Chapter 7.6: Political Trials

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7.6.1 Introduction

1. This chapter examines the trials of East Timorese prisoners for political crimes by the Indonesian state during the period of Indonesian occupation in Timor-Leste. The Commission acknowledges that Fretilin also tried people for political crimes, including treason, under its system of administration in the late 1970s. Fretilin trials are considered in Part 4: The Regime of Occupation and Chapter 7.4: Detention, Torture and Ill-Treatment, section on Fretilin, 1976-79.

2. The Indonesian courts in East Timor began to conduct criminal cases from 1977,[*] but the criminal law was not used to target political opponents to the claimed integration of Timor-Leste into Indonesia in the early years of the occupation. Instead of being put on trial, political prisoners in this period were either held in indefinite arbitrary detention or killed. In 1983 a new policy of "normalisation" led to a decision by the Indonesian government to charge people suspected of assisting the movement for independence with offences such as treason and subversion, and prosecute them in the courts. Hundreds of East Timorese were tried and convicted of these offences during the next 16 years.

3. The Commission has read and considered the contents of several hundred of the Dili District Court files in relation to these trials. In addition it has interviewed and received statements from a variety of individuals who were defendants in trials, witnesses to events and lawyers, both East Timorese and Indonesian, who were involved in the cases.

4. The picture that emerged from these inquiries is that the trials did not necessarily signal a reduction in the human rights violations that were occurring, but to some degree altered their form. The killing, arbitrary detention and torture of political opponents continued. In addition a range of actors including military intelligence officers, police, prosecutors, defence counsel and judges were involved in other violations related to the conduct of political "show trials".

5. These trials were intended to demonstrate to the world that a change in policy had produced a new commitment to human rights and the rule of law. In fact the trials were a sophisticated production designed to produce an illusion of justice and due process. This veneer hid the reality that the trials were a tool that ensured the conviction of political opponents while providing a response to international critics.

6. The trials involved a range of violations of both the Indonesian criminal code and international law. Suspects were routinely tortured and intimidated into signing Records of Interrogation (RoI), which contained confessions and evidence against other co-accused. These Records of Interrogation were the basis for many convictions. Indonesian military and police officers consistently gave false evidence under oath in court, and intimidated other witnesses into doing the same or not providing testimony at all. Defendants were refused the right to select lawyers to defend them and in most cases were appointed with lawyers who did little more than speed up the prosecution case. Judges ignored indications of unethical behaviour and evidence that had been fabricated, and handed down judgments of guilty in all cases. The sentences were disproportionately harsh and often did not take into account lengthy periods of time already served in military detention. The Commission did not find a record of complete acquittal of a

[*] As early as 24 July 1976, Kodahankam (Komando Daerah Pertahanan Keamanan, Regional Defence and Security Command) Commander, Colonel Dading Kalbuadi issued an arrest warrant for the governor's driver, Tito Dos Santos Baptista (22), for violation of Article 359 of the Indonesian Criminal Code (KUHP) in connection with a fatal car accident. [CAVR Interview with Mário Carrascalão, Dili, 30 June, 2004].

single defendant in any of the hundreds of case files examined. Appeal proceedings provided a rubber stamp of higher authority on the tainted decisions of the trial judges.

7. Because of the large number of political trials that were conducted the Commission was unable to report in depth on all violations. It has therefore included in this chapter an analysis of some of the most significant political trials that occurred during the Indonesian occupation. The violations apparent from the conduct of these trials are generally consistent with the patterns found to exist in other trials examined by the Commission.

8. The chapter begins with a survey of the first wave of political trials from 1983-1985, then provides specific analysis of four high-profile sets of trials: the trials in 1992 of the organisers of the Santa Cruz demonstration; the 1992 trial of the organisers of the Jakarta demonstration; the trial of Xanana Gusmão in 1993; and the trial in 1997 of the organisers and participants in the Mahkota Hotel demonstration.

7.6.2 Legal framework

9. As discussed in detail in the Mandate Chapter of this Report the purported integration of Timor-Leste into Indonesia was invalid according to international law. Indonesia was an occupying power in Timor-Leste.

10. Geneva Convention IV states that the penal laws in force in the territory immediately before the occupation shall "*remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention*".[1]

11. Civilians in the occupied territory may be tried for criminal acts designed to harm the occupying power.[2] However, the laws of armed conflict expressly state that the civilians in an occupied territory may not be required to swear allegiance to the occupying power.[*] Indonesia was therefore not permitted to persecute or punish the inhabitants of Timor-Leste for political opposition to the occupation, including for the crimes of subversion or treason.

12. Notwithstanding the above, the Commission accepts that, as a matter of fact, the Indonesian government applied the laws of Indonesia in their entirety to the territory of Timor-Leste during the relevant period, which it considered the province of Timor Timur (East Timor). The Commission has found that not only was there no right to try individuals for political opposition, but the manner in which the trials of political opponents were carried out was in violation of many of the applicable provisions of Indonesian law and international law.

13. This section considers the extent to which the trials of East Timorese political opponents during the occupation violated either Indonesian law and/or international standards of a "fair trial". This includes reference to specific violations of the Indonesian Criminal Code (Kitab Undang-undang Hukum Pidana, KUHP), Indonesian Criminal Procedure Code (Kitab Undang-undang Hukum Acara Pidana, KUHAP) Indonesia's express treaty obligations under Geneva Convention IV, customary international law, and violations of international human rights standards included in the International Covenant on Civil and Political Rights (ICCPR).

Indonesian law

14. The vast majority of political defendants were charged under the Indonesian Criminal Code (KUHP) with *makar*[3] or under the Anti-Subversion Law 11/1963 with overthrowing, destroying or undermining the power or authority of the state.[†] "*Makar*" is defined as "[t]he attempt undertaken with intent to bring the territory of the state wholly or partially under foreign domination or to separate part thereof." The Commission takes the position that "*makar*" is best translated as "treason".

15. The Indonesian Criminal Procedure Code (KUHAP) governs all criminal trials in Indonesia. Although it does not provide extensive fair trial guarantees, it does contain provisions that protect the rights of suspects and defendants. These include:

[*] Article 45 of the Regulations Annexed to Hague Convention IV (under which it is prohibited to force the population of the occupied territory to swear allegiance to the occupying power); see also Geneva Convention III, Article 87 (in sentencing prisoners of war, the courts or authorities must take into consideration, to the widest extent possible, that the accused is not a national and owes no duty of allegiance).

[†] Article 1(1b) Anti-Subversion Law 11/1963: It is a punishable offence to overthrow, destroy or undermine the power of the state or the authority of the state or the authority of the lawful government or the machinery of the state.

- Access to independent lawyers (Article 54, 55), family (Article 60, 61) and doctors pre-trial (Article 58)
- The right not to give evidence (Article 66)
- The right to a public trial (Articles 64, 153)
- The right to call witnesses (Article 65) and state a defence (Article 182 1b)
- The right of defendants and witnesses to be free from intimidation (Article 117)
- The right to appeal (Article 67).

International humanitarian law

16. A number of legally binding obligations in relation to the guarantee of a fair trial arise from the legal status of Indonesia as an occupying power according to international humanitarian law. As a party to the Fourth Geneva Convention from 1958, Indonesia was bound to observe the following obligations, among others:

- Article 67: The courts shall apply only those provisions of law which were applicable before the offence, and which are in accordance with general principles of law, in particular the principle that the penalty shall be proportionate to the offence. They shall take into consideration the fact the accused is not a national of the Occupying Power.
- Article 71: No sentence shall be pronounced by the competent courts of the Occupying Power except after a regular trial. Accused persons who are prosecuted by the Occupying Power shall be promptly informed, in writing, in a language which they understand, of the particulars of the charges preferred against them, and shall be brought to trial as rapidly as possible.
- Article 72: Accused persons shall have the right to present evidence necessary to their defence and may, in particular, call witnesses. They shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence.

International human rights standards

17. The minimal standards of the right to a fair trial are set out in Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR). The relevant guarantees may be summarised as follows:

- The right to be promptly informed of the nature and cause of the charge. The information must enable the accused to understand what is being alleged so that they are in a position to prepare a defence.
- The right to adequate time and facilities to prepare a defence, and the right to communicate with counsel of the accused's choice. This includes access to relevant documents, and the ability to communicate freely and in confidence with counsel.
- The presumption of innocence. This means that the accused is presumed innocent until proven guilty. The burden of proving the offence lies with the prosecution.
- The right to a fair and public hearing by a competent, independent and impartial tribunal.
- The right to be tried without undue delay.
- The right to be tried in one's presence.
- The right to defend oneself in person or through legal counsel of one's choice. The accused cannot be limited in choice of available defences recognised by law.
- The right to have legal assistance provided by the State if the accused is not able to pay for legal assistance.
- The right to examine witnesses.
- The right to have the free assistance of an interpreter if the accused cannot understand or speak the language used in court.
- The right not to testify against oneself or implicate oneself.
- The right not to be tried for something that was not criminal at the time it was committed.
- The right not to be tried for something for which one has already been tried.

Analytical framework

18. Based on Indonesian law, international humanitarian law and customary international law, Indonesia was obliged to guarantee a fair trial to those charged with criminal offences in the occupied territory of Timor-Leste. The following analysis considers five critical moments during the occupation: the first wave of political trials in 1983-85; the Santa Cruz trials in the early 1990s; the Jakarta trials; the trial of Xanana Gusmão; and the Mahkota trial. It uses the procedural guarantees identified above to determine the extent to which trials in each of these five situations complied with Indonesia's obligations under domestic and international law.

7.6.2 The first wave of political trials: 1983-85

Background

19. The Indonesian civil justice system was operational in Timor-Leste from at least 1977.[4] However, formal trials of Fretilin (Frente Revolucionaria de Timor Leste Independente) supporters and others linked to the independence movement did not begin until 1983.* The period 1983-85 saw a surge in "political trials" of individuals charged with treason, subversion or similar offences.

20. The first four trials of individuals charged on the basis of their membership of "GPK"† /Fretilin took place in December 1983. A letter from Indonesian Foreign Minister Ali Alatas to Amnesty International, dated 30 April 1984, noted that a further 200 trials were planned. By the end of 1985 there had been at least 232 verdicts handed down in relation to political trials – all of them guilty.‡ In 1986 a further 70 individuals were prosecuted. By 1987 the number of political trials being held had decreased significantly. In contrast, the number of trials for ordinary criminal offences remained constant throughout this period.§

21. The move towards formal trials for those accused of treason or similar offences signifies a shift in policy on the part of the Indonesian authorities. This policy involved adding the use of the formal justice system to the methods employed in the fight against the pro-independence movement.

22. However, this does not mean that the policy involved moving away from the previous practices of subjecting pro-independence activists to arbitrary detention, torture and extrajudicial killings. Analysis of the violations reported to the Commission confirms that these practices continued after the decision was made to also use the formal justice system (see Part 6: The Profile of Human Rights Violations and Chapter 7.4: Detention, Torture and Ill-Treatment).

23. Indeed defendants in several of the cases will have been aware that people who had been detained with them had been killed, disappeared or had died in detention as result of ill-treatment. In some of the cases brought to trial people alleged in court to have conspired with a defendant were themselves unable to appear as witnesses because they had been killed or had disappeared. ** The fate of these people was never mentioned in court, but could not have failed to prey on the minds of the accused as they faced trial.

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* There are reports of informal proceedings taking place in detention centres such as Sang Tai Hoo.

† Indonesian abbreviation for *gerombolan pengacau keamanan* , "band of security disruptors", the New Order name for resistance movements in Aceh, Papua and East Timor.

‡ One former prisoner described Balide, where most political detainees were held, as full until 1983, with about 200 people. Interview with David da Conceição (Aleon), The Neil Barrett Comarca Video Project, Submission to CAVR, August 2002; Caetano Guterres estimated there were about 300 prisoners, see CAVR Interview with Caetano Guterres, Dili, 22 May 2004, p.5.

§ According to Judge Siregar, "GPK" trials began in 1983 with five defendants, increasing to 82 in 1984, and 69 in 1985 through to 13 August 1985. In June 1985 the government issued a list of 154 people from December 1983-March 1985, later revised upwards to 157. A second government list obtained by Amnesty International dated 28 May 1985 listed 31 dossiers submitted to the Public Prosecutor (Jaksa Penuntut Umum, JPU). A third list dated 23 July 1985 has eight names tried in July (including one from the previous list). Taken together these lists indicated as many as 185 East Timorese tried for political offenses by July 1985. Amnesty International, *Unfair trials and possible torture in East Timor, December 1985*.

** Thus, for example: in the David Ximenes case two people alleged to have participated in meetings with the defendant, João Christorei and Danilo da Silva, both disappeared, along with many others, after being arrested following the Marabia attack of 10 June 1980; in the case of Zé Roberto Seixas Miranda Jeronimo, four people alleged to have attended meetings with the defendant, Francisco Serpa Rosa, Manuel Jeronimo, Manuel da Costa and Filomeno da Gama were reported to have been killed or to have disappeared at or around the time of Zé Roberto Seixas's arrest in November 1983. Several defendants, including Antonio Tomás Amaral da Costa (Aitahan Matak), Henrique Belmiro, Fernando da Costa and Rogério Pinto, were part of a group of 69 prisoners who were arrested in August 1983 and shortly afterwards taken to Penfui prison in Kupang. Only 14 of the 69 survived their year of imprisonment in Kupang. The rest either

24. The shift in policy also did not produce a situation in which pro-independence figures were granted fair trials on charges relating to their activities. What in fact took place was that a portion of those who were arrested for pro-independence activities were dealt with through trials, and these trials were manipulated to ensure that the defendants would be found guilty of treason and subversion.

25. Guilty verdicts for defendants were guaranteed through the use of physical torture and sleep deprivation during the interrogation process, intimidation of witnesses who might be able to testify on behalf of defendants, fabrication of evidence, collusion and fabrication of statements by prosecution witnesses, not allowing defendants to choose the lawyers who would defend them and manipulation of the trial process.

26. The trials therefore supplied the Indonesian government with a superficial answer to the increasing volume of international criticism over human rights violations in Timor-Leste. The trials created a basis for arguing that the programme to suppress the pro-independence movement was no longer based on gross violations of the rights of those suspected of pro-independence activities. However, in fact it was only the form of some of the violations that had changed. The systematic use of torture, arbitrary imprisonment and killing continued at the same time as political opponents were subjected to unfair trial processes which violated many of their fundamental rights.

27. It may be that the violation of the rights of some of those suspected of pro-independence activities was less severe than it would have been had the policy shift to include trials as a tool in the programme not taken place. The detentions, interrogations, unfair trial process and imprisonment may be argued to be an improvement on the previous practices, which were conducted almost totally “in the dark”. At least the trials were public, they probably involved less violence, and defendants were less likely to be killed or disappeared following public trials. But this does not detract from the fact that the trials themselves and the terms of imprisonment that inevitably followed involved serious violations of the rights of all the accused persons who were prosecuted.

28. The trials were, in effect, a sham that provided an illusion of a policy shift towards more respect for fundamental rights. This illusion, to some degree, diverted attention away from the violations that were still taking place

29. In 1985 Amnesty International noted that:

> In 1984 and 1985, the Indonesian government pointed to trials of political prisoners in Dili, East Timor as evidence that the human rights situation in the territory had improved…Press accounts have quoted Indonesian officials as stating that all prisoners either have been tried or are scheduled for trial.[5]

30. Indonesia’s efforts proved a somewhat effective means of gaining international approval, particularly as international observers were not able to monitor the trial processes and conditions of imprisonment of defendants. In 1984 the US State Department wrote:

> Many East Timorese detained in earlier years were tried in civilian courts this year. Represented by government-provided civilian attorneys and charged with criminal code violations, seventy persons were convicted and sentenced to terms ranging from one to eighteen years.[6]

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disappeared or died as a result of the deplorable conditions in which they were held. For more on these cases, see Chapter 7.2: Unlawful Killings and Enforced Disappearances.

31. The Commission, through its examination of over 200 court files and by interviewing many of the persons tried and others involved in the trial process, has been able to establish a clear picture of what actually transpired in relation to the political trials.

Formal legal processes

32. Documents examined by the Commission show that a policy change, initiated by the Indonesian military, took place in September 1983. Orders were given for cases previously under the control of the military to be handed over to district police commanders to be processed as criminal cases in the courts.[*] This policy was designed to reinforce the legitimacy of Indonesia's presence through an impression of normality and application of the rule of law.

33. While this change in policy ostensibly meant that responsibility was handed over to police, prosecutors and judges, an active role continued to be played behind the scenes by senior military figures.[7]

34. Documents in a case file examined by the Commission indicate that in 1984 a Special Police Task Force was established to work on the investigations.[8] This team seems to have replaced the earlier Regional (ie Provincial) Police Task Force 11.3 of East Timor (Kowil 11.3 Timor Timur) and the Operations Implementation Command (Komando Pelaksanaan Operasi, Kolakops) Investigation Team. On 21 February 1984 the Chief of East Timor Regional Police (Polisi Wilayah, Polwil), Drs. Soenarhardjadi, issued an order (No. Pol: Prinlak/69/Ii/1984/Polwil Tims) to "facilitate the tasks of the East Timor Police, within the framework of improving the efficiency of the Nusa Tenggara Police Task Force".[9]

35. Within three months of this order being issued, at least 15 persons were handed over to the police for judicial processing.[10] The Commission has examined a document addressed to the Dili District police commander from the Dili District Military (Komando Distrik Militer, Kodim) commander, Lieutenant Colonel Rohiat Wiseso. The document lists the handover of 15 suspects. Another such handover took place on 21 February 1984. The Korem commander, Colonel Rudito, in his capacity as Kolakops commander, handed over seven detainees to the police to be processed by law. Clearly, these were the cases considered "ready" for processing and did not represent the totality of operational detainees held.[11]

Informing defendants of their basic rights

36. The Commission has seen no evidence to suggest that those accused of political crimes were informed of their basic rights before trial. The Indonesian Criminal Procedure Code states that on arrest, a person may request assistance from a lawyer of his or her choice (KUHAP Articles 55 and 60) or from a lawyer designated by the state. In cases where the individual may face the death penalty or a sentence of five years of more, legal assistance is compulsory from the time of arrest.

