don't know the one who shot.

Q: How?

A: I don't know the one who shot.

Q: Don't know the one who shot, the one shot was a boy, what was his name?

A: Fatimah.

Q: Witness you have four children, what are their names, one in Dili, who is the oldest?

A: Fatimah.

Q: Boy or girl?

A: Boy.

140. PP No. 2 Tahun 2002 Tentang Tata Cara Perlindungan Terhadap Korban dan Saksi Dalam Pelanggaran HAM Yang Berat, supplemented by PP No. 3 Tahun 2002 Tentang Kompensasi terhadap Korban.

Q: Number two?
 A: Fernando.
 Q: Boy or girl?
 A: Boy.
 Q: The third?
 A: Francisca.
 Q: Boy or girl?
 A: Boy.
 Q: The fourth?
 A: Magdalena.
 Q: Boy or girl?
 A: Boy.
 Q: Magdalena is a boy or girl?
 A: Girl. Three girls two boys.
 Q: The third was a girl? Once more, Magdalena was a . . .
 A: Francisca, Fatimah.
 Q: The one hit was a girl?
 A: Yes, hit here.¹⁴¹

This exchange, early in the testimony, should have alerted the presiding judge to the difficulties that the witness was having in communicating in Bahasa Indonesia.

Example 2. A question from a panel judge:

Q: So you know who Laksaur were, yes, you know who their leaders were, who trained them, who established them?
 A: *No answer.*
 Q: Understand? How do you know?
 A: *No answer.*
 Q: You are pressured, you don't want to answer?
 A: *No answer.*
 Q (presiding judge): Just now you were asked what Laksaur was, you answered Laksaur were militia. Then if it is not clear, answer don't know. Are you afraid?
 A: No.
 Q: I mean, I would like to know how you know about Laksaur. Earlier you said you are a housewife and don't have a job, were you in an organization? At home or . . .
 A: Laksaur were militia.¹⁴²

This too should have alerted the court to problems with the witness's comprehension and ability to express herself.

It should be observed that this witness often did not answer questions that were put to her. When asked about this, she informed the author that she only answered what she could when she understood.

Example 3. This illustrates how the defence was permitted to confuse the witness with her weak Bahasa Indonesia, with no complaint from the summoning party (the prosecution).

¹⁴¹ Dominggas dos Santos Muzinho, *Suai Church Massacre* case, Transcript, 28 May 2002, at 16 and 17.

¹⁴² *Ibid.*, at 23.

Q: The ones who won [the referendum] were pro-independence because the referendum was peaceful because the prosecutors and police were backed up by the police. Madam was at the church, would you say the fight there was among the East Timorese with East Timorese, or with people from outside East Timor? Who was the fighting between? Where were the Laksaur from? Were the Laksaur East Timorese?

A: *No answer.*

Q: Mama, were the Laksaur East Timorese?

A: Yes.

Q: Fighting at the church with other East Timorese so it was a civil war that is so, yes, because you say it was a civil war, yes mama?

A: Yes.¹⁴³

Example 4. Questions put to her by one of the defence counsel:

Q: Your children, did they actively follow as officials in the referendum, were there children of yours who followed?

A: Followed.

Q: Oo, so your children were with Unamet? True madam? True madam, yes your children were chummy with UNAMET?

A: *No answer.*

Q: Your daughter named Fatimah is working, can you tell me or you may remember when she started to work? When did she start to work in Dili, can you remember madam, when? Six months ago, one month ago or when? Try and explain to me when Fatimah started to work?

A: *No answer.*

Q: Remember madam? Madam, I think you remember when Fatimah started to work, when?

A: *No answer.*

Q: OK. But Fatimah is already working? Already working?

A: *No answer.*

Q: Fatimah was working when you were examined two years ago, or before you became a witness? Do you remember before you became a witness or after you became a witness, do you remember madam? Witness first or Fatimah worked first?