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[*] The document TR/130/1983, dated 26 September 1983, reads: "Aaa…many criminal cases were previously handled by the Kodim Commanders [.] Bbb…it is ordered that all recipients [of this order] immediately reassign their cases to the relevant Sub-district Police Commanders (Danres) [,] for the immediate processing of the cases [.]"

The document was sent by the commander of the military command for East Timor province (Korem 164/Wira Darma) to the commanders of all district military commands (Kodims 1627 to 1639) in Timor-Leste. Copies of the document were sent to the Kodam commander in chief (Pangdam) XVI/Udayana, who had direct command responsibility for Kolakops from 1978 to 1990, the Police Commander of the provincial police of East Timor, Deputy Commander of Nusa Tenggara Tactical Command. (Wapa Kotis Laksusda Nusra), Korem 164/Wira Darma heads of sections one, three and five (Kasi 1, 3, And 5 Rem 164/WD).

This document was found in several files, including that of David Dias Ximenes, No.22/Pid/B/84/PN.DIL. There are also references in the files to a TR and Kolakops No:TR/661/IX/1983 dated 28 September 1983 regarding the hand-over of the detainee to be processed following the prevailing procedure of law that is likely to be an implementation of the order.

37. All of the cases examined fell within the category of compulsory legal assistance. However, none of the Records of Interrogation (RoI, in Indonesia known as *Berita Acara Pemeriksa* or BAP) examined by the Commission from this period indicate that the accused was informed of this right, or provided with an opportunity to have defence counsel of their own choice present.

38. Under Indonesian law, there is a basic presumption of innocence until guilt is proved (KUHAP Article 6). Detained persons were not advised of this, nor were they told that they had a right to challenge the legality of their arrest and detention (Articles 77 to 83). Those accused were not advised of their right not to incriminate themselves (Article 66).

39. Before being transferred to police custody for trial, suspects were often held for long periods of time in military custody. This was so despite international human rights standards requiring that persons detained on criminal charges be brought promptly before a judge, and the requirement under Geneva Convention IV that accused persons prosecuted by the occupying power must be brought to trial as rapidly as possible.[12] During the period of the Soeharto military dictatorship members of the military forces were granted the authority to investigate, arrest and detain individuals who were deemed to be a threat to national security.[*] However many of those who were detained did not in reality pose a threat to national security, and the treatment of suspects in detention violated a wide range of international human rights standards.

40. In addition the Criminal Procedure Code required that specific rules must be complied with if evidence were to be used against defendants in trials. These rules included that suspects be warned of their rights and be given the opportunity to have a lawyer present from the time of their arrest, particularly during interviews and interrogation. In the RoI of cases examined by the Commission not a single defendant was provided with this information at the time of interrogation. Accordingly the admissions made and evidence allegedly provided during interrogation should not have been admitted against the defendants at their trials. Despite this, these RoI formed the basis of conviction for the majority of defendants brought to trial.

41. David Dias Ximenes's file indicates that he was held in ABRI custody from 16 June 1980. On 21 February 1984, he was transferred to the police for processing. His RoI is also dated 21 February 1984. It is clear that he was held in military detention for over three years before being moved into the formal justice system. The file reveals that David Ximenes was transferred to the formal justice system together with six others, of whom three had been held in detention since November 1976.[13]

42. Domingos Seixas's RoI of 6 February 1984 records that he was arrested on 15 August 1983 by members of the Kodim, and was handed over to Sub-regional Military Command (Korem) 164/Wira Darma. On 16 August 1983 he was moved to Denpasar, Bali and then was moved back to the Comarca prison in Balide (Dili) on 9 November 1983. He appears to have entered police custody on 1 February 1984. In total, he was held in military detention for between three and six months before entering the criminal justice system.

43. Zé Roberto Seixas Miranda Jeronimo, the former Sub-district Administrator (*Camat*) of Illiomar, was arrested by the military in November 1983, but was not handed over to the police until 23 March 1984.[14] He was therefore held for between four and five months in military detention before entering the criminal justice system. The Commission's interviews with former

[*] This power was based on the formal letter given by President Sukarno to Soeharto on 11 March 1966. This "11 March Instruction", known as Supersemar, was used to establish the Command for the Restoration of Law and Order (Komando Pemulihan Keamanan dan Ketertiban, Kopkamtib) with Soeharto as its first leader, which replicated the military territorial structure. The authority of the Kopkamtib was extended by the Transitional People's Consultative Assembly (MPR) Decree (Ketetapan Majelis Permusyawaratan Rakyat Sementara, TAP MPRS No IXMPRS/1966), further extended by MPR Decree (Ketetapan Majelis Permusyawaratan Rakyat, TAP MPR NO X/MPR/1971) and given official recognition by President Soeharto's Presidential Decree No 9/1974. In 1988 the Kopkamtib was dissolved and replaced by the Bakorstanas (Agency for the Coordination of Support for the Development of National Security).

political prisoners confirm that there were often periods of arbitrary detention before individuals were handed over for legal processing. Caetano Guterres informed the Commission that he was arrested in September 1983 and taken to the Dili Kodim where he was beaten and interrogated.[15] Guterres recalls being held for three months by Kopasandha/Kopassus in Colmera (Dili), where he was questioned every night. Maria Immaculada Araújo was arrested by the military on 12 June 1980 and taken to Balide Prison. After one year she was moved to Ataúro, where she spent three years. She was then brought back to the Kodim for a month, followed by more time in the Comarca and then interrogation at the Office of Social and Political Affairs (Sospol)* in preparation for her trial in August 1984. She was therefore detained for over three years before being formally charged.

44. The degree to which the military illegally and arbitrarily detained suspects, and the way that suspects were treated while in military detention before trial, should have been raised with concern and examined by police, prosecutors and the trial judges. Apart from the violations this treatment discloses on the part of military officers, it also throws considerable doubt on the value and admissibility of evidence supposedly given by defendants during periods of military detention. However, the court files (including standard documents such as those dealing with transfer of custody, detention, interviews and summaries of the case) indicate that police, prosecutors and judges did not consider that prior arbitrary military detention was relevant.

Torture and ill-treatment in detention

45. Torture was especially common in the first days or weeks of detention, but in some cases continued for months or years leading to trial (see Chapter 7.4: Detention, Torture and Ill-Treatment). In many cases there was no other evidence apart from confessions given while being subjected to torture and intimidation in custody and from other persons who had also been detained by the military and themselves faced trial.

46. Abilio Tilman was one of the first clandestine members to be tried. He told the Commission that on 12 September 1983 he was taken to East Dili Sub-district Military Command (Komando Rayon Militer, Koramil) in Becora by the head of Mota Ulun neighbourhood in Becora, Dili, who was then given money as payment for handing him in. From there he was taken to the Kodim where soldiers punched and kicked him in the nose and forehead until his skin was torn and bleeding. The next day he was interrogated by soldiers, who beat him if he did not give the answers they wanted until he passed out. This procedure was repeated every day. He was fed once each day and his injuries were left untreated.

47. According to Abilio Tilman, on 12 November, after 30 days of this treatment, he and his cellmates were moved to the Comarca prison, where the men were stripped and tortured by military police. A visit from the international Committee of the Red Cross (ICRC) stopped the torture, and he was taken to Sospol for interrogation. He was not tortured there but the beatings resumed after he returned to the Comarca. After his trial he was sentenced to seven years imprisonment and was sent to Cipinang prison in Jakarta to serve his sentence.[16]

48. A clandestine member arrested in the same group as Aquelino Fraga Guterres remembers:

* An office in the Ministry of Home Affairs.

> *First they violated my body. For example, they reduced the food ration for one year. After this difficult time, they interrogated me: "How many times have you met with Falintil? What kind of assistance have you given to Falintil?" During interrogation they beat me with their guns, crushed my toes with chairs and electrocuted me. In the interrogation they couldn't care less about what I did wrong. Instead they told me what my crimes were and forced me to admit to them. This included sending ammunition, instant noodles, batteries…if you admitted all of these, you be put on trial and released quickly [Kopassus insisted on these crimes]. This went against my beliefs, so I refused to obey their wishes…*
>
> *Only Kopassus [members] interrogated me. In SGI detention only certain people [ABRI] could come and conduct the interrogation. I only saw one intelligence officer, PT1 [Manatuto] from Timor-Leste. Kopassus formed two groups to conduct interrogation and torture. The interrogations usually took place at night and each person would be in their cell. During the interrogation, the questions they asked had to be answered and admitted to, otherwise they beat and electrocuted me until I [felt like] dying. When I regained consciousness, they continued the torture.*[17]

49. Amadeo da Silva Carvalho told the Commission that his father Luis, a clandestine member, was arrested on 20 June 1980 in Lacoto (Balibar, Dili) and detained at the East Dili Koramil in Becora. There, he was tied to the upper branches of a tree each day. He was then moved to the former Colmera village office (Dili) and tortured. He was placed in water tanks with sharp-toothed lizards. The Commission has received similar evidence of the use of lizards during torture from a number of victims (see Chapter 7.4: Detention, Torture and Ill-Treatment). Luis was also forced to fight another detainee. He was sent from Dili to be detained on Ataúro on 4 August 1980. In 1983 Luis was one of eight detainees brought from Ataúro to be tried.[18]

50. Antonio Tomás Amaral da Costa (Aitahan Matak) reported being hung upside down from a tree until his leg joints broke, as a form of torture:

> *The justice procedure was: they would [bring us for] interrogation as far as Kupang, then back to Dili Korem, then they tied me to the banyan tree [at the former Military Police headquarters], my head below, feet above, I broke my legs this way and to this day I cannot walk straight.*[19]

51. Indonesian officials claimed that prison conditions were adequate, indeed better than during Portuguese times. A security official told a visiting Indonesian parliamentarian in 1985 that for arrests and interrogations, a humanitarian approach was always adopted. An Indonesian reporter who visited Dili that same year wrote:

> In Balide prison, which has 129 criminals and 29 detainees including three women, there is no impression of a prison. The door is always open, supervision isn't strict, and with the humanitarian approach, there is mutual trust between prison officials and criminals. When this correspondent asked: "Aren't you afraid of escapes?" Major Mustari answered: "Even less so now. They're more secure here, and there are even some who don't want to go home."[20]

Record of Interrogation (RoI)

52. Following interrogation, a RoI would be drawn up to be signed by the suspect. The Commission has received testimony, discussed below, that in many cases the RoI did not reflect what was said by the accused during interrogation. Not one of the cases examined indicates the presence of a lawyer representing the suspect during interrogation and at the signing of the RoI.

53. In addition to the torture during detention described above, there are reports of intimidation and coercion at the stage where suspects were required to sign a RoI. This ranged from the withholding of family visits to threats of lifelong imprisonment. Aitahan Matak was brought back from Kupang on 24 August 1984 but his trial was delayed because he refused to cooperate. After months of pressure, he agreed to sign a RoI and appear as a witness:

> *And they said gently that you, Antonio Aitahan Matak, have to accept it so that you can see your family, you are still young, so you can marry. If you refuse the trials you will die in prison; you cannot escape prison.*[21]

54. This account is consistent with contemporaneous reports by international human rights organisations. In 1988, Amnesty International noted:

> Many of the released prisoners appear to have been tried on the basis of false or coerced testimony after long periods of incommunicado detention during which some were reportedly told that signing a confession and being brought before a court would enable them to receive visits from their families.[22]

55. Some detainees signed a RoI willingly as a way of maintaining secrecy about other clandestine operations. Aquelino Fraga Guterres agreed to sign the RoI when he saw that it included mostly minor offences, and did not refer to leadership of Dili's clandestine networks or the sending of sensitive information overseas. Similarly, Marito Reis voluntarily signed his RoI so that he could go to trial, rather than being held secretly in detention for an indefinite period. At least being brought to trial meant that the public could become aware of the whereabouts of the suspect.

56. Some prisoners refused to cooperate or sign false confessions despite threats and the uncertainty of what might happen to them. After nearly two years in detention, 50 detainees, including 19 from Baucau, were released on 27 April 1985 in a public ceremony. One member of this group, Cristiano da Costa, told the UN Human Rights Commission:

> *Many political prisoners were made to sign false confessions which were then used to stage sham trials…I myself and 49 others refused to sign these false confessions so we were never tried. On 27 April 1985 after 20 months in prison, those of us who had refused to take part in the trials were released. We then had to report every week to the Indonesian military command.*[23]

57. Translation was an issue in many of the trials. Defendants were interrogated without interpreters and signed documents containing admissions of guilt, which were written in a language they did not understand.

58. In one example, the court file reveals that the RoI of Domingos Seixas, written in Indonesian, was admitted as evidence in his trial even though no interpreter had been present at the time he was interrogated and signed the RoI. The court transcript in the same file reveals that at trial, the judges determined that his Indonesian was inadequate and that he required the assistance of a translator, who served throughout his trial. Despite the fact that they ordered that Domingos needed a translator during this trial, neither judges nor defence counsel questioned the legitimacy of the signed RoI, which was the basis of the evidence against him, although it was written in Indonesian without the assistance of an interpreter.

Trial

59. While most trials took place in Dili, there are reports of trials being held in Baucau, Suai and Bali.[24]

60. In political trials held during the period 1983-85, defendants ranged from rural farmers to urban clandestine leaders. The youngest defendant in the cases examined by the Commission was 14-year-old Sabino Barreto, and the oldest was 72-year-old Caetano Ximenes, but most defendants were males in their twenties or thirties. The average sentence declined slightly over the period, from seven years and eight months in 1983, to two years and nine months in 1985.[*]

61. The average age fell slightly from 37.8 in 1983 to 31.4 in 1985. This trend may indicate that towards the end of this period, prosecutors were focusing on rank and file members of the clandestine movement, rather than leaders.

Indictment

62. Those tried for political crimes during 1983-85 were almost universally charged with treason, based on Articles 106, 108 and 110 of KUHP.[25] Fifty-one of the cases carried a similar primary charge. Several defendants faced subsidiary charges under provisions such as Article 169 (membership of an illegal group).[†] The only defendant not charged with any of the treason provisions was João Soares.[26] He was charged under Article 134 for insulting the President. [‡] The court often did not consider subsidiary charges if the primary charge was proved.[27]

63. Most charges stemmed from one or two incidents, usually meetings at which the alleged crime of treason had occurred. In most cases the prosecution acknowledged that the arrest had

[*] Calculations are based on the spreadsheet of trials prepared by the CAVR from files found in court archives. Figures for 1986 are similar to 1985.

[†] Calculations are based on the spreadsheet of trials prepared by CAVR from files found in court archives. In one other exception, Amnesty notes that the defendant was charged with violating the duties of a civil servant, another with slandering the President.

[‡] Section 134 reads: "Deliberate insult against the President or Vice President shall be punished by a maximum imprisonment of six years, or a maximum fine of three hundred Rupiahs."

prevented the planned acts of violence, and even planned non-violent acts, from taking place.[28] Consequently, it was not necessary to show that the planned acts had taken place in order for the crime to be made out.

64. In some cases the court noted that it was common knowledge that Timor-Leste had already been integrated into Indonesia and that Fretilin's purpose was to separate Timor-Leste from Indonesia.[29] Therefore any action in support of Fretilin amounted to an act of treason.

65. Some persons arrested and tried were in fact directly involved in organising the clandestine movement supporting independence. Others were only peripherally involved, having given food or other minor support to pro-independence fighters. Some others had in fact not participated in supporting the independence movement in any material way. The manner of conducting the interrogations and fabrication of evidence during the trials meant that it was impossible for the court to ascertain exactly what participation the various defendants had actually played. Their decisions were based on the picture formed during the distorted interrogations and trial preparation and conduct.

66. Many of the suspects were charged for holding secret meetings and supporting independence, as well as for providing direct assistance to an emerging urban guerrilla movement. Others were charged for past activities such as David Ximenes and Mariano Bonaparte, who were charged in connection with the 1980s Marabia attack. The very first political trials in December 1983 involved several defendants charged for recruiting company commanders with plans to obtain weapons and mount attacks in the cities, although they were arrested before they made much progress. Defendants were accused of planning for the arrival of the UN or even seeking foreign soldiers who would help Fretilin attack in Dili.

67. Clandestine activity was taking place mainly in urban areas during this period. According to Aitahan Matak, when Falintil fighters were prevented from returning to the mountains after visiting families in the towns during the ceasefire, the underground moved to rebuild clandestine structures in case Xanana Gusmão was captured.[30] Examples of trials connected to urban clandestine networks include:

- Marito Reis, recently freed from detention on Ataúro and working as a driver for the Korem intelligence section head (Kasi I Korem) Willem da Costa. He was also working to revive Dili's clandestine network after the Marabia attack in 1980. According to Marito Reis, the authorities became suspicious after an underground newspaper began to circulate and arrested him together with other clandestine members. They were taken to Bali but were later returned to Dili and put on trial.[31]
- Henrique Belmiro, charged with treason for his involvement in a meeting in 1982 that led to an agreement to look for new members sympathetic to Fretilin, to create groups to support Fretilin activities, and to send logistical support to the mountains, with the final goal of separating Timor-Leste from Indonesia and creating an independent Timor-Leste.[32]
- Armindo Florindo, charged with treason for meeting Albino Lourdes on 15 December 1982, and being named leader of a clandestine group with the task of looking for additional members.[33]
- Caetano Guterres, a Fretilin leader who surrendered in 1979 and was then given the task of setting up clandestine activities in Dili. He spent several years smuggling documents out of the country to the Frente Diplomatica. He received a letter in mid-1983 telling him to take a break from his clandestine activities. However, three days later he was arrested. The primary charge was treason; specifically that Guterres had met with Albino Lourdes at his house together with José Conceicão, and had separately had discussions with Jacinto Alves in their office. A witness testified that Guterres was given the job of couriering letters from the Resistance in the mountains to destinations abroad, through Bishop Martinho Lopes. He was accused of sending letters to Portugal, Australia, Mozambique and the UN. He was also accused of sending notebooks, envelopes and blank cassettes to a clandestine leader in Baucau.[34]
- David Ximenes, whose primary charge was derived from meetings with Mariano Bonaparte Soares, Januario Ximenes, Danilo da Silva, João Cristorei, and Mateus Amaral, between July 1979 and June 1980 at the house of Januario Ximenes and Mariano Bonaparte. The participants were accused of treason for planning to gather fighters for an attack on Dili, with the ultimate goal of separating Timor-Leste from Indonesia.[35]
- Domingos Seixas,[36] accused of chairing two clandestine meetings in November and December 1982 at which he reported the killing of 15 members of ABRI in the east of the territory, discussed Australian Radio broadcasts about Australian and Portuguese assistance arriving by Christmas time, and reported on a possible referendum for which people should prepare. Those present agreed to help Fretilin in its struggle. According to the authorities, the accused eagerly agreed to carry out the assignment hoping that, should Fretilin win, he could work again in the hospital with a good salary.

68. Many of the more than 200 people tried between 1983 and 1985 were not clandestine leaders and had only limited, if any, contact with the guerrillas. Defendants included those who allegedly supported Falintil by their attendance at rural meetings. In many other cases the evidence alleged that the defendants had supported the independence movement through provision of items such as cigarettes, palm wine or rice.[*] Trials of local supporters of the Resistance include those of:

[*] Case file No.99/Pid/B/85/PN.DIL. Maria Amelia Sousa was charged with participating in an illegal meeting and providing GPK with sago, corn, cassava and notebooks [see Indictment against Maria Amelia Sousa and Bill of Charges against Maria Amelia Sousa in Case File No. 30/PK/1985]; Joki de Sousa was charged with providing cassava and palm wine (*tua mutin*), as well as information on ABRI strength in the area [Case file No. 25/PID/B/1985/PN.DIL].

- Francisco Mendes, alleged to have perpetrated treason on or about 15 July 1983 in Kolorau (Same, Manufahi) by meeting with members of the Resistance and agreeing to support them, and that to show his support, the suspect gave items consisting of one packet of Ribbon brand cigarettes and East Timorese tobacco and or tobacco of another kind.[37] He was also accused of agreeing to support "GPK" efforts, while knowing with certainty that Timor-Leste had integrated with the Republic of Indonesian in 1976.[38] A witness testified at the trial that the defendant gave material support to the Resistance but never said anything about supporting independence.
- Gil Fernandes, accused of meeting with Fretilin members four times between March 1984 and April 1985 in Muapitene (Lospalos, Lautem) to provide information on military strength in the area and the locations of posts and patrols, as well as providing several kilograms of corn and rice, items of clothing and a notebook. The assistance was considered particularly serious because in May 1984 Falintil attacked an ABRI post, resulting in the deaths of nine Indonesian soldiers.[39]
- Maria Immaculada Araújo was charged with treason on the basis of a meeting in May 1980 in Lacoto, East Dili, where, according to the indictment, she, along with three other women, was "formally inaugurated as a member of OPMT [Organização Popular Mulher Timor, Popular Women's Organisation of Timor]…with the task of gathering information on ABRI strength in Dili, looking for food, drink and medicine…the defendant understands that the OPMT organisation is an illegal movement with the goal of supporting the struggle of GPK/Fretilin through violence/war." According to Maria Immaculada she was arrested "because at that time we together formed a clandestine structure in order to assist the armed Resistance. But we only helped them with information, guidance and logistics".[40]
- Zé Roberto Seixas Miranda Jeronimo, the sub-district administrator of Iliomar (Lautém) was charged with being a threat to national security and conspiracy to commit a crime. The subsidiary charge was violation of Article 108 of the KUHP.[41] It was alleged that, as a civil servant, he had been in contact with the Resistance during the ceasefire, attempting to persuade them to surrender. But after the breakdown of the ceasefire he remained in contact with and assisted the Resistance, for example by sending them cigarettes and medicine. He was accused of plotting to kill the local Hansip (Pertahanan Sipil, Civil Defence) commander and his deputy, and of acting as a conduit between the Resistance in the Lospalos forest and those in Dili.

Courtroom conditions

69. The trials were first held at the former Portuguese high school building (the *Liceu)*, across from the former Benfica sports club, where the prosecutor's office was located. The court was later moved to the current Dili District Court building in Mandarin. Trials might be concluded in one day, or held over three or four sessions several weeks apart. Different cases involving the same witnesses were often held on the same day.

70. Each trial began with an announcement from the judge that the court was open to the public. In practice the presence of military and intelligence created an intimidating atmosphere that prevented people from attending. Caetano Guterres told the Commission that at his 1984 trial everyone close to him was too afraid to attend except his wife and children. Antonio Tomás Amaral da Costa (Aitahan Matak) reported that even family members were intimidated from attending his trial by the military police guarding the courtroom.

71. The government rejected Amnesty International's request to send observers in 1984, declaring the trials essentially a matter of domestic jurisdiction.[42]

72. During the first years after the invasion, defendants spoke little or no Indonesian and required interpreters. Interpreters were typically Timorese members of the police department.

Witness testimony

73. KUHAP requires a minimum of two pieces of evidence in order for a conviction to be recorded. The authorities adhered to this rule in form, if not in substance. In all the cases examined, there were two items of evidence, usually in the form of statements by witnesses and sometimes in the form of physical evidence.

74. However, evidence provided to the Commission shows that many witnesses were coerced into testifying, and in doing so many were forced to provide incriminating evidence in relation to their own trials. Many detainees had been held for months or years, subjected to torture and deprived of access to family and lawyers. As a result, they were vulnerable to coercion to sign false confessions in their own matter, and also to bear witness against others.

75. The Commission accepts, on the basis of strongly corroborated evidence, that there was a consistently followed discipline among those involved in the clandestine movement for independence which included using code names at all times. This discipline was designed to ensure that people in fact did not know each other if they had never met. They had heard about different persons but always referred to by the code name, and so could not, in reality say who these persons were.

76. Many defendants stated at trial that they knew co-defendants, thus incriminating them, although in fact they had never met them and could not in reality say whether the others were those persons referred to by code names. This false evidence, which was the basis of numerous convictions, was the result of torture and intimidation. Antonio Tomás Amaral da Costa (Aitahan Matak) stated about his trial:

> *When we went to court, between nine and 12 people were tried in one day. Those tried were put into groups of three, sitting side by side, and each gave testimony against the other [two]…But how could I know your name? Because we had taken an oath in the jungle to never say anyone's [real] names. I am just I, you are just you. But [ABRI] had a way to counter our strategy, they put us in groups of three. Say one brother had never met me. After being beaten and tortured, he knew me and he was part of the first trial and got sentenced to five years imprisonment. The following day I came for my trial, two friends were witnesses and all were incriminated at once. The day after, another friend was put on trial and the two of us were the incriminating witnesses…I got five years in prison, while my two friends got four years, and another friend got three years.*[43]

77. Under pressure, Antonio Tomás Amaral da Costa (Aitahan Matak) agreed to testify against the other two in his group of three, even though he did not know them:

> *I also was forced by them to admit that the two of them had done wrong. I did not know Agusto of Dili, I did not know José Agusto of Quelicai [Baucau], I was in Viqueque working with Daniel João Batista. But they forced the three of us.*[44]

78. Clandestine leaders Caetano Guterres, Marito Reis and Albino Lourdes all testified at each other's trials. In one of the earliest cases, José Simões's witnesses were defendants in other trials in which he was a witness: those of Antonio José Eduardo (Simões's brother-in-law), Abilio Tilman, and Fernando Pinto Baptista.

79. Amnesty International received reports of these practices at the time and made specific reference to them at the United Nations Committee on Decolonisation. The Amnesty International report focused on the case of Agapito da Silva who was sentenced to six years in August 1984 after having spent four years in detention.[45] The only witnesses were two other accused, who had also been detained and tortured during their four years imprisonment. They were told to sign statements or there would be no trial, and their imprisonment and torture would continue indefinitely. If they were tried their cases were at least brought into the open, there was a public record of their imprisonment and an end date to their detention.

The right to defence counsel of choice, and to an effective defence

80. In a 1984 letter to Amnesty International, Indonesia's Foreign Minister Ali Alatas wrote:

> In accordance with Indonesian civil and criminal procedural law, each defendant may retain his own legal counsel (attorney-at-law), or in case of inability to pay lawyers' fees, the defendant is provided free counsel by established legal consultant groups.[46]

81. In practice defendants were not advised of their right to have a lawyer, let alone allowed the lawyer of their choice. In fact, there were no independent lawyers practising in Timor at the time. The lawyers provided by the state were selected from the Trisula Legal Aid Institute in Kupang, West Timor. Court documents reveal that the accused was not given an opportunity to select his or her own counsel.

82. For example, in the case of Domingos Seixas, the Court appointed Merry S Doko and Saartje Seubelan as defence counsel on 9 March 1984 of its own initiative and without any consultation with the accused. On 13 March 1984 the court appointed Merry S Doko and Saartje Seubelan as defence counsel for David Ximenes, again of its own initiative and without consulting the accused. Francisco Mendes's file notes that he was officially detained on 10 December 1984, but was not appointed a lawyer until a judge's decision on 3 January 1985.[47] José Simões, in detention since August 1983 and under interrogation since October of that year, was not appointed a lawyer until 7 January 1984.[48] Nearly every defendant was represented by any one of two of the same three lawyers_Merry S Doko, Asmah Achmad, and Saartje Seubelan_despite the fact that not one of the persons whom they defended had been acquitted of all charges. When Marito Reis refused to accept his lawyer, she attended but did not participate in the proceedings and no alternative was offered.[49]

83. In many cases the defendants met their lawyers for the first time at trial.[50] A review of the court proceedings, while not necessarily accurate or complete, confirms that there was little effort to cross-examine witnesses or otherwise disprove the elements of the prosecution. Some defence statements are remarkably similar to statements produced by the prosecution.

84. For example, the defence statement for Henrique Belmiro reviewed the witness statements, many of which had negative implications for the defendant, and appear to be arguments that the defendant should be found guilty, rather than not guilty. These include statements on behalf of the defence such as: "The ultimate goal of this covert meeting was to secede Timor-Leste from the Unitary State of the Republic of Indonesia and form a separate State of Democratic Republic of Timor Leste." The only argument actually made in defence of the accused was that he was merely a disappointed job-seeker, who did not have a strong reason to demand separation from Indonesia.[51]

85. The defence statement filed by David Ximenes's lawyers began with profuse expressions of respect for the court. This is in sharp contradiction to the evidence to the Commission that the defendant did not recognise the sovereignty of the court or their right to try him. Counsel then

read through the evidence and the charges, only to conclude that the prosecutor had successfully proven all of the elements of the crime against his client.[52] The only issue left, therefore, was possible mitigation of the sentence. Counsel made no mention of the fact that the accused had been held in arbitrary detention for over three years, nor did counsel complain that David Ximenes had not been advised of his absolute right to be assisted by a lawyer or about the nature of the evidence being brought against the accused.

86. Exactly the same situation arose in the defence of Zé Roberto Seixas Miranda Jeronimo. Defence counsel agreed with the prosecution case and then raised mitigating factors on behalf of his client. Nothing was said about arbitrary detention, the treatment of the accused or witnesses, or that the client had been interviewed without a lawyer being present.

87. The court transcript of the trial of Domingos Seixas summarised the efforts of his defence counsel in the following terms: "The Defence Team basically states that they agree with the charges from the General Prosecutor that is that it is proven that there was a violation of Article 110(1) and Article 106 of KUHP and submit the accused and the future of the accused into the hands of the Court."[53]

88. Unlike later trials, many of the files and the records of proceedings from this period do not include the second round of statements normally made by the prosecutor and the defence team in Indonesian trials (the *replik* and *duplik*). One of the few prosecutorial replies on the record contains a revealing evaluation of the quality of the defence. The one page statement notes:

> After listening to and then assessing the plea of the Defence, we are now of the opinion and conclude, that because the Defence is of the same view as us and in principle has only pleaded for a reduced sentence for the accused so we as the General Prosecutor in the case of Abilio Tilman consider that there is no need for further response.[54]

89. The enormous caseload taken on by defence lawyers would also have compromised the quality of representation. The three Kupang lawyers represented all 232 political defendants from 1983 to 1985, as well as taking on many ordinary criminal cases during the same period. Given that they reportedly divided their time between Dili and Kupang, there would have been little time to familiarise themselves with the details of each case, and this may explain why their submissions are virtually identical in the many cases in which they acted. In 1985, the *Far Eastern Economic Review* (FEER) reported that defence lawyers practising in Timor-Leste claimed that guilty pleas saved time.[55] Furthermore, there were obvious conflicts of interests for these three lawyers, who between them were dealing with cases where their clients were appearing as the accused in one case and as a witness in other cases, including as a witness against other clients.

90. It appears that the control of the military over the process leading to trial, including torture, intimidation and fabrication of evidence extended to the courtroom itself, in ensuring that in fact defence counsel never produced a real defence of their clients, thus guaranteeing convictions. Caetano Guterres remembers being told by his court appointed defence counsel, Doko:

> *We can just help you, but we've already received direction from the military. We just follow the military's wishes. This means if they say A, it's A, they say B, it's B…We just followed the direction from the military. We can't do anything but just sit there.*[56]

91. In addition to the evidence received by the Commission of an overwhelming inability or lack of will of defence counsel to properly defend their clients, some defendants claimed that their lawyers did try to help them despite the difficulties of overcoming the fabricated evidence and influence of the military in the trial process. Caetano Guterres, who ultimately received a sentence of six years, remembers:

> *The defence lawyer was provided by them. My defence lawyer was Mery from Kupang. She was very nice and did all she could to defend my case, because the judge[s] wanted life imprisonment.*[57]

92. Cristiano da Costa, who refused to confess and was freed after 20 months in detention, told the UN Human Rights Commission about those who were not so lucky:

> *Two Indonesian lawyers from Kupang were appointed by the court to defend them, but they had no contact with the prisoners. In fact, they worked closely with the prosecutor and the judge to produce guilty verdicts and sentences that had already been decided upon by the military.*[58]

93. The evidence provided to the Commission that defendants were not free to choose their own defence counsel, that the court appointed counsel despite their objections and that these lawyers in most cases worked with the military and prosecutors to ensure prosecutions, rather than acquittals, is strongly supported by the objective facts which are drawn from an examination of the court files. Of the 232 political prisoners tried between 1983 and 1985 not one entered a plea of not guilty to the serious charges against them, and not one was acquitted.

94. The Commission's examination of the files reveals that the defence case was generally limited to raising mitigating circumstances. A *Far Eastern Economic Review* Article from the time notes that the prosecutor simply establishes the circumstances of the alleged crime and the defence seeks only to lighten the sentence.[59] Arguments based on mitigating factors were repeated almost verbatim in all defence statements. Defence lawyers would invariably argue that the defendant was a polite, honest, remorseful, family man with no prior record.[60] One 1985 case took a somewhat different tack. As described by the judges' panel in their decision, the defence was of the opinion that

> After studying the witnesses' testimonies and the defendant's own statements, it has been juridically established that the defendant is proven guilty. However, there were non-juridical issues that influenced and pushed the defendant into committing the crime(s), or at least [made him] susceptible to GPK/Fretilin influence, with whom the defendant, who is a farmer, met in the forest while searching for food.[61]

95. The non-juridical factors referred to included the defendant's low level of education, which meant that he was incapable of telling the difference between freedom/independence in GPK/Fretilin propaganda and independence with Indonesia; his low social standing made him vulnerable to high-sounding promises; and psychological pressure because of frequent encounters with GPK.[62] Another defence used in several cases was that the defendant was disappointed that he or she could not find a job or other government promises of support.[63] David Ximenes was one said to have been embittered by the failure to advance professionally through the Indonesian army, despite what he felt to have been substantial personal sacrifice.[64]

96. There was some degree of flexibility in sentencing. There may have been negotiation on what the prosecutor asked for in the list of charges and defendants were also given the

opportunity to accept or reject the sentence. Caetano Guterres says he was initially sentenced to 20 years, but rejected this sentence, arguing that he was an only child and his parents were getting old. The sentence was subsequently lowered to 15 years, then ten, and finally six. Even Marito Reis, who had no lawyer, saw his sentence reduced from 20 to 17 years (eventually serving 12).

The presumption of innocence

97. As stated above, review of court documents relating to the 232 cases examined by the Commission found no acquittals. Despite this, the 1984 US Department of State Human Rights Report noted that in addition to those sentenced to prison sentences that year, several dozen other persons were tried and acquitted, while prosecutors released still others for lack of evidence.[65] The Commission has not been able to identify any of these acquittals from its investigations of the surviving files and records of the District Court of Dili. It therefore doubts the truth of the material contained in the US State Department report, which was probably compiled without the benefit of being able to refer to court records. The Commission found evidence that in one November 1984 case, Markus Assis was accused of meeting with the Railakan company commander where some charges were dropped but others proceeded with. Prosecutors dropped the primary charge because it could not be proved. However the subsidiary charges were pursued and Assis was sentenced to one and a half months in prison.[66]

98. In addition to the outcomes of these trials, there are further indications that the presumption of innocence was routinely flouted. As noted above, those accused were not advised of their rights on arrest, including the right not to self-incriminate (Article 66 of KUHAP). There is no express right to silence guaranteed under KUHAP, but it clearly forms an element of the right not to incriminate oneself, and the right to a presumption of innocence. The prosecution bears the burden of proving guilt, and cannot prove guilt by coercing the accused into an admission.

99. Most defendants did not have an opportunity to assert their right not to self-incriminate at trial, having already confessed to the alleged offences in their RoIs made before the trial. Many of these confessions were made under duress or threat.

100. The few public comments made by judges during this period indicate that the presumption of innocence was not upheld in trials in Timor-Leste. The head of the Dili District Court, Judge LP Siregar, told a reporter in 1984 that defendants acknowledged their guilt because they were honest, and for the same reasons they declined to appeal: “When they’re asked if the accusation of the prosecutor is correct, they always say yes.”[67] The article continues:

> If all trials could be like those in East Timor, the task of the legal profession would be easy, he said. Those who come before the green baize [those who are tried] are all honest. If they've done something, they readily admit it. And they never deny anything in their interrogation depositions, so the whole process goes smoothly.[68]

101. These facts led Amnesty International to express concern in December 1985 that the presumption of innocence was not maintained and that there was pressure on defendants to plead guilty.[69]

Independence and impartiality of the tribunal

102. There were no East Timorese judges or prosecutors during the Indonesian occupation of Timor-Leste. Judges from other Indonesian courts spent time on rotation in Timor-Leste (usually for several years) and then were moved elsewhere.