A: *No answer.*

Q: Madam can choose not to reply. This really is a 'sham court', political court. False testimony, madam, in Indonesia, is punishable by seven years, to give false testimony. Sorry, but this concerns four TNI officers and police, their fate is to be accused. Beloved madam, I beg your honesty, Fatimah worked before you became a witness or after you became a witness? Don't look at the *bule* [white foreigner] on your right, I know he has been coaching you, don't look. Look at me if you need to, look at the judge, just listen no need for coaching. Beloved madam, was Fatimah working after you became a witness or before you became a witness?

A: *No answer.*

Q: Thank you, if you don't want to respond, I won't force you. But follow the conscience of your heart, my most beloved madam, were your daughters raped or about to be raped/wanting to be raped [diperkosa atau mau diperkosa]? It is up to you if you don't want to answer, I am only talking about the pure inner self. Beloved madam.¹⁴⁴

^{143.} *Ibid.*, at 48, 49.

^{144.} *Ibid.*, at 47, 48.

At no stage did the prosecution intervene to complain about the harassment of its star witness. The presiding judge only intervened at the end, and then to ask that a question on timing be rephrased. In spite of his obligations under Article 153 of KUHAP, the presiding judge did not halt the intimidation and harassment, nor did he object to the line of questioning.

Example 5. The following also illustrates the harassment of the witness by defence counsel that was permitted and even endorsed by the court, which joined in towards the end:

Q: Do you know the term Danki Laksaur, what does Danki mean?

A: Danki?

Q: Yes, what does Danki mean? Here [in the record of examination] it says Danki Laksaur, do you know the term Danki Laksaur?

A: Danki is Laksaur.

Q: Oh my god, you don't know the meaning of Danki, and you just talked about it in your Record of Examination. That means you don't know. OK. You said the attackers were TNI and police, you know they attacked? In your Record of Examination you said they attacked, you don't know?

A: *No answer.*

Q: Good then madam, if you want to pretend you don't know. Can you sign? Signature, do you know what that means? You don't know a signature? I'll go on, madam you know what a signature is? In Dutch it is taken in English it is sign, madam do you know what it means?

A: In Bahasa Indonesia I know.

Q: OK, you know a signature in Bahasa Indonesia, yes what does a signature mean? Don't know. I request that this is noted, panel, the witness does know what it means. I am suspicious that the witness even signed this Record of Examination. Madam, picture this, you testified happily from morning till evening, there are five people here whose destiny is at stake, you so easily change things. Just now you said people brought guns to the church, then you said not. You said your house was 100 m from the church, then when asked again you said it was 1 km, this makes me unclear how to deal with your explanations. You were questioned in Dili?

A: Yes.

Q: By whom? Who questioned you? OK if you don't want to answer, I will show this Record of Examination to the court, this is your signature isn't it? [witness goes to the bench].

A: I did.

Q (presiding judge): Come let us . . . let it be an assessment, because this is information. Because this is the Record of Examination. [Witness is tested on her signature in the Record of Examination and is asked to sign.] Is this yours?

Q [defence counsel resumes]: Let me resume. Madam, just now I showed you the record of examination, that is called the *berita acara pemeriksaan*, you signed this where? Didn't you sign this?

A: I did.

Q: Where did you sign?

A: In Suai.

Q: What did you sign?

A: *No answer.*

Q: No? If you signed the paper the judge gave you just now, that is called a signature on a paper on the table and so on. Where did you sign?

A: At home, once in the church.

Q: What did you sign? Don't know, don't remember. Or is it too hard to answer. This is called a Record of Examination, your name is mentioned here. You couldn't show just now your signature or had you forgotten or what?

A: I forgot.

(Presiding judge: Don't confuse. So it isn't confusing, just ask, OK.)

Q (defence counsel resumes): Just now you were shown the scrawl, did you make it or what? Who made it? You said you forgot? This is the original of the Record of Examination, there is a question answered, then a mark, then you say the mark, who ordered the mark?

A: Yes.

Q: You say you cannot read, cannot write. Then is this mark yours? Yes. Can you remember if at the time you made the mark or not? This you should remember, don't easily say you forgot. What is this? Your mark or have you forgotten?

A: I forget.

Q (presiding judge): You are reminded by the judge not to so easily forget. Do you remember being examined as a witness?

A: Yes.

Q: Where were you examined?

A: At the church.

Q: You were sworn?