103. Indonesian judges in Timor-Leste were civil servants, employed by the Ministry of Justice and therefore lacked true independence. The results of the judgments in the trials were an overwhelming demonstration of support for the political goal of suppressing the movement for independence. The Commission is satisfied that the judges involved in these cases colluded and collaborated, directly or indirectly, with those who manipulated the trial process for a preferred political goal. Not one finding of "not guilty" was handed down in over two hundred cases despite the legal presumption of innocence. There was almost a total absence of rigorous judicial scrutiny in the face of evidence, which indicated that witnesses and defendants had been subjected to torture and ill-treatment, and that evidence had been fabricated. An Indonesian lawyer active in Timor in the 1990s gave his opinion that factors such as bribery may also have affected whether and how a case went to trial.[70]

104. In the Indonesian civil law system, the judge controls proceedings, taking an active role in questioning witnesses. However, the court records indicate passivity by the court in these political trials, and a reluctance to interrogate the prosecution case. When they did take an active role, judges tended to ask questions of a political nature, inquiring as to the defendant's attitude towards integration and independence and asking if the accused knew that East Timor was lawfully part of Indonesia and that what he did was against Indonesian law because it sought to separate the territory.

105. Defendants and their lawyers consistently describe the trials as operating under military control, with judges unable to exercise any independence. The governor of East Timor during this period, Mário Carrascalão, described the trials as set up by the military.[71] According to Marito Reis:

> *They came to the Comarca prison after the sentence was handed down…They told me that it had all been set up by the army, and they could not do much. [The judges and prosecutors] have been set up by the military, they had been ordered to ensure that this person be punished this way, that person that way, so it had all been set up by the military.*[72]

Right to appeal

106. In his 1984 letter to Amnesty International, the Foreign Minister of Indonesia, Ali Alatas, asserted:

> Each defendant is entitled to appeal the sentence to a higher court [appellate court] and all the way up to the Supreme Court. So far none of those already convicted have opted to take a recourse to such an appeal, although this right has been made explicitly clear to them by the panel of judges at each sentencing.[73]

107. The Commission is not aware of any appeals in the 232 trials it has examined, which took place from 1983 to 1985.[74] A contemporary press account corroborates the views expressed by Judge Siregar. These views are totally opposed to the information which the Commission has received from those defendants who were tried and sentenced:

> If they are sentenced, they never make an appeal, even if their defence counsel urges them to do so. The reason, they say, is that everything they are accused of is true, and they admit their error. After the sentence is announced, these criminals even express their thanks and ask for a joint photograph![75]

108. Once sentenced, defendants were pressured to sign a document indicating that they accepted the judgment of the court and did not wish to appeal. Some, such as Marito Reis, said that they acceded to this, and declined to appeal because they did not believe any of the proceedings to be legitimate in any sense. More often, defendants stated that they did not appeal against their conviction and sentence because they received threats that if they did not accept the results harm would come to their families or they would continue to be tortured and kept in terrible conditions with no access to family or friends and no hope of ever being released:

> *If we don't accept it, we don't see our families, we stay in the darkened cells, and at night we're threatened with death. If you agree you will go free.*[76]

109. Amnesty International concluded that many defendants apparently did not understand that they had the right to appeal their sentences and in some cases were told that if they did not accept their sentences without appeal, they would be increased.[77]

Conclusions

110. Before 1983 East Timorese suspected of involvement in the pro-independence movement were routinely arbitrarily detained, tortured and killed (see Chapter 7.2: Unlawful Killings and Enforced Disappearances and Chapter 7.4: Detention, Torture and Ill-Treatment). In 1983 a policy decision was made to use the courts as well as the military in the fight against the opposition to the occupation.

111. Although this could have resulted in a change in the Indonesian government's approach to the Resistance towards one based on justice and the rule of law, in fact the approach was manipulated so that there was little justice involved. The trials during this period were not an opportunity for a fair hearing before an independent decision maker. They were instead a tool that the Indonesian authorities manipulated to achieve a political goal.

112. The conditions of detention and interrogation, the manner in which the prosecution and defence cases proceeded, and the judgments delivered were part of a combined strategy intended to provide an illusion of justice being done and also ensuring that all defendants would be found guilty of political offences.

113. The bare facts relating to the political trials of East Timorese conducted by the Indonesian government between 1983 and 1985 which were examined by the Commission produce a startling summary which reflects the degree to which the trials were fair and conformed with the requirements of due process. The Commission examined 232 political trials. These resulted in:

- 232 convictions on charges involving treason and subversion
- 232 defendants being represented by government appointed defence counsel
- 0 defence witnesses being called
- 0 cases of acquittal of all charges being recorded
- 0 appeals against conviction being lodged.

114. The trials violated not only international human rights standards but also the applicable provisions of Indonesian law in relation to many of the most fundamental requirements for a fair trial. These included the following:

- Individuals were arbitrarily detained by the military for up to seven years before trial.
- Members of the Indonesian military forces systematically tortured and abused suspects in order to produce false confessions and seek information
- Accused persons were not informed of the right to counsel, nor provided with an opportunity to have a lawyer of his or her choice present during trial
- Government appointed lawyers represented hundreds of defendants accused of similar charges in many cases related to the same facts, creating a serious conflict of interest. Defence lawyers failed to vigorously defend their clients. They did not raise the issues of arbitrary detention nor physical abuse and torture during trial proceedings, generally remained passive, did not call witnesses to support the defence case, and often agreed with submissions made by the prosecution.
- Judges did not act impartially and independently. They participated in or acquiesced to, the manipulation of the trial process to guarantee verdicts of guilty for all defendants.
- Due to direct and indirect intimidation by members of the Indonesian security forces, members of the public were not able to freely observe trial proceedings.
- Penalties imposed in general ranged from between five and seven years. Judges failed to take into account prior periods of military detention when determining sentences, which in some cases were periods up to seven years.

7.6.3 The Santa Cruz trials: 1992

115. The killings at the Santa Cruz Cemetery (Dili) on 12 November 1991 provoked an international outcry, largely stimulated by film footage showing soldiers shooting unarmed civilians, which was smuggled out of the territory. In response the Indonesian government conducted a number of inquiries related to the events. An internal military investigation and National Commission of Inquiry were conducted. An Honorary Military Council heard misconduct allegations against 6 senior officers. Ten lower ranking officers faced court martial.

116. However, the strongest response of the Indonesian government was not focused on disciplining those Indonesian military officers who were responsible for shooting hundreds of unarmed demonstrators, killing many. Rather it focused on bringing to trial and imprisoning the East Timorese who had organised the demonstration that had brought the protesters to the Santa Cruz Cemetery.

117. After the National Commission of Inquiry submitted its preliminary report, President Soeharto instructed the Attorney General to take all necessary steps against those who planned and took part in the riot.[78] What resulted were trials against eight individuals, two of whom were charged with subversion, the others with treason. A total of 12 trials were conducted, commencing on 12 March 1992, with 11 trials conducted in the Dili District Court, and one taking place in the Baucau District Court.

118. The following section analyses the trials of Gregório da Cunha Saldanha, Francisco Miranda Branco, Jacinto das Neves Raimundo Alves, Carlos dos Santos Lemos, Juvençio de Jesus Martins, Bonafacio Magno and Filomeno da Silva Fereira. The analysis is based on case files from the Dili District Court, witness statements, secondary sources and interviews conducted by the Commission. For the purposes of this Report the Commission has focused on the major trials, those of Francisco Branco and Gregório Saldanha, although it has researched and analysed the other relevant trials and reference is made to them where relevant. The analysis of the judicial processes related to the Santa Cruz incident is based on material relating to all trials.

Factual overview

Background

119. In late 1991 a Portuguese government delegation was due to visit Timor-Leste. Human rights and pro-independence activists intended to use the visit as a means of notifying the world about the massive human rights abuses that were being committed against the East Timorese people.

120. The executive committee of the Resistance network, called the National Council of Maubere Resistance (Conçelho Nacional da Resistencia Maubere, CNRM), disseminated political information about the visit and were planning to deliver a petition to the delegation.[79] All but one of the Santa Cruz defendants were members of this Executive Committee.

121. In the lead up to the planned Portuguese visit there was an increase in anti-government political activity. The Indonesian military responded to this activity by seeking out, arresting and imprisoning an increasing number of young men in Dili, during October and November 1991. As a result around 20 young activists took refuge in the Motael Church, in Dili.

122. Members of the Indonesian military responded forcefully to the action of taking shelter in the church, and during a clash with the activists on 28 October 1991, one of the young East Timorese men, Sebastião Gomes Rangel, was killed.[80] Afonso Henriques, an intelligence agent, reportedly sustained fatal injuries from a sharp implement.[81]

123. Five East Timorese men were tried and convicted of acts of violence leading to the death of Afonso Henriques.[*] No official action was taken against security forces involved in the killing of Sebastião Gomes Rangel.

124. The Executive Committee of the Resistance planned a peaceful demonstration to draw attention to the killing of Sebastião two weeks after his death. This plan included a peaceful march from the Motael Church to the Santa Cruz Cemetery, where he was buried

Findings of fact as determined by the court during the trials

125. The following briefly summarises the facts of the Santa Cruz Massacre as determined at trial: Plans for the Santa Cruz demonstration commenced on 8 November 1991, and the preparations included the creation of pro-independence banners and determining the route the demonstration would take. On the morning of 12 November 1991, a procession led by Gregório da Cunha Saldanha left from the Motael Church. Pro-independence chants were shouted along the way and participants carried pro-independence banners.

126. Major Andi Gerhan Lantara and Private Domingos da Costa were attacked by protesters on the way to the Santa Cruz Cemetery. The following extract from the Gregório da Cunha Saldanha decision details the court's version of what later occurred at the cemetery:

> [T]here were gunshots coming from the direction of the protesters, followed by warning shots from the Security Agents, then from the direction of the protesters came a scream: Forward. Attack, and the protesters attacked the security agents, and a riot ensued between protesters and security agents, followed by gunshots from security agents; the riot claimed victims on the part of protesters.[82]

127. The quotation above contains the only discussion by the court concerning the events at the Santa Cruz Cemetery. The facts in issue at trial focus on clandestine meetings and preparations leading up to the demonstration. The killings at the cemetery, and in particular the actions of Indonesian soldiers, are not detailed.

128. The fact that the demonstration did increase tensions, and by implication justified the massacre that followed, however, was at issue before the court. To justify this position, much weight is given to the official statements of Brigadier General Theo Syafei, Kolakops Commander of East Timor, written on 31 January 1991 and Drs A B Saridjo, Vice-Governor of East Timor, written on 25 February 1992. The contents of both these statements are exactly the same:

> That the demonstration on 12 November 1991 in Dili caused:
>
> a. damage or undermining of State authority or the authority of the legal Government or State Agents;
>
> b. animosity or enmity, division, conflict, chaos, shock or restlessness in the community on a large-scale.[83]

Facts according to independent sources

129. After careful consideration of the material produced by agents of the Indonesian government and independent witnesses, the Commission finds the following account of what

[*] The following defendants in the Motael trials received the following sentences: Aleixo da Silva Gama 2 years, 3 months; Boby Xavier 3 years; Jacob da Silva 2 years; João dos Santos 1 year 8 month; Bonifacio Barreto 1 year, 8 months.

actually occurred to be more credible than that accepted by the court: Around 3,000-4,000 people, mainly students, took part in the demonstration from the Motael Church to the Santa Cruz Cemetery.[84] The procession was generally peaceful, with protestors carrying pro-independence banners and shouting pro-independence chants along the way. Approximately 1 kilometre from the cemetery a major and a private in civilian dress were injured by demonstrators.[85] Some five to ten minutes after the protestors arrived at the Santa Cruz Cemetery, hundreds of soldiers armed with M-16 automatic weapons arrived.[86] Eyewitnesses report that soldiers marched to the entrance of the cemetery and opened fire without warning or provocation. The shooting reportedly lasted for ten-15 minutes. Independent estimates put the number killed as high as 271 (see Chapter 7.2: Unlawful Killings and Enforced Disappearances for an analysis of the estimates of the deathtoll of this massacre).

Arrest

130. Immediately after the massacre, the Indonesian security forces began arresting those suspected of involvement in the demonstration. The Commission has found that on 13 November 1991, 308 people were arrested and 49 were detained. Of those arrested or detained, 259 were subsequently released. According to the Indonesian government, however, by January 1992, just 32 people had been detained in Dili in connection with the incident.[87] Gregório Saldanha, after being shot and wounded at the cemetery was taken into custody from the military hospital:

> *On the second day I was visited by an Indonesian Army officer called Captain Made from Kopassus. He said to me "Are you Gregório?" I said "yes". He said "we have been looking for you for a long time." He then took a photograph of me. The next day two other Indonesian Army officers came to see me. They were from Kopassus also. One of them was called Lieutenant Eddy. He questioned me and wanted to know the names of the organisers of the demonstration. I told him I was the organiser.*[88]

131. Intelligence agents uncovered the names of the other organisers of the demonstration and they were issued with warrants to appear at the Polwil (Regional police headquarters, some as witnesses for the investigation of Gregório Saldanha.[89] From this moment on, the defendants were officially detained as suspects, with some allowed to return home on the condition they reported to the Polwil every day. During this period the defendants were subjected to intense interrogation. Francisco Miranda Branco describes what occurred:

> *At that time, after the 12 November tragedy, the military arrested many people for interrogation. During investigation they found out our names…During that interrogation the Police concluded that the 12 November incident was not spontaneous, instead it was organised, and planned from the beginning.*[90]
>
> *They suspected us so they told us to report daily to Polwil. They found out that we were to be suspected, because they already had information [on us], but not evidence. So while we reported daily, they wanted to confirm that we were members of the Executive Committee, and as soon as they got the confirmation needed, they arrested us.*[91]

132. The defendants were then issued with what appear to have been valid arrest warrants by police in early December 1991. Detention orders and extensions appear to have been issued in accordance with the correct procedure.

133. The arrest procedure was generally similar for all defendants, with the exception of Bonifacio Magno. He was detained late on 11 November 1991, around midnight, before the massacre occurred. He was then released at 6.00am but could not leave his house as it was surrounded by the military. Bonafacio Magno was taken into custody again about one hour after the massacre occurred.[92]

Pre-trial

Conditions at the Regional police headquarters (Polda), Comoro[*]

134. After approximately one week at Polwil, in early December 1991, the defendants were moved to the Regional police (Polda) headquarters in Comoro, Dili. They remained at the Regional police headquarters until after the trials were completed. Here, conditions for detainees did not meet acceptable standards, including overcrowded cells, poor hygiene, and sub-standard food. Francisco Miranda Branco describes the situation:

> *Talking about the environment, it was definitely not humane. Friends, who slept in the hall that was actually for exercise, had no mat. They suspected that my other friends and myself were planning to escape, so they put us in an isolation room, but it was not humane.*[93]

135. Some defendants stated that physical torture was used. In a statement to the SCU, Bonifacio Magno said: "I was also brutally tortured by police officers whose name I do not know."[94] Gregório Saldanha, also in a statement to the SCU, said: "I was also beaten many times by Sergeant PT2 and one other person whose name I cannot remember."[95]

136. It appears, however, that physical abuse of those detained in relation to the Santa Cruz demonstration, who were eventually tried, was not widespread.[†] However, treatment intended to create psychological distress, including threats to family members and intimidation, were used to extract information. According to Francisco Miranda Branco, the relative lack of physical torture was due to international scrutiny of the Santa Cruz Massacre:

> *I was not tortured then. Because they were aware that the world already knew about the Santa Cruz, and that the eyes of the world focused on Timor-Leste at that time.*[96]

137. While at the Regional police headquarters, the defendants were subjected to constant, psychologically damaging interrogation sessions. These occurred in the absence of a lawyer, the right to which is guaranteed under Article 54 of KUHAP.

138. The usual practice of the Indonesian authorities was to carry out interrogations when detainees were sleep-deprived:

> *As they said that a prisoner needed no mattress, bare, this was their way. At other times they interrogated for hours, even for a full day or 24 hours, this was against international standards.*[97]

[*] The defendants were imprisoned post-trial in Comarca Balide, Becora Prison, Semarang Prison.

[†] Other detainees, who did not eventually go to trial, reported beatings and torture. See Chapter 7.4: Detention, Torture and Ill-Treatment.

> *They started the interrogation from 7.00am…ended at 12 midnight, 1.00 or 2.00 am and only then let us sleep. At 7.00am they opened the door and called me again for interrogation. This was the daily routine, no time to rest for a prisoner.*[98]

139. Jacinto Alves described how his family was intimidated and harassed while he was detained:

> *During trials, were there threats from the Police? No, but [there were threats] against my family.*[99]

Investigation

140. The investigation combined three distinct approaches: information seeking, confession seeking and the falsification of evidence.

Information seeking

141. The primary investigation strategy of the Indonesian authorities consisted of constant interrogation of the suspects by investigators, prosecutors and various members of the security forces, including Kopassus. Francisco Branco specifically remembers being interrogated by members of the State Intelligence Coordination Agency (Badan Koordinasi Intelejen Negara, known asBakin, which the Indonesia's civilian intelligence agency from 1967-2000) from Jakarta, who used intimidation tactics aimed at extracting information:

> *A group of intelligence officers from Bakin, Jakarta, were assigned to investigate my case.*[100]
>
> *Like putting the guns on the table and displaying the guns in the holster, and it was not just one person but one to four people conducting the interrogation simultaneously…for hours.*[101]

142. It should be noted that KUHAP provides no legal basis for the interrogation of the defendants by intelligence agents or any members of the security forces. Jacinto Alves further describes the stressful environment during interrogation:

> *[T]here were five or six interrogators at one time, one person asked, and before we could answer, two others cut in with more questions, and this was a way to confuse us and drain us.Daily interrogation from November, December, January, February until March and April, that was a very long time.*[102]

143. These oppressive investigation techniques resulted in untruthful statements being recorded in records of interview. Gregório Saldanha describes this in relation to what appeared in his RoI:

> *The truths I told, I said it with an open heart. The lies, I was forced to say. I tried to say things which sometimes were unnecessary, just to help my case, and I told lies to protect people outside, so that our network survived.*[103]

144. Intimidation and psychological torture were not only used to produce fabricated evidence in the words of the defendants. It also extended to produce false evidence by witnesses which was used against the defendants at their trials.

145. In the trial of Gregório Saldanha a witness, Agusto Felipe Gama Xavier (Teky) informed the court of the manner in which he had come to produce his evidence against the defendant.

> *Judge I: Do you verify all statements in the Proceeding?*
>
> *Witness V: In general yes, but there are some parts that I did not know anything about, because they were forced on me by the investigator[s], who said: "Help me [investigator] so that all the crimes committed by the defendant could be verified, to wrap this case quickly."*[104]

146. In the same trial, beatings of witnesses during the investigation period were alleged in the written closing statement of the defence:

> [T]he testimonies of witnesses in the Investigation Proceedings prepared by the Investigators were not voluntary, they involved coercion and the beating of witnesses.[105]

Illegal methods of seeking confessions

147. Under Article 54 of KUHAP, suspects have the right to legal representation during interrogation, while there is no such provision for witnesses. This is in accordance with the basic rights of all persons not to be forced to incriminate themselves.

148. A method used by the Indonesian authorities in relation to all of the Santa Cruz defendants was to interview them as witnesses in the cases of their co-accused, for example on the structure and strategies of the clandestine network. The material gained from those interviewed was intended to be used against that person in their own trial. By pretending that the defendant was only a witness, ignoring the fact that each was intended to be tried in his own right, the Indonesian authorities sought to illegitimately subvert the provisions of the Indonesian criminal code and commonly accepted human rights standards. The fact is that those interviewed were to be defendants. They were therefore entitled to be questioned only in the presence of a lawyer.

149. Lawyers were not present during any of these witness interrogations. For example, six out of the eight defendants were interviewed as prosecution witnesses for the case of Francisco Branco. This is consistent with an Amnesty International report at the time which claimed that some defendants were asked to sign statements that amounted to confessions without being advised by a lawyer, or with the benefit of a lawyer's presence to help avoid possible pressure, force or intimidation related to confessions.[106]

Fabrication of evidence

150. There are numerous allegations of investigators attempting to falsely obtain statements and fabricate evidence. Jacinto Alves describes techniques used in an attempt to force the suspects to sign statements:

> *There were times when we did not like what they wrote in the proceedings and I would often refuse to sign the proceedings and they usually pulled up their shirt to show their handguns or they opened the drawer to show the gun inside.*[107]

151. Gregório Saldanha was quoted by Amnesty International as having given false names due to the pressure applied by interrogators:

> *[B]ecause I could no longer bear this inhumane treatment, and because I was weakened by a gunshot wound, I carelessly gave names of high officials, priests and business owners who knew nothing and had no link with me, following the saying "as long as the boss is happy."*[108]

152. Another example of illegitimate investigation techniques is the fabrication of evidence. Jacinto Alves describes being forced to choose Gregório's gun_as a piece of evidence_in front of a judge:

> *Then they tried to reconstruct the 12 November incident. They [Police and intelligence officers] said that the protesters used guns. There was a long box with guns inside…Some of these guns were rusted from not being used for a long time. There were police, and intelligence officers, and they said: "Let's go and check the guns used by the protesters". The way they asked was like this, "come on, choose, which guns they used there." The odd thing was that this theatre proceeded in front of the judges, and they believed it. Some of these guns were presented at the trials, so the judges were convinced.*[109]

153. Jacinto Alves describes two further examples of fabricating evidence:

> *They took several photographs during the Santa Cruz protest. The photos contained images of wood, people with banners, and we were forced to acknowledge that the wood was a weapon Or they came to your house just like what happened to Saturnino from Baucau, they grabbed a knife and machete from the kitchen, confiscated them and used them as evidence.*[110]

Access to a lawyer

154. In the pre-trial investigation period, the defendants were prevented from appointing their own defence counsel and were effectively forced to accept the appointment of a lawyer chosen by the Indonesian government. The defendants were initially represented by Ponco Atmono, a Dili based Indonesian lawyer.[*] Letters signed by defendants in December 1991 can be found on court files and these provide official authorisation for Ponco Atmono to act on their behalf.

[*] At trial Francisco Branco and Gregório Saldanha were represented by a collaborative team from Indonesian Legal Aid Foundation (Yayasan Lembaga Bantuan Hukum Indonesia, YLBHI) and Indonesian Bar Association (Ikatan Advokat Indonesia, IKADIN). The team was led by Luhut M.P. Pangaribuan and Artidjo Alkostar. Juvencio Martins and Filomeno da Silva Ferreira were represented at trial by Nur Ismato from the Legal Aid Institution (LBH) Yogyakarta. Carlos Lemos and Bonafacio Magno were represented by Ponco Atmono from the beginning to the end of their trials.

155. It appears, however, that at least some defendants did not wish Ponco Atmono to represent them and may have been forced to sign these letters. Accordingly, Ponco Atmono was effectively appointed by the Indonesian authorities as the defendants' counsel against their wishes. This is in clear breach of Articles 54 and 55 of KUHAP,[*] which let defendants to be represented by lawyers of their own choosing from the very first stages of investigation.[†] The investigation period is a crucial time to have independent lawyers protecting a suspect's rights and interests. Without an independent lawyer present, suspects can be forced to sign statements and evidence can be falsified, as occurred in the Santa Cruz trials.

> *From the very outset, Gregório da Cunha did not accept Ponco Atmono as his counsel and was dissatisfied with not being able to choose an independent lawyer:*
>
> *He always played the role of a defence lawyer, no not like the defence lawyer we chose, but one working for the authorities. Normally, he would not be present during investigation, unlike other lawyers who would have been present during investigation, and although they may not have been physically present but at least they defended us.*[111]

156. Some defendants, dissatisfied with having a lawyer imposed on them by the government, had family members contact legal aid lawyers. According to Francisco Branco:

> *We were forced to choose one of the government's lawyers, but I flatly refused. His name was Ponco and I told my family to choose a truly independent team of lawyers who could take on a big case. They came from the Jakarta Legal Aid Institute [LBH Jakarta], but they were obstructed by the intelligence officers and the judges. The intelligence agents terrorised them and the judges were told by Bakin to refuse them.*[112]

157. As referred to earlier in this chapter the records of interrogation of defendants were routinely fabricated. There is a direct contradiction between the words of Francisco Branco, above, stating that he did not agree to a court appointed lawyer, and his record of interrogation, which stated the following:

> *Investigator: Do you need a legal advisor for this interrogation?…*
>
> *Francisco Branco: For this interrogation, I do not need a defence counsel, but later in court I need to be represented by legal advisor.*[113]

158. As a result of the complaints by defendants over having a lawyer effectively forced on them, a team of lawyers drawn from both the Indonesian Legal Aid Foundation (YLBHI) and the

[*] Article 54 KUHAP: In the interest of defence, a suspect or defendant has the right to get legal assistance from one or more legal advisors during the period and at every level of examination. Article 55 KUHAP: [T]he defendant has the right to choose his legal advisor.

[†] Article 56(1) KUHAP requires that officials appoint a lawyer at all levels of examination for crimes which attract the death penalty or a sentence of more than 15 years or for those who cannot afford a legal advisor with a crime punishable for more that 5 years, while they have no legal advisors of their own. It could therefore be argued that the appointment of Ponco Atmono was justified as there were no lawyers selected by the defendants at the time Ponco Atmono was appointed. However, this does not recognise the pressure placed on defendants and goes against the intention of Article 56(1) which is to ensure that those in serious cases that cannot otherwise receive legal representation, have lawyers appointed for them

Indonesian National Bar Association (IKADIN) came from Jakarta to represent the lead defendants. At the commencement of the first trial (that of Francisco Miranda Branco), Luhut M P Pangaribuan, a lawyer with YLBHI, appeared before the Court but was refused permission to represent the defendant. According to the presiding judge:

> *When a lawyer from Jakarta or elsewhere wanted to defend a case in [other jurisdictions], he/she was required to seek permission from the Chief Justice of the High Court in the jurisdiction where the lawyer wanted to defend.*[114]

159. According to YLBHI the lawyers who had been sent were authorised to practise in any Indonesian province, including East Timor. Although the defence team had also sent a letter of request to the High Court in Kupang two days before the trial commenced and had not yet received a reply, they were refused permission to act. In light of this, the judge reappointed Ponco Atmono to represent the defendant in court. The YLBHI newsletter from the time summarises what occurred:

> All lawyers on the legal team hold the position of senior advocate, which allows them each to practise in any Indonesian province. Despite the legitimacy of the legal team to represent the eight East Timorese charged with subversion in a Dili court, the Dili judge claimed the YLBHI-IKADIN team did not have authority, based on their procedural failure to secure permission from the High Court of the Eastern Provinces in Kupang, West Timor, to practice in Dili…The Dili judge refused to allow the team to represent the defendants on grounds of procedural flaws and instead appointed a Dili lawyer…to represent the defendants. Under the Indonesian Criminal Procedural Code, a defendant has the right to choose his representation. However, given that the Dili judge refused to allow the YLBHI-IKADIN team to practise, the judge claimed that by law a substitute lawyer must be appointed whether or not the defendants agreed with the appointed lawyer…In protest at the decision of the judge which violated the rights of the defendants, the director of YLBHI requested that the Indonesian Supreme Court correct the error of the Dili judge. The Supreme Court received the request of YLBHI and sent a telegram directing the judge of the Dili Court to honour the YLBHI-IKADIN team and allow them to represent the defendants in Dili court of East Timor.[115]

160. The telegram referred to above was read out at trial:

> The refusal by Dili Court to grant permission for the lawyers from Jakarta to represent the defendant: Francisco Miranda Branco in the Dili Court; the refusal read among other things, that the judges in the Dili Court shall withdraw the appointment of legal counsel for the defendants in this case.[116]

161. The intervention of the Supreme Court in sending this telegram was instrumental in ensuring that some defendants received independent legal assistance.[117] A large amount of direct lobbying from YLBHI to representatives of the Supreme Court, drawing their attention to the

fact that what was occurring was contrary to the rules governing the court and the rights of defendants led to this intervention

162. Amnesty International reported that relatives of the defendants felt pressured by Indonesian authorities to withdraw applications to obtain independent legal counsel and that on arrival the legal aid lawyers were subject to surveillance by intelligence officials.[118] Thus although the defendants were eventually allowed to appoint their own lawyers, their defence suffered due to the lack of independent legal counsel from the beginning of their cases and the intimidation of the legal aid lawyers once they arrived in Dili.

Trial

Indictment

163. The indictments were, in general, well drafted and logically set out, detailing a long list of factual allegations. The indictments of Francisco Branco and Gregório Saldanha contained primary charges under Indonesia's Anti-Subversion legislation, Law 11/1963. The maximum penalty for these offences was the death sentence carried out by firing squad. Subsidiary charges based on KUHP were also included against the two main defendants, such as treason and publicly expressing hostility towards the Indonesian government. Indictments against the other six solely contained KUHP charges.

164. The defendants not charged with subversion were prosecuted under the treason provision, Article106 KUHP, generally first as a principal who perpetrated or caused others to perpetrate the act,[119] and then under a subsidiary charge of involvement in a conspiracy to commit treason.[120]

Courtroom conditions

165. All defendants were tried individually, with all but one trial held in the Dili District Court. The main deficiency of the courtroom was a lack of transparency, with court proceedings theoretically open but in practice closed. Gregório Saldanha describes the situation:

> *[It was both] open and closed, meaning the door was open but guarded. But evidently it was a closed session and no one was granted entry, and my friends were brave but they waited on the street.*[121]

166. Members of the public who did want to enter were prevented from doing so.

> *Friends who wanted to follow the trial were terrorised and obstructed so it was not open. During the trial, all intelligence officers were present, in civilian clothes, but we could see that there were more of these officers than other people; most of them were police intelligence officers in civilian clothes.*[122]
>
> *The trial was always closed and most attendees were intelligence officers or their collaborators.*[123]

167. International monitors were allowed to view court proceedings. The International Commission of Jurists (ICJ) attempted to send two observers, but found it difficult to obtain visas. One observer's attempts to monitor the cases were thwarted by a lengthy visa application process.[124] In the end, the ICJ had one trial monitor present in court.[125] *Asia Watch* also had a trial observer present. The monitors were critical of the trials, and conveyed this message to the

UN Commission on Human Rights.[126] Despite the presence of these monitors there was insufficient transparency of process, as members of the public were not free to attend the proceedings. To that extent, the process breached Article 153(3) of KUHAP, which requires that trials should be open to the public. Accordingly, decisions made by the court in these circumstances should arguably have been annulled under Article 153(4).

Witnesses

168. The information considered by the Commission leads it to an inescapable conclusion that much of the evidence given by witnesses in the trials was the result of intimidation and force applied to pro-independence supporters, (many of whom were in custody at the time they gave evidence), or collaboration and collusion by members of the Indonesian security forces. Many prosecution witnesses were intimidated, through threats to them and their families, into providing false evidence. Defence witnesses, on the other hand were intimidated not to appear in court or to provide any evidence that might assist the defendants.

169. The lack of capacity for the defendants to call witnesses to support their cases is reflected in the fact that in all but two trials no defence witnesses appeared. The cases in which defendants did call witnesses to support their cases were those of Jacinto Alves, where two defence witnesses appeared, while the prosecution called ten witnesses, and Gregório Saldanha's case, where two defence witnesses appeared, and the prosecution produced 24 witnesses.

170. Almost all prosecution witnesses were serving members of the Indonesian security forces who, it should be remembered, were centrally implicated in the shootings of the civilians at the Santa Cruz Cemetery, and East Timorese civilians who were held in custody and subjected to threats, intimidation and psychological or physical torture. The serious conflict of interest raised by the security force witnesses giving evidence was not recognised, explored or considered in any real way by the trial judges. Statements of different witnesses for the prosecution often included evidence which was exactly the same, word for word, or so strikingly similar as to lead to the inevitable conclusion that they were not independent testimonies but the result of collusion and collaboration.

171. There are also serious doubts that the few prosecution witnesses who were not detained by or working for the Indonesian security forces gave independent and reliable testimony. Rather, they appear to have been coerced into supporting the version of events put forward by the prosecution.

172. In some cases where a witness strayed from this predetermined concocted story during the trial, steps were taken to ensure that this was remedied. For example, a prosecution witness in the Gregório Saldanha trial was Agusto Xavier who later claimed in a related trial that he was forced to give false information by interrogators. When the evidence given by this witness differed from that included in the prepared record of interview the judge did not allow him to continue giving the testimony he was relating, which was his own personal account of what had taken place, to the best of his recollection, or to refer him to his prior statement, which is normal practice. Instead the judge automatically adjourned the hearing.

173. Article 163 of the KUHAP required that judges investigate a discrepancy between written and oral testimony.[*] These duties are directed at inquiring into the circumstances in which a written statement may have been concocted, fabricated or been the result of force or intimidation, or any other reason why the oral testimony may be different from the statement. However, the

[*] Article 163 the KUHAP: If the testimony given by a witness during a session is different from his recorded information, the judge/chairman of the session shall remind the witness about this fact and ask him to explain the difference which shall be noted down in the record of the session.

judges considered that the previous documentary evidence should be the basis of the evidence, not the words of the witness. They ordered adjournments and during the adjournments steps were taken to ensure that the witnesses gave evidence that accorded with the previously written testimony.

174. In addition to the fact that witnesses were interrogated concerning issues of their own guilt, and their purported answers recorded without being informed of their rights, nor provided with the opportunity for a lawyer to be present, witnesses also were asked incriminating questions during trials without being warned of their rights. Every single defendant gave evidence in the trials of other co-accused and each of them was asked and answered questions in a way that incriminated them. An examination of the court files in each of the cases does not reveal any notation or evidence that the suspects were informed of their right not to answer questions which might incriminate them, as required under Article 66 of KUHAP [*]

175. One major obstacle faced by the defence was the difficulty in finding people willing to testify in court to their experiences, which differed markedly from the version of events that was officially endorsed by the Indonesian government. Potential witnesses were either threatened, or were unwilling to testify because appearing in court would attract the attention of intelligence officials and raise the possibility of intimidation and reprisals from the Indonesian authorities.

176. A common practice in relation to prosecution witnesses who were unable to appear before the court was to accept written statements as evidence. This did not occur with defence witnesses, who, despite the difficulties, were expected to attend.

177. With defence witnesses either too afraid to speak the truth or even appear before the Court, there was little to balance the evidence provided by members of the Indonesian security forces who were themselves implicated in the massacre. For example, in the Gregório Saldanha trial, PT3, a member of Mobile Police Brigade (Brimob) 5846, was questioned by the Presiding Judge and provided evidence which is totally contradicted by the facts which the Commission has found to be true. Yet this witness account was not seriously questioned during the trial:

> *Judge I: Did the protesters panic after the initial warning shots?*
>
> *Witness XII: No, they became more ferocious and brutal.*[127]

178. The Commission has received many reliable eyewitness accounts that contradict PT3's testimony, stating that the crowd at the Santa Cruz Cemetery was generally peaceful and the Indonesian soldiers opened fire without provocation (see Part 3: The History of the Conflict for a more detailed account of the demonstration). There were hundreds of survivors of the actual attack who could have attested to this before the court, many of whom have given such evidence to the Commission. However it appears they were too afraid to do so. Article 65 of KUHAP grants defendants the right to seek and put forward witnesses. The Commission has found that in the cases examined many potential defence witnesses were intimidated into not giving evidence or pressured into providing false evidence, in violation of this right.

Evidence

179. The Commission has found that in addition to the witness testimony material evidence was fabricated and manipulated to support the prosecution case. It is interesting to note that the prosecution introduced a range of material evidence, such as guns and knives, which were allegedly used by the demonstrators. The available film footage of the demonstration, taken by

[*] See for example Article 14(3)(g) of the ICCPR: In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:(g) Not to be compelled to testify against himself or to confess guilt.

Max Stahl, which showed the demonstration to be generally peaceful and the massacre unprovoked was not sought by the prosecution to be used in evidence, despite the fact that it was freely available and being shown on television newsreels around the world. This footage included Indonesian military officers firing directly at unarmed men and women who were not threatening in any way, and in fact running away in some cases.