A: Yes

Q: And then you did this mark without being sworn? Come on, did you make the mark or not? Do you feel you made this mark?

A: Yes.

Q: How many times? There are many questions on each page. This here, this here. How many? Many times or one time or you forgot?

A: I forgot.

Q: Good, let the panel be the one to assess this, the facts on their own. Thank you panel, once again with all due respect let the explanations of this witness be recorded, she even signed something and forgets it, panel let me say again that I doubt the Record of Examination of this witness.¹⁴⁵

During the panel's examination, the presiding judge tested her credibility, something he did not do with any other witness, in several ways. He wrote on a piece of paper and asked her to read it, he made her assume the position she took when she explained how she had hidden by the fridge during the attack (this was not done with any other witness), and he tested her signature in court against that on her identity card. All of this had the effect of humiliating the witness, and creating the impression that the court agreed with the defence submission that the witness was unreliable.

It is true that whether for reasons of lack of linguistic ability, fear, confusion, or otherwise, witness Dominggas did give contradictory answers, did not communicate well, and often gave no answers. Yet preceding and following witnesses were also unreliable and some told blatant untruths. These were almost always allowed to pass without challenge, yet in this case the court felt that it was appropriate to tolerate aggressive and harassing cross-examination and even to join in the effort to show the witness up as unreliable. The prosecution made no complaint and appeared satisfied with the way in which the defence and the panel treated its star witness.

¹⁴⁵. *Ibid.*, at 75–7.

7.4. Judgements

Apart from the conviction of Abilio Soares and the imposed sentence of three years, which was well below the minimum prescribed by law, the acquittals were to be expected. The prosecution clearly failed in its burden of proof. On substance, it was clear that the judges had made an effort with drafting, and the input of the academic ad hoc judges, particularly on international law, was clear. Although one could take issue over their substantive legal interpretations, the most important feature is the positive and encouraging attitude towards the use of international law in Indonesian courts. This should have important ramifications for the implementation of international human rights norms in cases pursued under Law 26/2000.

The three East Timorese witnesses seem to have been regarded as credible, but against them was ranged the testimony of many Indonesian luminaries, soldiers, police, and civil servants who actively denied the alleged roles of the accused in the violence. The evidence presented at trial was weighted towards a certain version of what happened, and was the basis on which the court was entitled to make certain findings regarding issues such as UNAMET's partiality, duplicity, and cheating in the course of the referendum and how the ensuing violence was therefore its responsibility. The weight of the evidence provided to the three panels of judges – by the prosecution as well as the defence – was that the accused did their best to separate the brawling East Timorese and were not blameworthy. Judges were therefore entitled to make findings such as in the *Suai Church Massacre* case that 'there was not one shred of evidence which indicated that the security forces, both the Police and TNI and BRIMOB [mobile/riot police], were involved in the attack on the church'. Yet the judges felt able in some instances to dismiss some of the more ludicrous evidence. For example, the *Suai Church Massacre* case panel did so when it considered all the testimony about East Timorese brawling at the church, and rejected it, finding that it is logical to conclude that when a group of armed persons enters a church where unarmed civilians are sheltering, and the people inside end up dead or wounded, an attack has taken place.¹⁴⁶ That panel found that the reasons given for the changes in testimony were without foundation, and that no logical reason was given for the changes or grounds given to support it.¹⁴⁷ Those witnesses were being dishonest, it concluded.¹⁴⁸ The panel also explicitly rejected accused Gatot Subiyakto's changes of testimony, given that he was a local police chief and knew exactly how the interview process worked.¹⁴⁹ However, it did not address some of the more important changes to testimony, such as Jehezkiel Berek seeking to withdraw his claims about the role of the district military headquarters in protecting the Laksaur and preventing the police from doing their job.

There were a number of peculiarities in the judgements; some were to do with basic judicial skills such as reasoning and assessment of credibility, while others were not. For example, the evidence at trial did not justify the conviction of the

¹⁴⁶ *In the matter of Herman Sedyono and Others*, Reading of the Judgement, Transcript, Ref: 03/HAM/TIM-TIM/02/2002, 15 Aug. 2002, at 56–7.

¹⁴⁷ *Ibid.*, at 60.