180. The improper practices regarding evidence are best illustrated in relation to weapons. According to the prosecution case the defendants either owned or condoned the use of powerful weapons. According to Gregório Saldanha:

> *[They] prepared various guns and 8 grenades, and there were boxes of knives. They said I carried all those weapons myself. This is one example of their lies.*[128]

181. The defence counsel in Gregório Saldanha's trial pointed out that the prosecution had produced guns and alleged that they belonged to the defendants, but had not provided witnesses who could state where they had found those guns and knives, and therefore they were only objects with no link to the defendants. The defence also relied on the argument that any use of guns during the demonstration was the work of Indonesian military intelligence agents who had dressed as young male civilians and pretended to be part of the demonstration, in order to give an excuse for other military officers to respond against the demonstrators with force.

182. The evidence relating to guns or knives or gunshots from the direction of the protesters establishes that it was planned and was the work of *Intel* agents who infiltrated among the protesters.[129]

183. There was no valid and convincing evidence presented to the Dili District Court. Because there were no statements or witnesses that could verify without any doubt from whom those guns and knives came from and when they were confiscated.[130]

184. Much of the evidence produced by the prosecution in the trials had been fabricated to support a claim that the demonstrators had been heavily armed and violent, that they had attacked members of the security forces, who had been forced to respond by firing at them. The Commission examined the film footage taken of the incidents, which clearly shows Indonesian military officers firing at unarmed boys and girls, who were cowering and trying to escape. It also interviewed and taken statements from many witnesses to the incidents. It is clear to the Commission that the evidence produced by military and police witnesses and delivered to the court by the prosecution in relation to this version of events had been fabricated.

Prosecution

185. The work of the prosecutors during the formal aspects of the trial appears to have been satisfactorily carried out. Indictments were drafted comprehensively and questions at trial, although few, pursued arguments established in the indictments. However, the evidence which was produced at the trials was not a compilation of independent sources which the prosecution presented to the court in order to ascertain the truth of what had occurred. It appears to the Commission that the result of the trials had been decided before they were in fact conducted. The duty of the prosecution was to provide sufficient material to substantiate the predetermined guilty verdicts.

186. Under the civil law system practiced in Indonesia it is the duty of the prosecution to present both incriminatory and exculpatory material to the court. However, in the Santa Cruz trials the prosecution did not seek to introduce exculpatory material, despite the fact that there were abundant witnesses who had seen what in fact had taken place, and it had been captured on film by Max Stahl, who was not contacted to give evidence for the prosecution concerning the

circumstances surrounding the filming of the events. Little effort was made to ensure that those witnesses who were available could give evidence in an environment free from intimidation, or that there was a balanced view presented at trial.

187. The evidence was in general a collection of materials and witness testimony which was strongly controlled and manipulated in order to produce the predetermined outcome of a guilty verdict against the accused. This guilty verdict was an important political goal, viewed as necessary to answer the international outcry over the massacre and to suppress any future will to demonstrate against human rights abuses in East Timor, or to support the right to self-determination. The process of justice for the individuals charged was a tool used to achieve this goal. The evidence on which the desired outcome was reliant was therefore manipulated to remove any possibility that the political goal might not be achieved.

Defence

188. Members of the Indonesian legal aid team who assisted in the trials stated that for Indonesian human rights lawyers defending Timorese prisoners, their point of reference was the Indonesian Constitution, in which the right of self-determination is enshrined. They also noted that international human rights law is also formally part of the Indonesian legal system, and that they struggled to uphold these values. However, they were faced with intense opposition in pursuing the ideals of justice by officials who were pursuing the New Order political objectives without regard for the requirements of the Indonesian Constitution or the legal protections over the rights of suspects. This was particularly so for those suspected of political opposition, who were kept in much worse conditions than common criminals:

> It was shocking, when I was in Dili, how impossible the Indonesian officials were at this time…when we requested to meet with the Chief of the Sub-district Police (Kapolwil) in Dili…he asked a straightforward question…"Are you Indonesian?"…It was as if those of us who defended (prisoners) were not Indonesian. It should be clear that our commitment was to the law and human rights…we did not see nationality or the problems behind a case, political or otherwise. We see that everyone who is arrested, detained and tried has the right to be defended. Every person on trial has the right for a lawyer to be present.[131]

189. The Commission recognises the courage and dedication of the Indonesian defence counsel who risked their safety and careers by defending the East Timorese defendants in the Santa Cruz trials. Domi Yos Atok, Artidjo Alkostar, Luhut M P Pangaribuan and Nur Ismato are commended for their demonstrated commitment to the ideals of justice and human rights in the face of threats, intimidation and obstruction. The Commission also recognises that reform and improvement of the judicial systems of both Indonesia and Timor-Leste is dependent on the contribution of individuals such as these, who hold to their commitment, principles and integrity no matter what the political context, threats or cost. There can be little hope for reform or improvement unless these qualities and the individuals who demonstrate them are provided with the high respect that they deserve, and are able to provide an example for others to follow. According to the defendant Jacinto Alves:

> *Our lawyers from LBH received threats, so their hotel was closely watched and so on, but threats also came from the prosecutors, ie the title of defence lawyers' argument was "coercion" and the prosecutor demanded that the defence lawyers dropped that title. If they didn't, they would be taken to court. So threats like that were common.*[132]

190. According to defendant Francisco Branco:

> *The lawyers were really kind to the family, kind because they visited the family for moral support. The military were suspicious of them; they were followed wherever they went.*[133]

191. The defence lawyers appearing for the defendants were accused of being unpatriotic during the proceedings in the courtroom. Prosecutors were allowed by judges to be diverted away from the issues before the court, such as whether the defendants had committed the alleged offences, to attack the integrity of defence counsel and suggest that their work in defending the charges was contrary to the goals of their shared nation. The following quote from the transcript of the trial of Gregório Saldanha provides a clear indication of a belief on the part of the prosecution that the efforts of both prosecution and defence lawyers were directed to ensure the political goal of integration, rather than ascertaining the truth in relation to the charges.

> *It is unfortunate that the defence lawyer's argument did not benefit the security and stability in East Timor, [it] could lead to loss of confidence about the history of integration of East Timor into The Unitary State of the Republic of Indonesia* [134]

192. Not only do such remarks deny the importance and independence of the judicial process, they also reflect a clear failure to recognise that the exercise of every defendant's right to rigorously defend allegations brought against them is the foundation of the justice system within which they were working. It is important to note that political attacks on defence counsel, such as the above, were frequently allowed with no intervention from the presiding judge.

193. A small number of Indonesian citizens also assisted the political prisoners during the terms of their imprisonment, visiting and monitoring their conditions. The Commission highly commends the contribution to humanity of these individuals who placed universal values of fairness, justice and compassion over threats to their own safety. Ade Sitompul was one person who provided an outstanding example of how these universal values produced individual, selfless action:

> *Our conversations opened my heart and mind about why these people were fighting for their nation's independence, for their country and nation, and how they felt occupied by Indonesia. Their stories were similar to my experience when I was young and fighting for independence from the Dutch.*

194. In response to attacks on their integrity defence counsel sought to explain that they were motivated by universal principles, and a patriotism for their nation, Indonesia, and as civil servants had a duty to try to improve the performance and status of the government of Indonesia.

> [W]e love truth and freedom…[S]o the people of East Timor [must] be given the freedom to stand on their own feet like other nations and be given the universal right to self-determination, as prescribed in the United Nations principles and Resolution 1514 (XV), 14 December 1960.[135]

> As civil servants for the Indonesian government, we are obliged morally to contribute in improving the image of the Republic of Indonesia, which has plummeted in the international Community since the TNI invasion of East Timor[136]

195. The defence team generally had to work to unreasonable deadlines and were often not given even basic access to their client. For example in Francisco Branco's case, the defence was granted only three days to draft the written defence response to the indictment after they were officially allowed to act. Also

> *As their prisoner [their client], they tried to visit me, but were always denied…they were not given permission to see the detainees.*[137]

196. Legal arguments by defence teams were based on the claim that East Timor's integration into Indonesia was illegal, and would continue to be so until the East Timorese were given an opportunity to participate in a free and fair choice concerning their political status. This was argued in a number of ways, for example through detailed accounts of East Timorese history from the pre-colonial period up until the Indonesian invasion and occupation; by disputing the validity of the Balibo Declaration; by arguing that self-determination was supported by the 1945 Indonesian Constitution; as well as arguments based on international law and UN Security Council resolutions. If the Indonesian claim over East Timor was illegal then there could be no substance in charges that East Timorese had committed treason by not supporting the sovereignty of Indonesia in East Timor.

> *The core of their defence, they [the defence lawyers] said that: "The right to self-determination, the Timor-Leste issue, is an ongoing process. The Indonesian government's presence in Timor-Leste is a breach of international law, because the people of Timor-Leste were denied the opportunity for self-determination and the Indonesian presence was imposed on the people of Timor-Leste."*[138]

197. In the trial of Gregório Saldanha defence counsel provided written submissions which argued:

> 1. That the Balibo Declaration, followed by the joint Petition for Integration by four political parties: UDT, Apodeti, KOTA and Trabalhista was illegal because it represented a minority of Timorese who fled to Atambua [Nusa Tenggara Timur, Indonesia];
>
> 2. That the East Timor issue was an international issue, not a domestic Indonesian issue.[139]

198. Political arguments were also taken up by some defendants. The statement by Jacinto Alves, entitled "Struggle is the Discovery of a Nation that has never Died", drew parallels between the struggles for East Timorese independence and Indonesia's own struggle for freedom.

> History is a constant and irreversible march, it continues to move forward, never backward, and shapes the human self across generations of people who tune into its rhythm. From this point of view, we revisit the history of East Timor and draw parallels with the history of the Indonesian Nation.[140]

199. Statements written by defendants also raised arguments based on international law:

> All international laws and agreements passed by the UN regarding East Timor are valid and apply to Indonesia because they are based on the international law which is the basis for the Indonesian law.[141]

Judges

200. The Commission is satisfied that the panels of three judges[*] did not act independently and impartially. It appears the judges were in close collaboration, either directly or indirectly, with intelligence agencies and police investigators for the purpose of securing the politically motivated conviction of the defendants. All of the defendants and many other witnesses interviewed by the Commission were strongly convinced of the guiding role of the military in the conduct of the trial. Francisco Branco told the Commission in his interview:

> *[B]ecause the judges were on the side of the military authority the trial which should have been fair and independent, was manipulated by the military. They just waited for Bakin's instructions, closely watched in whichever direction they went.*
>
> *They were not independent, [they were] manipulated by the authorities. Their competence, they waited for instruction from Bakin even regarding the Articles, they looked for Articles to incriminate the defendant. How did they give instruction? Within the police, the interrogation was controlled by Bakin. The judges, too, could do their work but not independently.*
>
> *CAVR: Do you believe that all judges were controlled from the Centre or by the military?*
>
> *FB: Yes, that was obvious, even the judges did not know the decisions, the decision was handed down by the intelligence to be read by the judges.*
>
> *CAVR: What about the judges' decision?*
>
> *FB: As I said, the intelligence officers who were present at the trial[s] gave them the decision just before the judges read those decisions.*
>
> *CAVR: What did the intelligence officers give them?*
>
> *FB: One note to the Prosecutor, then the decision was given to the judges.*
>
> *CAVR: You saw it with your own eyes?*

[*] The judges varied for each trial. The judges included Pandapotan Singa (Chairman), A. Bire Radjah, Andreas Don Rade, Hieronymus Godang (Chairman), Arnold Ratu Tanahboleng, Edhi Sudarmuhono, Amir Pane (Chairman), Hizbullah and Suhardjono.

FB: Yes I saw it with my own eyes.[142]

201. In the trial of Francisco Branco, there was the following exchange which reveals how judges sought to reinforce the legitimacy of the occupation through the trial:

> *Judge 1: Witness named Catherina. Who gave you that name?*
>
> *Witness 2: My parents gave me that name.*
>
> *Judge 1: Why don't you change your name now?*
>
> *Witness 2: I can't, that is my baptismal name according to the Catholic religion.*
>
> *Judge 1: I explain to the witness that the name is a fact, just like the integration of East Timor is a fact.*[143]

202. Under Article 188 (3) of KUHAP, the evaluation of evidence by judges shall be wise and prudent, after he or she has accurately and carefully conducted an examination on the basis of his conscience. In relation to witness testimony, according to Article 185(6) of KUHAP judges must take into account its reliability, motivation and possible influencing factors.[*] There is no indication that judges weighed up the reliability of testimony and evidence. Rather, in general the judges did not question the evidence put forward by the prosecution, nor did they give reasons why they found it to be compelling.

203. By inhibiting defence cross-examination, encouraging pro-Indonesia political testimony and not questioning the reliability of evidence, the judges in effect supported the prosecution case and restricted the possibility of evidence favourable to the defence being raised at trial.

204. It appears that because of the political motivation to convict the defendants the judges, in several instances, required the defendants to prove that they had not broken the law. The fact that the defence could not produce sufficient evidence to prove their innocence was a reason given for conviction. This is a fundamental misunderstanding of the basic principle of the presumption of innocence.

205. In the Jacinto Alves decision, the judges convicted the defendant despite the following statement in the judgment: "During trial, the Judge Panel could not find evidence to support the indictment that the defendant broke the law."[144]

Decisions

206. Most defendants were found guilty of the primary charges on their indictments (see Annex: Tables and Convictions on Indictments). The exceptions were Juvencio Martins, Bonafacio Magno and Filomeno da Silva Ferreira who were acquitted of the treason charge as a principal but convicted of the subsidiary charge of conspiring to commit treason.

207. The sentences handed down to the defendants were severe. They ranged from five years and eight months for Filomeno da Silva Ferreira to life imprisonment for Gregório Saldanha (see Annex: Tables and Convictions on Indictments). Those acquitted of the primary charges and convicted of conspiracy to commit treason received the shortest sentences.

[*] Article 185(6) KUHAP: In judging the truth of a testimony by a witness, a judge must seriously take into account:…c. the reason which might have motivated a witness to give a certain testimony; d. the way of life and morality of a witness and any other things which can be of influence for determining whether or not the information he has given can be trusted.

208. The judges based their decisions on pages of justifications of East Timor's supposed integration into Indonesia, providing further evidence that the role of the trials was partly to legitimise the Indonesian occupation.

209. The general reasoning in the decisions was as follows: East Timor was legally a part of Indonesia; Indonesia had contributed to the development of East Timor; and as the Santa Cruz demonstration went against Pancasila and failed to appreciate the development brought about by Indonesia, the actions taken at Santa Cruz could therefore be justified by the need to uphold Pancasila ideals.

210. An initial premise of all decisions was that East Timor has been legally integrated into Indonesia. The Jacinto Alves decision illustrates this:

> The integration of East Timor into the Republic of Indonesia was not the initiative of the Indonesian government or the Indonesian People. The basis was the will of the East Timorese themselves…the will of the people of East Timor has been reflected as a whole in the Balibo Proclamation.[145]

211. At trial defence counsel argued that the Anti-Subversion Law breached Indonesia's 1945 Constitution and that accordingly, the Law must be repealed and that any indictments based on this law were unlawful.[146] This argument was rejected in both trials involving charges of subversion.

212. The form of the indictments and the judgments were not overly problematic. It is only on a deeper consideration of the totality of factors relevant to the trial that it becomes obvious that witnesses who could have given true evidence concerning the events were prevented from doing so, others were threatened and intimidated into supporting the prosecution case, material evidence was fabricated, exculpatory material was ignored, and military officers and police colluded and fabricated their evidence. The seeming rationality of the indictments and the judgments provided a veneer of fairness, which covered a deeply flawed process.

213. The decisions generally imply that the defendants were not only guilty of subversion by organising the demonstration, but also bear some degree of responsibility for the killing of the East Timorese protestors at the Santa Cruz Cemetery, even though the victims were the friends and colleagues of the defendants who had been shot by Indonesian military officers. According to the Francisco Branco decision:

> [T]he demonstration had:
>
> 1. Claimed victims, which according to KPN (the National Investigation Commission) totalled 50 deaths and more than 91 injuries
>
> 4. Caused anxiety in the community[147]

214. Gregório Saldanha's life sentence was considered appropriate due to aggravating circumstances, including the fact that his actions were designed to draw the attention of the United Nations Human Rights Commission to what was taking place in East Timor:

> *The defendant's actions that confronted the government, by leading and directing a demonstration on 12 November 1991 during a visit by UN Human Rights Commission, clearly aimed at undermining the government's credibility in the international community and may provide a false picture of the integration process.*[148]

215. For the majority of the defendants, their positions as Indonesian civil servants were considered aggravating circumstances.[149] Mitigating circumstances were included, however these were generally formulaic, with factors such as the defendants' behaviour in the courtroom and the needs of their families apparently taken into consideration.

216. The decisions are remarkable for the high level of detail included. In this respect, they reflect efforts throughout the trial to give an appearance of due process and legality, which covered the manipulation, torture, intimidation and fabrication which characterised the interrogation and prosecution of the defendant.

Appeal

217. Most defendants appealed their cases to the High Court in Kupang.[150]

> *My lawyer[s] and I rejected the judges' decision, then we appealed to the High Court, then the Supreme Court, until we got a final decision.*[151]

218. They therefore exercised their right under Article 67 of KUHAP to have their case reviewed by a higher tribunal.[152] However it is doubtful that the appeal added any value to what had been a flawed trial. The appeals appear to have been a "rubber stamping exercise" of the decisions of the lower court and were generally dismissed without reasons being given.

219. All of the appeal decisions from the High Court in Kupang opened with a lengthy procedural history of the case. In all but one decision, the court then affirmed the entirety of the decision made by the Dili District Court without any reasons or justification. In the case of the exception the appeal court only modified the wording of the Dili court's judgment in relation to the charges.

220. The following example from the Gregório Saldanha case is typical of how the High Court justified its decisions:

> [T]he considerations and reasons given by the judges in the district court were deemed accurate and correct, and the High Court, therefore, will apply the same decision for this case.[153]

221. Thus there was no description of prosecution or defence submissions and no written analysis, merely an affirmation of the trial court's decision. This cannot be considered a genuine appeal. The prosecution and defence presented lengthy appeal submissions, primarily mirroring the arguments raised at trial, and these were not even referred to the appeal decisions.