¹⁴⁸ *Ibid.*, at 82.

¹⁴⁹ *Ibid.*, at 82.

one East Timorese (Abilio Soares) or a number of factual findings that were made in that case such as on what happened at Suai (see below). The reasoning provided to explain the imposition of a sentence lighter than that set out by law was not logical; the judges explained that '[j]udges are not slaves of the law' and 'punishment is not simply to obtain legal certainty or revenge but to fulfil a sense of justice'. They found it relevant that the president of Timor-Leste, Xanana Gusmão, had written in support of Abilio Soares, which to them showed 'the spirit of reconciliation cannot be defeated by a heavy sentence on the accused' and proclaimed 'their support for the efforts of reconciliation that are going on without supporting the practice of impunity'. The judges were generally reluctant to name the militias that took part in atrocities and opted for the broader terms of 'pro-autonomy' and 'pro-integration'.

In the *Timbul Silaen* judgement, the court misreported some of the East Timorese statements and testimony. For example, the testimony of Emilio Bareto from Liquiça about the church massacre was as follows:

The attackers were militias, with TNI in civilian dress, BRIMOB [mobile/riot police] were outside. The attackers included people with caps who had weapons. The police and BRIMOB outside the fence were in uniform; they stayed outside but fired shots. The soldiers in civilian dress took part in the attack, some had firearms. TNI soldiers taking part in the attack could be distinguished because they had automatic weapons while the others had samurais or long swords. Tome Diego from the TNI was one of those who took part in the attack, he didn't have a gun. Tome Diego said come on, attack, kill them. The witness recognized Jose Ramos, also from the TNI, who came into the church wearing a black face cover.¹⁵⁰

The court reduced this to the statement that Tome Diego 'ordered the attack on the church complex and the witness saw about 200 police outside'. This is very different from what the witness actually said and eliminates the important allegations of participation in the attack by the military, some with firearms. Similarly, the evidence of Joao Perreira was said by the Silaen panel to be that 'at around 1300 hours on 6 April 1999, the militia with firearms, standard and *rakitan* [home-made guns], and sharp weapons, attacked the people who fled and sought protection at the residence of Pastor Rafael in the Liquiça church complex'. The witness had in fact clearly identified TNI participation in the attack – his testimony was that he recognized Tome Diego, a member of district military headquarters 1636 as one of those taking part, as well as another soldier called Jose Ramos, who came into the church wearing a black face cover. He personally saw Jose Ramos shoot five to seven people who collapsed. What the court did was to eliminate the references to TNI participation in its summary of the witness's evidence.

Also in the *Timbul Silaen* case, the court failed to record an important section of the statement of Maria Ferreira Soares. As with several others, her testimony was read into the record as she refused to give evidence in Jakarta because of security concerns. In a serious omission, the Court did not note the evidence that she gave about the attack on Bishop Belo's residence: 'Arriving at the front of the residence, I saw Aitarak militia and TNI and police shooting at the refugees who were inside

150. Author's own notes, Testimony of Emilio Bareto, *Timbul Silaen* case, 30 May 2002.

Bishop Belo's residence including at Bishop Belo's residence and also burning it using benzine'.¹⁵¹ This witness was the only interviewed victim who had been at the residence and witnessed the attack. The failure to incorporate this section of her witness statement meant that in the *Timbul Silaen* case there was no evidence from any of the victims of the attack on the Bishop's residence. Interesting also was the failure to record her explanation for the mass exodus to West Timor – this was because 'they were afraid to stay in Dili, besides part of Dili town had been burnt by the militia assisted by the TNI and police. There were also threats from the BMP militia, that all had to flee to Atambua and Kupang, because shortly the district military headquarters itself would be burnt'.¹⁵²

Strong findings were issued by the panel who convicted Abilio Soares; in fact the conviction seems to be just in relation to the conduct of the regent of Covalima (who, ironically, was acquitted at his own trial). Not a single victim-witness from Suai testified at this trial and, as previously noted, not a single such person seems to have been interviewed in the course of the investigations into Abilio Soares. All the evidence that was provided at trial was against any culpability on the part of the authorities, whether civilian, military, or police. Yet the panel found that

By healthy logic/reasoning, it is unlikely that the *bupati* [regent] of Covalima, Herman Sedyono, did not know about the concentration of thousands of people about to attack pro-independence who had sought shelter in the church. Likewise, with the commander of Suai subdistrict military command and police chief of Suai and other security apparatus, they must have known the situation which would occur.¹⁵³

The court concluded that regent Herman Sedyono, the commander of Suai sub-district military command, the police chief of Suai, and the security forces deliberately permitted and gave the opportunity for the attack by pro-integration on pro-independence who had sought refuge in the Suai church; 2,000 or more were trapped in the church without food and water and in a weak condition. From the start, the security forces failed to clear the would-be attackers away from the church, and they made no effort to protect those who were sheltering in the church. 'The Court finds that *bupati* Covalima Herman Sedyono should be brought to account by law even though he didn't directly take part in the attack but by not doing what he should have done he cannot escape his responsibility for the violence that occurred at the Suai church.'¹⁵⁴ The TNI, the police, the commander of Suai Subdistrict Military Command, the police chief of Suai, and the regent only arrived at the scene after the attack was over and the damage done. Further, held the Court, 'the *bupati* Herman Sedyono did not make an effort to order that the bodies be buried in a proper way, and they were left scattered all over the place and were gathered and buried the next day by Sugito, *danramil* Suai [commander of Suai military sector command] and the witness Pranoto at Metamauk coast'.¹⁵⁵ Therefore the Court found that 'the first charge was proven, that the accused clearly participated in and supported actions

151. *Silaen* Prosecution Dossier, *supra* note 40, Record of Examination, Maria Ferreira Soares, 22 July 2000.

152. *Ibid.*, at 5.

153. *Abilio Soares* case, Judgement, Verdict No. 01/PID.HAM/AD.HOC/2002/PH.JKT.PST, 7 Aug. 2002.

154. *Ibid.*

155. *Ibid.*

that he has been accused of by the Prosecutor'. This suggests the imposition of a strict liability standard rather than command responsibility, and the court does not explain why it is that the governor should have been made responsible for regent Herman's alleged criminality. Being the superior of someone who has committed a crime is not in itself criminal. The panel failed to address the crucial issues of whether Herman Sedyono's actions were according to or contrary to instructions from the governor, and what the governor could have done about Herman, had he acted contrary to instructions, at that particular point in the unfolding maelstrom of violence in East Timor. The court also faulted the governor for direct failure to act to disband the 17 April 1999 meeting held in front of his office, although he was only charged with command responsibility and for failing to discipline the regent of Covalima (even though the accused was not charged with responsibility for this regent's actions but in relation to those of Eurico Guterres). The court found that there was no formal link between the governor and the militia leader Eurico Guterres. And the conduct of the regent of Liquiça somehow escaped the court's scrutiny.

Although the assessment of this observer was that the conviction of Abilio Soares was not justified on the basis of the evidence presented at trial, the ramifications of that particular finding are that in East Timor there had been a widespread attack on the civilian population ('the incidents alleged are proven to have involved large amounts of killings, repeatedly, in [sic] a large scale (massive, frequent, large scale) conducted collectively with very serious results meaning large loss of life').¹⁵⁶ This attack had also been systematic, that is, further to

a political purpose, plan for an attack, an ideology, in the sense that there is widespread destruction or weakening of a community; criminal acts on a large scale against a part of the civilian population, or repeated and continuous inhumane actions that are interconnected; the existence of preparations and significant use of public property and facilities, or private; high level political or military implications in the development of creation of a methodological plan.¹⁵⁷

The court found that the attack on Liquiça church continued with the same form and pattern in Covalima and Dili, without any maximal preventive efforts by the security forces, who, along with the local authorities, took sides and were not neutral in dealing with the conflict.¹⁵⁸ The accused, as head of the province and chief administrator, was responsible for the loss of life per se (strict liability again) and because he failed to stop the violence and even contributed to it through the activation of *pamswakarsa*.¹⁵⁹

8. THE TRIALS UNRAVELLED

A judicial process must meet certain standards if it is to be recognized as legitimate and in satisfaction of the state's obligations to investigate, prosecute, and punish

156. *Ibid.*

157. *Ibid.*

158. *Ibid.*

159. *Ibid.*

international crimes. Observation of the ad hoc trial process did not indicate any problems with the rights of accused persons to fair trial and due process. All accused had large and active teams of defence counsel, in particular those from the TNI, who sufficiently protected the interests of their clients. There were no indications that the court was biased against the accused.