222. All defendants who appealed to the Kupang High Court then applied for cassation to the Supreme Court, to have their cases reviewed once again. All applications were refused without reasons, with the Court merely stating that the request for a Supreme Court appeal was refused.

223. The only defendants tried in Dili who did not appeal were those represented by the Indonesian-appointed lawyer Ponco Atmono. Rather than file for appeal, Carlos Lemos and

Bonafacio Magno made applications to President Soeharto to grant clemency.[154] In both cases, the defendants requested and were granted a two year reduction in their sentences. The decision, dated 10 August 1993, was personally signed by President Soeharto. No similar applications appear on the files of the other defendants, and it appears that the appeal for clemency was a successful strategy employed by Ponco Atmono.

Imprisonment

224. Following the handing down of their sentences the defendants were sent to Comarca Balide in August 1992. From there all defendants were moved to Becora prison (Dili) around the time of a visit from a UN delegation led by Amos Wako. After two weeks in Becora, Carlos dos Santos Lemos and Bonafacio Magno were sent to serve their sentences in Kupang. Gregório Saldanha, Francisco Branco, Jacinto das Alves, Juvençio de Martins, Filomeno da Silva Ferreira and Saturnino Belo were flown to Semarang (Central Java, Indonesia) after two years in Becora. In September 1999, Gregório Saldanha and Francisco Branco were transferred to Cipinang Prison in Jakarta and remained there until they were both released on 10 December 1999.

Trials and punishment of Indonesian security personnel involved in the Santa Cruz Massacre.

225. A useful illustration of the injustice of the Santa Cruz trials is found in a brief comparison with the court martial in Bali of ten low-ranking Indonesian officers in 1992. All but one were charged with minor disciplinary offences in relation to the Santa Cruz Massacre. No officers were charged with criminal offences such as murder or torture, despite the existence of extremely strong evidence to show these crimes were committed.[155] The sentences handed down ranged from 8-18 months. Thus the East Timorese defendants received up to life imprisonment for their role in organising the demonstration, while the many soldiers and officers who were involved in the mass murder of civilians effectively received impunity. According to the International Commission of Jurists, who monitored both sets of trials:

> [T]he charges brought against the military officers and personnel subsequent to the 12 November incident are patently inappropriate to the crimes involved…It may fairly be said that "justice" has been turned on its head in this case.[156]

Conclusions

226. The Commission has examined the court file for each of the defendants tried in relation to the events surrounding the Santa Cruz Massacre, interviews with those who participated in the trials as witnesses, defendants and lawyers, statements of scores of individuals who were present during the events at Santa Cruz, and secondary material such as reports of organisations such as the International Commission of Jurists, who monitored the trials, and Amnesty International.

227. Elsewhere in this Report the Commission provides an in-depth account of the demonstration and the subsequent massacre at the cemetery. It has found incontrovertible evidence that the demonstration was intended to be peaceful, that an unplanned incident took place during the march which involved an attack and wounding of a member of the Indonesian security forces, and that the angry response to this incident led to heavily armed Indonesian military officers randomly shooting into the crowd of demonstrators, killing large numbers and wounding many others (see Chapter 7.2: Unlawful Killings and Enforced Disappearances for details of the deathtoll of the massacre). In addition to scores of corroborating witness statements

the Commission has viewed video film clearly showing the Indonesian troops at the cemetery shooting unarmed young men and women without provocation.

228. Before the incident at Santa Cruz journalists were banned from entering East Timor and information concerning the massive human rights abuses committed by security personnel was suppressed. The film footage of the massacre was secretly shot and smuggled out of East Timor. It was released internationally and provoked world-wide outrage and calls for justice for those involved. The response of the high-ranking Indonesian government and military officials to this international outcry was to formulate a sophisticated strategy aimed at creating the impression that:

- The demonstrators were violent and had attacked the security forces.
- The demonstrators were led by subversive elements who intended the violence
- The security forces had been forced to defend themselves and during this defence a small number of officers had committed disciplinary offences
- The Indonesian government was intent on complying with international principles of human rights and had therefore given each of the East Timorese defendants a fair trial
- The Indonesian government was even-handed and had therefore not only tried and punished the East Timorese but had also targeted members of its security forces who had been involved in the massacre.

229. The strategy included using trials to support these claims, although not one of them is true. The trial process was manipulated to ensure an outcome that both confirmed the claims and created a veneer of respectability, which could be defended against allegations of inaction. There was no real intention of uncovering the truth, punishing those responsible or providing a fair trial for those charged. In this way the Santa Cruz trials were typical of “show-trials” conducted by other dictators under authoritarian regimes.

230. The Commission, by investigating the conduct of the trials more deeply, has found that the military officers most centrally involved in the massacre were not punished, and those who had ordered the attack on unarmed civilians enjoyed total impunity. A few junior officers were charged with non-criminal offences and given light penalties. Once again the strategy behind this step is to provide an illusion that a serious attempt had been made and give a basis for answering critics, which in fact hid rather than revealed the truth.

231. In the same way, the trials of the East Timorese defendants held a veneer of superficial respectability. Although the written indictments and judgments might indicate that the process had been respectable, almost every step in between was fundamentally defective. Evidence was fabricated, witnesses intimidated into lying or not appearing, defendants tortured into signing confessions. If the evidence before the court is biased, selected only to favour one side, then the court must “legitimately” come to a decision that is in accordance with the material that it has considered. The Commission finds that the strategy employed in the Santa Cruz trials was to ensure that the evidence produced to the court supported only one possible conclusion. To ensure the desired outcome, evidence was manipulated and fabricated, which required the participation and compliance of everyone involved in the trials.

232. The Commission finds that the investigating police, military personnel, prosecutors, government-appointed defence counsel and judges involved in the trials colluded, both directly and indirectly, to subvert the cause of justice in order to produce a predetermined political result.

233. The police and military officers who carried out the investigations tortured and intimidated witnesses so that they gave a version of events that suited the political goals of the trials. They threatened and intimidated other witnesses and their family members so that they would be too

frightened to give evidence of the truth. The courtroom was effectively closed to the public to avoid scrutiny, including the intimidating effect of large numbers of military in attendance at the trials. They also collected false evidence, such as guns and knives, and intimidated witnesses into falsely declaring that they had used them.

234. Prosecutors did not look behind this evidence, although it was obvious that much of it had been fabricated or obtained through coercion, nor did they pursue or provide to the court freely available information that controverted the evidence that they presented to the court. Judges accepted this evidence at face value, despite obvious discrepancies, and did not give any weight to material produced by the defence. They did not fulfil their duty to enquire into discrepancies between written and oral statements. The government-appointed defence counsel failed to present evidence that could have acquitted their clients and presented arguments that in fact supported the prosecution case.

235. Of all persons officially involved in the trial process only the independently appointed Indonesian defence counsel demonstrated integrity, honesty and commitment to principles of justice. They alone should be proud of their contribution to the ideals contained in the Indonesian Constitution to which they referred, and their contribution towards achieving these ideals. The other officials, police and military involved, demonstrated the tendencies of corruption and collusion which undermine any hope of establishing a legal system which can provide justice to the citizens it serves.

236. The political motivation for conducting these “show-trials” included four distinct objectives. First, the trials offered a means of punishing those who organised the Santa Cruz demonstration, through the mechanism of the criminal law. Second, the trials paraded the captured leaders of the clandestine network, thereby demonstrating and potentially deterring others from becoming involved in clandestine activities. Third, the trials supported the defensive version of the Santa Cruz Massacre that the killing of civilians was provoked by protestors and that the inappropriate reaction involved only a small number of ill-disciplined officers.

237. By holding individual trials, instead of a single joint trial, the Indonesian government was able to re-assert in each case that anti-government action would be punished. By holding repetitive separate trials, the threat presented by the defendants appeared greater, thereby further justifying the extreme actions of the military. Finally, the trials created the impression that the Indonesian court was lawfully established, embodied the judicial arm of a legitimate sovereign government, and was fully authorised to convict and punish those who participated in anti-government activities. All of these factors contributed to an attempt on the part of Indonesian authorities to legitimise the Indonesian occupation of East Timor.

238. It is clear that the cost of achieving this political goal was great injustice suffered by each of the eight defendants. They did not receive a fair trial or due process, and were given extremely severe punishments.

239. The penalties which were handed out for actions relating to the events at Santa Cruz included harsh sentences of up to life imprisonment for East Timorese defendants for actions which basically involved organising a peaceful demonstration against the government- sponsored killing of a colleague. The harshest penalty handed out to a member of the Indonesian security forces, which were implicated in the mass killing of unarmed civilians, was 18 months imprisonment.

240. The major procedural flaws in the Santa Cruz trials include the following:

- The pre-trial detention conditions at Polda Comoro, which included the torture of civilians, prolonged interrogation with minimal time for rest and psychologically damaging techniques such as the harassment of defendants' families.
- Investigation techniques, which included violence and threats of violence when taking defendant and witness statements, seeking incriminating testimony, as well as the fabrication of evidence.
- The initial failure to uphold the right to an independent lawyer. Although the defendants were eventually allowed to appoint their own counsel, this occurred after the commencement of trial and meant that independent lawyers were not present during the crucial investigation and interrogation period.
- Failure to guarantee a fully public trial. Although the court sessions were theoretically open to the public, the fact that Indonesian intelligence officers and sympathisers filled the courtroom as well as an atmosphere of fear perpetuated by the Indonesian authorities meant that many East Timorese were too afraid to observe trial proceedings.
- The failure to guarantee the safety of potential witnesses. This prevented potential defence witnesses from testifying and resulted in vast inequality in the number of prosecution as opposed to defence witnesses. Further, the manner in which the trials were conducted prohibited defence counsel from asking effective questions to prosecution witnesses and the few defence witnesses who testified.
- Intimidation and interference in the defence team's work, both inside and outside the courtroom, combined with minimal access to clients and inadequate time to prepare the defence. Despite the oppressive conditions, legal aid lawyers generally performed admirably, providing solid submissions and well-reasoned arguments. Yet, on balance, there was not a level playing field between the defence and prosecution from the very outset of the trials.
- A lack of impartiality and independence on the part of judges. Judges appeared to be in collaboration with intelligence officials, conducted courtroom proceedings to favour the prosecution, and cut short any statements criticising integration that were elicited from witnesses by defence counsel. Witness testimony and evidence were not considered impartially and the judges often appeared to be promoting the official Indonesian government position, rather than acting as impartial arbiters.
- A lack of a meaningful appeal process. Although appeals were granted to the High Court in Kupang, the High Court's rejection of appeals cannot be considered to constitute a meaningful appeal process, due to a lack of transparency and failure to give reasons. The decisions of the High Court in Kupang appear to have been a rubber stamp, approving the decisions of the Dili Court without detailed examination of the many procedural and substantive flaws in the trials. Further, given that the Supreme Court rejected all applications for cassation without reasons in all but one case, it appears that these applications may not have been treated on their merits.
- Disproportionate sentences. The sentences were overly harsh, particularly when compared with the treatment handed down to military officers found to have breached their duties at the site of the massacre.

7.6.4 The 1992 Jakarta trials

241. The massacre of civilians at the Santa Cruz Cemetery on 12 November 1991 and the repercussions of that incident were of great concern to East Timorese students studying in Indonesian cities. As a protest against the massacre, student leaders organised a demonstration in Jakarta on 19 November 1991, to raise awareness about the actions of the Indonesian military and to demonstrate to the international community that intervention was crucial to resolving the conflict in East Timor.

242. The Jakarta protest was the first major political demonstration held by East Timorese students in the Indonesian capital.[*] It followed increased political activity in East Timor, for example the protest in Tacitolu, Dili, during Pope John Paul II's visit on 12 October 1989 and the demonstration at the Turismo Hotel during the visit of John Monjo, the US Ambassador to Indonesia, between 17 and 19 January 1990

243. On 19 November 1991, at around 10:30am, two groups of East Timorese students gathered in Jakarta to hold a peaceful and orderly demonstration. Protestors chanted pro-independence slogans, displayed political banners and delivered a petition to UN representatives and to the Australian and Japanese embassies. The contents of the posters and petition, aside from referring to the Santa Cruz Massacre, also addressed issues regarding the initial invasion and forced integration of East Timor into Indonesia, for which the protestors sought immediate UN intervention. One of the posters was directed at the Indonesian Foreign Minister:

> Mr Alatas! The question is not Development but Invasion and Self-Determination.[157]

244. The petition stated that:

> Indonesia's invasion of East Timor is a despicable action and…the Indonesian invasion and occupation of East Timor is comparable to the Iraqi invasion of Kuwait in 1991.[158]

245. Following the demonstration, five student leaders were arrested and faced trial for their roles in the demonstration: João Freitas da Camara, Fernando de Araújo (Lasama), Virgilio da Silva Guterres, Domingos Barreto and Agapito Cardoso. They faced charges of either subversion or treason for opposing integration and rebelling against the Indonesian government. The following analysis is based on trial documents,[159] interviews with defendants [160] and lawyers[161] as well as a number of secondary sources.

Arrest

Arrests in Jakarta

246. Approximately 100 people, mostly East Timorese students, participated in the demonstration on 19 November 1991 in Jakarta. The students were studying in universities in large cities such as Denpasar, Surabaya, Malang, Yogyakarta, Semarang, Solo-Salatiga, Bandung and Jakarta. Police arrested 71 protestors.

[*] One prior, although unsuccessful, action in Jakarta was the attempt by several East Timorese students to gain asylum in 1987.

247. The protestors were arrested by police officers from Regional Police of Greater Metropolitan Jakarta (Kepolisian Daerah Metropolitan Jakarta Raya, Polda Metro Jaya). Domingos Barreto describes the lead up to the arrest:

> *We showed our solidarity that the shootings by the Indonesian army in Dili on 12 November was a violation [of human rights] so we launched an action to protest the 12 November incident…We the students in Java, that is, in all large cities in Indonesia, held an emergency meeting to launch a protest against the events in Dili. We held a series of meetings on 14,15 and 16 November. Finally on 19 November 1991 we took to the streets and submitted our petition to the UN representative in Jakarta. After our first demonstration in front of the UN Representative Office, we met a delegate from the UN and he said that the time of our demonstration had been approved. So at that time we felt that what we wanted to say would come true, but the approval of the UN delegate was not given in writing, only orally. After that we held a demonstration at the Australian and Japanese embassies. We were going to continue on to the British embassy, but were arrested by the Jakarta police. It was not only the police, there was also a joint team of Special Forces Command [Komando Khusus, Kopassus], Mobile Police Brigade (Brigade Mobil, Brimob), and Regional Police of Greater Metropolitan Jakarta [Polda Metro Jaya], so these three components arrested us.*[162]

248. One of the defendants, João Freitas da Camara, said about the arrest:

> *The police arrested us, I don't know which team, but it was the police for sure. We were arrested in front of Hotel Indonesia [HI] and were taken to Central Jakarta TNI near St. Karolus [hospital] There was a police precinct there.*[163]

249. Following the arrests some of the defendants were beaten. They were not informed where they were being taken and were subjected to sleep deprivation and continuous interrogation. Domingos Barreto stated the following:

> *After our arrest we were immediately beaten, and a few friends had lesions on their faces…Then for three days we were kept in a secret place, we were questioned, or investigated at all sorts of times at midnight, 3.00am, and so they did things their own way.*[164]

250. According to an investigation by the Indonesian Legal Aid Foundation (YLBHI), the arrest of the defendants occurred in the context of a widespread round up:

> In the Jakarta demonstration, of the 71 people arrested only four became suspects. The rest were released after a period of detention at Polda Metro Jaya. Following intensive examination, one week later the detention of 49 people was suspended. Then after nearly 120 days of detention, 18 more people were released. After the second phase of suspension of detention only four people remained in detention, namely: João Freitas da Camara, Virgilio da Silva Guterres, Agapito Cardoso and Domingos Barreto.[165]

The arrest in Denpasar, Bali

251. As arrests were occurring in Jakarta, suspects were also being detained in Bali. On 24 November 1991 at around 6.00am, security forces raided a house in Denpasar. The security forces, wearing traditional Balinese clothes and without any official warrant, arrested six students: Fernando de Araújo, José Pompeia, Anito Matos, Clemente Soares, Aniceto Guterres Lopes and José Paulo.[166] On the following day, Aniceto Guterres Lopes and José Paulo were released as the two students' presence at the place of arrest was considered coincidental.

252. Fernando Araújo elaborates on the background and reason for his arrest and that of his friends in Denpasar*:*

> *I was arrested because I was the Secretary General of Renetil [Resistentia Nacional Estudantes Timor Leste]. Actually because of the Renetil problem, it was directly related to the Santa Cruz Massacre on 12 November 1991. After the massacre on 12 November, I coordinated my friends to hold a demonstration in Jakarta, in front of embassies to oppose and to protest the 12 November massacre. At that time of all the friends participating in the demonstration, 72 [sic], were arrested; also all our friends from the clandestine front executive in Dili were arrested. I was arrested on 24 November 1991 in Denpasar, Bali, at my boarding house with five others.*[167]

253. In his written defence pleadings, the defendant Fernando de Araújo described the apparent fabrication of evidence by police during his arrest:

> Once they returned to Clemente Soares' room they immediately produced two grenades and two sticks of explosives and confiscated all my documents and personal letters. None of the people involved in the search understood Portuguese, so all writings in Portuguese were taken because they thought they were [incriminating] documents, even books in Portuguese were all taken.
>
> During the arrest and house search the officers did not produce either an Arrest or Search Warrant from the police. When we were all in the living room, they threatened to handcuff us and said that they would shoot anyone who moved.

> At that time my friends and I argued with them that we would admit ownership of all our possessions but not the grenades and explosives, because we had never seen them before and we never even contemplated the possession of those things. This was slander. The officers intentionally tried to compromise us by alleging that we possessed forbidden material in the house. During the argument the officers just said that we would settle it at the police station. We were taken to Polda Nusra in three separate cars and on arrival we were interrogated separately. There too we continued to deny ownership of the grenades and explosives.[168]

254. The arrests conducted in Denpasar appear to constitute breaches of Indonesian law. Arrests were conducted by the military and without first obtaining a warrant. This is in breach of Articles 16 and 18 of KUHAP. In relation to the Jakarta arrests, it is arguable that warrants were not required at the time of arrest as the suspects were caught in the act.