Yet observation of the trials and assessment of the applicable laws and documents relating to the three cases identified deeply disturbing patterns. What is at issue is Indonesia's failure to satisfy its international obligations to hold a legitimate process of accountability for gross violations of human rights. The quest for justice for East Timor has produced a spectacle involving uninterested and incompetent prosecutors, squandered opportunities to get at the truth of what really happened in East Timor, and the abuse of the justice system to present a single perspective, namely the Indonesian establishment's version of the East Timor situation, one that is radically at odds with the conclusions of other highly regarded investigations. The process has delivered neither truth nor justice. These findings are made in full recognition of the fact that these are highly complex cases, involving multiple incidents and accused with various roles, ranging from military to police and civilian authorities. Crimes against humanity prosecutions require getting to grips with the complex contours of state policy and the involvement by state officials in either direct or indirect perpetration of crimes, by way of different forms of conduct such as orders, aiding and abetting, and common purpose. This is highly complicated, and there is no doubt that the genuine lack of skills and training contributed to the abysmal professional standards, particularly of the prosecution. Yet what happened in Jakarta went well beyond this; there are abundant indicators that the process has not been one carried out in good faith.

Jurisdictional restrictions imposed by the decrees of President Wahid and then President Megawati always meant that the Attorney General's Office was going to be limited in its ability to tackle the true extent of what happened in East Timor. Yet, rather than make the most out of what they could do and develop strong prosecutions from the wealth of existing evidence relating to the incidents in April and September 1999 in Dili, Liquiça, and Suai, the Attorney General's Office destroyed the slender chances of justice through what appears to be carefully calculated incompetence. Some of the most striking technical flaws have been examined in the course of this report. The cases have been labelled crimes against humanity cases, but the evidence that led to the strong findings of three highly credible investigations (KPP-HAM, the Independent Commission of Inquiry, and Special Rapporteurs) was simply not produced to justify the allegations. In fact, the prosecution was not able to prove some of the most basic allegations, for example that an accused really was in command or control of a person alleged to have committed crimes against humanity (Abilio Soares and Eurico Guterres) or that there was something criminally remiss in the conduct of subordinates and superiors (for example, Timbul Silaen and his three local police chiefs, Abilio Soares and his two regents). Similarly, in none of the three cases was the prosecution able to prove that any police, TNI, or civil servants committed crimes at all, let alone crimes against humanity.

Prosecutorial unwillingness to secure convictions is a conclusion that is inevitable following the prosecution's conduct of the cases, which ranged from weak indictments to appalling witness selection, a dearth of documentary and other material evidence submitted, and then exceptional under-performance during trial, including ineffective and incompetent questioning of witnesses, failure to maximize the testimony of the three victims from East Timor who did attend in Jakarta, and refusal to pursue effective alternatives, such as testimony by way of video link, for those witnesses who were too afraid to attend after the experiences of the first three witnesses.¹⁶⁰ The claims that the prosecution cases were ruined by UNTAET's failure to deliver the East Timorese witnesses cannot be taken seriously, given how little such testimony actually contributed towards the construction of the cases (e.g. there were no such witness statements in the Abilio Soares dossier which was submitted to court), the emphasis that all three prosecution teams placed on the testimony of those from the TNI, the police, or the civil administration, the treatment of the three East Timorese witnesses who were brave enough to testify in Jakarta, and the prosecution's unwillingness to try alternative measures such as video-link to secure the testimony of terrified witnesses. There were also plenty of indicators that the evidence that was presented and coaxed out of witnesses was carefully manipulated in order that a certain version of what occurred in East Timor would emerge, and that nothing about certain 'sensitive' issues – such as the role of the Kopassus (special forces) or intelligence services, or indications of the existence of a comprehensive plan for the sabotage of a free vote in the referendum followed by a retaliatory scorched earth campaign if the result did not go in favour of integration with Indonesia – would emerge, or that if it emerged, it would be glossed over as if it were unimportant and irrelevant. Much is also revealed about the philosophical approach of the prosecutors by the range of exceptionally light sentences that they ultimately sought: ten years six months for Abilio Soares (sentenced to three years); ten years six months for Timbul Silaen (acquitted); ten years to ten years six months for the Suai church massacre (acquitted). Under Law 26/2000, ten years is the minimum sentence. While it comes from one of the cases not covered in this study, a striking insight into the mindset of the prosecutors is offered by their application to the court for the acquittal of Major-General Adam Damiri, the most senior of the TNI officers prosecuted. When the court in fact convicted him, the *prosecution* filed an appeal that the conviction and three-year sentence be set aside.

Of utmost importance is the impressive body of material that was collated by KPP-HAM and led to its strong findings about the perpetration of crimes against

160. It is striking that the prosecution chose to rely on witness statements taken by their office during the trip to East Timor in 2001 rather than use video conferencing facilities, which were used for the first time in the *Akbar Tandjung* case in July 2002. They did so knowing full well that the statements were challenged by defence for non-compliance with KUHAP as having been partly conducted by officials who were not from the Attorney General's Office (UNTAET police officers were used as conduits through which the Attorney General's Office placed the questions to the witnesses). It was also clear that, in general, the statements could be challenged as not reliable, given the extent of the changing of testimony as already discussed in this report. In the *Suai Church Massacre* case they paid the price, since the panel considered the three victim-witness statements (of Tobias dos Santos, Fres da Costa, and Armando de Deus Granadero) read into the record to be weak simply because they were challenged by the accused.

humanity in East Timor. The facts and evidence indicated to those investigators that the civil and military apparatus, including the police, co-operated with the militia in creating a situation and conditions that supported the occurrence of crimes against humanity, which were carried out by the military, police, and militia groups with the assistance and support of the civilian authorities. In addition to extensive interviews with witnesses, KPP-HAM collated confidential documents surrendered by the TNI at a time when it was feeling the need to make concessions due to its vulnerability in post-Suharto Indonesia. Many key documents were submitted by KPP-HAM to the Attorney General's Office along with its striking findings on 31 January 2000. Very little of this reached the court and what little there was (Operasi Hanoen Lorosae I and II, data about weapons surrendered by militia during hand-overs in West Timor, exhumation materials for the 27 Suai church victims from West Timor) was not used.

There exists a wealth of other incriminating evidence available in Indonesia and East Timor, including that arising in the course of Serious Crimes investigations and the trials of militia members at the District Court of Dili. But none of this was used by the Attorney General's prosecutors. Even film footage of the highly relevant pro-autonomy rally outside the governor's residence on 17 April 1999, at which militia leader Eurico Guterres was filmed making inflammatory statements and inciting violence in the presence of police and the TNI, was not submitted in evidence – it is a particularly striking omission, given that this rally was specifically referred to in two of the indictments. Reports from UN bodies, NGOs, or the media were not used. Other relevant material, such as the order known as the Lumintang Order making plans for what should be done if pro-autonomy lost the vote – which led to the imposition of a multi-million dollar judgement against its author Johny Lumintang by a US court¹⁶¹ – were not produced in court. No photographs were used, even to illustrate the fallacy of claims that it was impossible to distinguish the pro-Jakarta militias from ordinary members of society.

Certainly, on the basis of the evidence submitted in all three trials, there were no grounds at all to conclude that:

- there was a widespread or systematic attack on the civilian population;
- the Indonesian authorities took part in such an attack;
- the Indonesian authorities permitted such an attack;
- the Indonesian authorities aided and abetted such an attack;
- the Indonesian authorities covered up such an attack;
- the Indonesian authorities were negligent in their duties;
- there was any state policy or plan to carry out such an attack;

161. The Lumintang Order is even widely disseminated on the internet; see, for example, the website of the East Timor Action Network at <http://www.etan.org>. See *Jane Doe et al. v. Lumintang*, Civil Action No. 00-674 (GK) (AK), United States District Court for the District of Columbia, Findings of Fact and Conclusions of Law, 10 Sept. 2001, available at <http://www.etan.org/news/2001a/10lumjudg.htm>.

the Indonesian authorities had any role in the establishment, development, funding, training, command and direction of the armed militia groups; or

the relevant subordinates behaved in any way that could lead to the criminal responsibility of their civilian, police or military commanders.

Thus, notwithstanding the fatal flaws in the process, the burden of proof of guilt was not satisfied in any of the three cases.

Beyond the question of innocence or guilt in individual cases, a legitimate crimes against humanity process for East Timor should properly be used to establish the truth behind the atrocities committed. It should examine all the evidence to determine if there was indeed sufficient proof justifying the widespread allegations of a multi-faceted plan devised by Indonesian officials, specifically the TNI, the police and civil servants, encompassing strategies and plans for the implementation of a widespread or systematic attack on the civilian population. A legitimate post-mass-violence accountability process should be used to get at the people behind the policy or action that motivated the crimes, as well as the direct perpetrators themselves. A legitimate judicial process for East Timor would therefore properly have examined in great detail the role of Indonesia in East Timor, the actions or inaction of its officials, whether civilian, police, or military, and tested such conduct by using objective standards of professionalism. It would have determined exactly what it was that these institutions were doing in East Timor and their relations with the local community, whether pro-independence or pro-autonomy. Particular attention should have been paid to the development, structure, and purpose of pro-Jakarta East Timorese, whether labelled militia, *pamswakarsa*, Hansip, Wanra, or Kamra. It would have examined how it was that in September 1999, despite the presence of so many TNI and police, East Timor was virtually destroyed. As this report has shown, despite being readily available, such evidence was not presented to the court, and it did not exercise its own initiative to summon evidence. The three panels of judges chose to be passive in fulfilling their responsibilities as finders of fact, and none of these issues was explored in anything but a superficial way, if at all.

The Ad Hoc Court has provided the Indonesian establishment and pro-autonomy East Timorese with unfettered access to a most useful mechanism for communicating their version of the tragedy of East Timor to the international community and the domestic audience. That version has now been 'proved' to have been correct in a court of law. It bears little resemblance to the vast wealth of independent documentation and evidence that exists elsewhere about what happened in East Timor. They have been in a win-win situation: trials were held as demanded by the international community, those trials provided an excellent forum from which to broadcast the official TNI-police-pro-autonomy line without challenge, and Indonesian judges eventually acquitted Indonesian officials from any culpability in East Timor (the only one convicted was the one East Timorese). The confidence and planning with which all of this was carried out strongly suggests an underlying belief that all the international community ever required was the ritual of a criminal justice process and, now that this has been provided, the dreaded international tribunal will never materialize.

Given the serious flaws in the process that render it incompatible with international standards, the verdicts reached in these cases are fundamentally unsound and the one conviction and the six acquittals fatally flawed. The consequences of the verdicts are far-reaching, particularly for the six who were acquitted. The accused have been 'proved' to have been innocent and wrongly prosecuted. The TNI–police–pro-autonomy version of what happened in East Timor has been tested and proved in a court of law, and thus the reputation of the TNI and the East Timor police (domestically at least) has been redeemed. Then there is the issue of double jeopardy; those acquitted are in principle now able to claim the benefit of this fundamental human right to block any future prosecutions or extradition to stand trial abroad, for example in Timor-Leste. But, as the Statute of the International Criminal Court confirms, *ne bis in idem* only applies where an honest and legitimate judicial process has been conducted in accordance with international standards.¹⁶² The cases of Abilio Soares, Timbul Silaen, and the Suai church massacre were not conducted in a way that is consistent with an intent to bring to justice the persons responsible for gross violations of human rights in East Timor. Rather than casting light on the dark deeds that led to crimes against humanity and bringing the perpetrators to book, this has been used as an opportunity to whitewash Indonesia's role in East Timor and to cement impunity for those who believe in the absolute sanctity of nationalism and territorial integrity over the rights of human beings.

162. See Art. 20(3):

No person who has been tried by another court for conduct also proscribed under Article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

- a. Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
- b. Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.