255. In a report issued after the incident, the Indonesian Legal Aid Foundation supports the view that the arrest in Bali did not follow the procedural rules established by KUHAP:

> For example in Fernando's arrest, the [arresting] officer was not from the police. First of all, the arresting officers proceeded without showing any identity or Arrest Warrant, and they also didn't leave a copy of the Arrest Warrant for the family or [house] occupants of the arrested person nor [any information on] the place of detention.
>
> The fact was, officers that were not from the police arrived at Fernando's house and immediately proceeded to search the house looking for reasons to make things appear as if he was in possession of grenades and other forbidden material without ever giving him a chance to explain. In short, he was taken away with the documents found during the search, which were not known because no Record of Interview was made at the time.[169]

Pre-trial detention

256. After the police conducted an initial investigation of the 71 detainees, three categories emerged: organisers of the demonstration, coordinators, and those who had just participated. A few days after the arrest some demonstrators from the second and third categories were released, while those considered to be responsible for organising the event, João Freitas da Camara, Virgilio Guterres, Domingos Barreto, Agapito Cardoso and Fernando de Araújo,[*] remained in custody in Jakarta and awaited trial.

Conditions of detention in Jakarta

257. The defendants were detained for approximately three months in Jakarta before being brought to trial. They spent only three days in Polri headquarters, spending most of the three months in Polda Metro Jaya. The defendants were not subjected to physical torture but had to endure psychological pressure. During their detention, the police interrogated them in turns from

[*] Fernando Araújo who was the only defendant to have been arrested in Bali.

night until the afternoon. João Freitas da Camara, the demonstration leader, described the situation:

> *In Polda Metro Jaya and, Polri, I was kept up all night…I was so tired, I just sat there in the chair until around 3.00 the morning. They would take me outside for a walk while asking where my house was, and I would say I didn't know because I was too tired. They always took me outside at night: "We want to go to your house" [they would say]. "What for?", "We just want to." I wouldn't tell them.*[170]

258. Domingos Barreto experienced similar treatment:

> *I was tortured, not beaten; it was a form of indirect torture, like being interrogated from midnight till morning, I think that was torture, not physical but psychological, then we were awakened at three in the morning when people are supposedly sound asleep, but we would be called up one by one and taken outside.*[171]

259. João Freitas da Camara further elaborated on the conditions:

> *In Polri I endured not physical torture but mental torture, because they didn't let me rest, I was so tired, two nights they didn't let me sleep, the first night they kept asking me the same questions, I was upset [as] they kept repeating the same questions I had already answered, they kept asking, then they would grow tired because there were questions I refused to answer. I just kept silent, then they would get bored and just let me be. There were desks around, so they would all sit around at their desks playing cards but making noises as well…to keep me from resting…I wasn't tortured physically but mentally…they didn't give me a chance to rest, so when they came back to ask again we were not given the time to rest, to think and answer coherently, so it was mental torture…they fed me, but only a little.*[172]

Conditions of detention in Denpasar, Bali

260. Fernando de Araújo, one of the defendants detained in Denpasar, Bali, was treated differently. During interrogation, he experienced the following:

> *I was detained in a dark, large and filthy room. I was detained alone away from the others and before I was put in that filthy place, full of mosquitoes. I was stripped naked. They took all my clothes and I slept only in my underwear, for almost a month in Nusa Tenggara Regional Police [Polda Nusra] headquarters, and every night I would be interrogated until midnight by several people. People in the first two weeks weren't clear where they were from. They were intelligence or military. [They] threatened to shoot me, held a pistol to my head and I was interrogated [in a room] with electric cables used to give electrical shocks and to torture people. After I was sent back to my cell. Some more people would come and yell and curse, that dog, stupid, idiot, East Timor will never be independent. So it was a dreadful situation. Although I was never tortured physically, the psychological and mental torture was plentiful. I said that they tried to break us.*[173]

261. During detention in Denpasar no one had access to the detainees, as is made clear in Fernando de Araújo's defence statement:

> *During my detention in Denpasar from 24 November to 22 December 1991, officers never allowed my friends to visit me in my cell although they had requested permission through the formal channels. I was forbidden to keep reading and writing material. At nights people in civilian clothes came to my cell to threaten me. Throughout my detention I wasn't treated as a political prisoner. We were taken to Jakarta handcuffed. The handcuffs were only opened after we arrived in the Serse [interrogation] room at Polda Metro Jaya.*[174]

262. These forms of psychological abuse endured by the prisoners, both in Jakarta and in Denpasar, constitute breaches of fundamental human rights guarantees, including the right not to be tortured. Further, although Indonesian criminal procedure does not guarantee proper standards of detention, interrogation in the absence of legal counsel and restrictions on visits to detainees constitutes a breach of KUHAP.

Access to a lawyer

263. In Polda Metro Jaya, the defendants were not allowed access to legal counsel. Although they requested legal representation, the police rejected their request. No counsel were present during the investigation and interrogation processes, which is a breach of the duties under KUHAP.

> *Often I asked the prosecutor to call LBHI to request legal representation, but the response was always negative, citing as a reason: "I want to speed up the examination process so you can be released faster. If we wait for a legal counsel it would take too long". So, as many of my friends were becoming ill, I reluctantly accepted the situation.*[175]

264. The record of interview of João Freitas da Camara stated that he had declined to request a lawyer whilst being interrogated when in fact he had not. The following is an extract from his RoI:

> [Question] In this interrogation do you need the presence of a legal counsel/lawyer?
>
> [Reported response]For this examination, I do not need the presence of a lawyer.[176]

265. In his defence statement, João Freitas da Camara said:

> The statement "I do not need the presence of a lawyer" was the prosecutor's statement and not my own. Before the interrogation started I had refused to be interrogated if my lawyer wasn't contacted to be present at the interrogation. This happened on 22 February 1992, Saturday, around 5.00pm: the prosecutor prevented my legal counsel from attending by using as an excuse: "your friends are waiting in a room upstairs, [they are] waiting to be released. If you act like this, next week things could change, it could prevent or slow down their release."[177]

266. Fernando de Araújo stated:

> One investigator even said that cases of subversion do not necessarily require the presence of a legal counsel. He said it [a lawyer] was not guaranteed by law…The examination must be concluded quickly so there would be "hope" for you [the defendant]…Legal counsel will be present at the trial.[178]

267. Indonesian law, under Articles 54 and 55 of KUHAP, stipulates that suspects have the right to legal representation of their own choosing from the very first stages of investigation. It is clear that these fundamental guarantees were not upheld in relation to the defendants. Further, under Article 56 if a suspect or defendant does not have a lawyer of his or her own, a legal advisor must be appointed.

Investigation

268. It appears that the Records of Interrogation during pre-trial interrogation contained false allegations. According to João Freitas da Camara:

> *I looked at the list of accusations. It was all there, like, for example, my relationship with Xanana. I never had any direct contact with Xanana. We had many people coming here, but they insisted I had contacts with Xanana Gusmão in the forest to do this, do that, and they said I was the leader of Renetil, which I wasn't, and they made up things to incriminate me.* [179]

269. Defendants were then forced to sign inaccurate records of interrogation, as Fernando de Araújo explains:

> *[T]hey forced us to sign it by saying the trial was about to commence. So in frustration I signed it, hoping that the case would be tried in an open court so we could turn it into a political campaign*[180]

270. Fernando de Araújo raised the issue in his defence plea:

> On 27 April 1992 I was examined (defendant examination). I said before the Panel of Judges that what was written in Record of Interrogation was mostly untrue, and because I had no legal representation I was forced to answer all questions although I never knew about or did what they asked.[181]

271. The approach by investigators and interrogators in forcing and coercing defendants to sign false statements clearly breaches Article 117 of KUHAP which guarantees that information by a suspect and/or witness to an investigator shall be given without pressure from whomsoever and/or in any form whatsoever. It also violated Article 52 of KUHAP which gives defendants the right to give statements freely to the investigators or the judges. Apart from being grossly unethical, from the very outset this greatly reduced the possibility of a fair trial. RoIs play a large part in an Indonesian trial as they provide the factual basis for the indictment. Any difference between oral testimony given in court and a statement recorded in a RoI should be investigated by judges and recorded. The original false statements obtained during interrogation remained the factual foundation of the trials.

Trial

Indictment

272. The main defendants, João Freitas da Camara and Fernando de Araújo, were indicted for subversion under the Anti-Subversion Law, and for subsidiary charges under KUHP. Three others faced charges under Article 154 KUHP for crimes against public order.

The charges against João Freitas da Camara[182]

273. The primary charge against João Freitas da Camara was that he violated Article 1(1)(1)(b) and Article 13(1) of the Anti-Subversion Law (UU No.11/PNPS/1963) in that he engaged in actions aimed at or which could be expected to overthrow, destroy or undermine the power of the State, the authority of the lawful government, or the machinery of the State. It accused him of unspecified criminal activities in the clandestine movement from 1983 until 19 November 1991 or at any other times where day, date and month cannot be exactly determined and of having conducted unidentified illicit activities in at least five locations in Jakarta and in the form of meetings, forums, public displays and demonstrations using banners, posters and declarations. João Freitas da Camara was accused of having committed or having been involved in committing continuing crimes. Thus the prosecution attempted to link the most recent occurrence (the demonstration on 19 November 1991) to the accused's activities in the clandestine movement that appear to have begun in 1983 or 1984.

274. A number of factual allegations are made against João Freitas da Camara. These include that he agreed to receive information from East Timor and send it abroad, to organisations such as ACFOA (Australian Council for Overseas Aid) in Melbourne and Amnesty International in London. He also allegedly received funding from these and similar organisations. The information he disseminated allegedly spread feelings of hostility, opposition and concern and originated from sources that were anti-government and the facts of which he failed to check with competent

authorities. It was also alleged that on 20 June 1988, an underground organisation called Renetil (Resistencia Nacional Estudantes de Timor Leste) was formed in Denpasar, Bali, led by Fernando de Araújo, with the defendant as the leader of the Jakarta chapter. Also, the defendant took every opportunity to demonstrate and distribute declarations and petitions to foreign visitors in Indonesia. Finally, as president of Renetil in Jakarta and as leader of the Movimento National Dos Estudantes de Timor Leste, João Freitas da Camara allegedly used the excuse of human solidarity for the events of 12 November 1991 to shield his true intent of gaining world sympathy for his political campaign to see East Timor released from Indonesia. The indictment further lists the inception, planning and execution of the demonstration on 19 November 1991.

275. The first subsidiary charge against João Freitas da Camara was the dissemination of feelings of hostility or aroused hostility, or causing splits, conflicts, chaos, disturbances or anxiety among the population or broad sections of society or between Indonesia and a friendly state. The second subsidiary charge was that the defendant publicly declared his feelings of hostility, hatred or contempt towards the government of Indonesia in violation of Article 154 of the KUHP.

The charges against Fernando de Araújo[183]

276. Fernando de Araújo was accused of being the president of Renetil and faced primary and subsidiary charges that mirrored those of João Freitas da Camara. He was also charged with committing a continuing criminal act based on factual allegations, commencing in 1986.

277. A summary of the factual allegations against Fernando de Araújo are as follows. In 1986 in Denpasar, Bali, Fernando de Araújo received instructions from Xanana Gusmão calling on the Catholic youth of East Timor in Indonesia to organise and form associations aimed at furthering the struggle to free East Timor from Indonesia. In connection with this, the accused received a telephone call from José Ramos-Horta in Australia. On 20 June 1988, in Bali, the defendant was present at a meeting which established Renetil, and was subsequently elected its leader at its first congress. From 1988 to 1991, he established many branches of Renetil across Java and was the point of contact for information about East Timor, whether provided by Constancio Pinto or Xanana Gusmão, to the outside world and Renetil branches. The indictment details numerous Renetil meetings and communications. Also, the defendant allegedly received funds and medicines from abroad and channelled them through the clandestine network.

278. On 12 November 1991, Constancio Pinto informed Fernando de Araújo of the killings at Santa Cruz Cemetery and instructed him to organise a demonstration in Jakarta. At 1.00pm, Fernando de Araújo telephoned João Freitas da Camara, leader of the Renetil branch in Jakarta and instructed him, among other things, to notify foreign media and embassies in Jakarta, ACFOA and Amnesty International about what had happened in Dili. His further instructions were to carry out a demonstration using banners and posters at the UN Representative Office, and the embassies of Japan and Australia, and contact other Renetil branches so they would send demonstrators.

279. Fernando de Araújo alleges that his indictment contained false allegations. He said that he had never received the open letter from Xanana Gusmão, nor acted in furtherance of it.

280. Like other political trials conducted under the Indonesian occupation, the Jakarta trials were based on inherently unjust charges under the Anti-Subversion Law and KUHP. The charges against the defendants in the Jakarta trials further illustrate the wide range of options available to prosecutors when seeking to prosecute and punish not only peaceful public protests, but also gatherings of East Timorese students to discuss the situation in their homeland. Also notable was the lack of detail in relation to allegations about the long-term clandestine activities of the defendants, which remained vague and unsubstantiated. Allegations spanned as much as a ten year period and often did not contain specific detail as to dates, places and persons involved.

Courtroom conditions

281. All defendants were tried individually in the South Jakarta District Court. The trials took between two and six months. Before trial, the defendants were detained in prisons in Salemba and Cipinang in Jakarta and were taken to the courthouse under heavy guard. The judge stated at the beginning of the hearings that the trials were open to the public. The only spectators who were allowed into the courtroom, however, were intelligence agents, police, or military, all of whom were part of the Indonesian security forces. Thus, the trial had the appearance of being open, but in practice it was not.

282. According to Fernando de Araújo, the presence of the Indonesian security forces was partly to intimidate the defendants:

> *The situation during the trial [was that it was] full of police, military in uniform and in civilian clothes, they were there too. They showed up before the trial. During the trial and at the end of it they sat at the back of the courtroom, and until the end they sat at the back of the courtroom for security reasons. But [they were there] to terrorise and intimidate us, as I said, they [said they] would crush our heads and we should be get heavy sentences and all that.*[184]

283. Under Article 153(3) of KUHAP, trial proceedings should be open to the public. This was clearly not the case in relation to the Jakarta trials, and accordingly, the decision issued by the court should arguably have been annulled under Article 153(4).

Witnesses

284. Similar to previous trials, the number of witnesses was weighted strongly in favour of the prosecution. In fact, the Commission is unaware of any defence witnesses who testified. Further, a large number of prosecution witnesses were also current or former detainees, who were either about to face trial or who had been held on suspicion of having committed a crime related to the Jakarta demonstration. According to João Freitas da Camara:

> *[T]hose witnesses came from the 70 friends who were arrested, most of whom were released, leaving the 22 of us. Then most [of those] were released, leaving 5 of us. At the trial 17 people returned as witnesses and we testified against each other."*[185]

285. Article 65 of KUHAP grants defendants the right to seek and put forward witnesses. Given the complete lack of defence witnesses, there are strong indications that this provision was breached.

Evidence

286. Physical evidence obtained both during and after the demonstration was submitted to the court. Among these were:

> Banners and petitions, carried by the defendants during the demonstration, [evidence of] financial aid and [of] meetings held by the defendants. Evidence was submitted regarding their role as leaders of student clandestine organizations like Renetil and of their relationship with East Timor struggle figures.[186]

287. Other examples of the physical evidence tendered by the prosecution come from the Virgilio Guterres trial:

> [O]ne copy of the petition/declaration dated 18 November 1991, titled *Declaracão Do Movimento Nacional Dos Estudantes De Timor Leste Na Indonesia*; posters written on yellow-coloured manila paper, saying "We are testament to 16 years of Indonesia brutality!"; "Integration is the total extermination of our people!"; "Mr Alatas! The question is not development but invasion and self determination!"; "Where are our Martyrs? We want them to be buried according to our tradition!"; "Better death than integration!"[187]

Performance of defence counsel

288. After initially being refused legal representation, at trial the defendants were represented by a team of lawyers from YLBHI-IKADIN, Jakarta. Those two institutions formed a team called the Joint Committee For East Timor, the purpose of which was to provide legal assistance to the East Timorese defendants in Dili and Jakarta. Similar to other political trials, the lawyers were obstructed and prevented from representing their clients without interference. Given the political situation in Indonesia at the time, it was highly controversial and possibly dangerous to defend East Timorese defendants. Nevertheless, despite these impediments to their work and unfair treatment by the Indonesian military, the defence team continued to represent the East Timorese defendants.

289. According to Fernando de Araújo:

> *Towards the end of February 1992, the lawyers from LBH-Jakarta, they usually visited us in prison. Their coordinator was Mr Luhut Pangaribuan, SH, LLM. I really admire him, he was so kind although at the time he was afraid himself because the military government decided everything. But they fought for their clients' rights to speak and write their defence plea.*[188]

290. According to João Freitas da Camara:

> *The lawyers attempted to defend us, to defend our position as students, as young students who should be given consideration to return to campus and continue their studies, not give them harsh punishment But the prosecutors demanded harsh punishment.*[189]

291. The Commission commends the integrity and courage demonstrated by the Indonesian legal aid lawyers who defended their clients rigorously despite extremely adverse conditions. In particular Mr Luhut Pangaribuan should be commended for his commitment to the ideals of

justice and the principles of the Indonesian Constitution when faced with actions orchestrated by members of the military forces which were illegal, immoral and intimidating.

Substance of the defence

292. The arguments raised by defendants in their defence statements were generally that human rights issues and international law must be upheld without discrimination. They claimed that they had the right to organise a peaceful protest and should not be punished for this. They also relied on international legal principles which demonstrated that the Indonesian occupation of East Timor was illegal, the questionable legality of trying East Timorese in an Indonesian court and Portugal's rights over the territory of East Timor.[190]

Decisions and sentences[*]

293. Both João Freitas da Camara and Fernando de Araújo were found guilty of subversion as a continued action. They were sentenced to ten and 9 years imprisonment respectively. The other defendants, Virgilio Guterres and Domingos Barreto were convicted of crimes against the public order under art 154 KUHP for publicly expressing feelings of hostility, hatred or contempt against the Indonesian government. Virgilio da Silva Guterres was sentenced to 2 years and 6 months imprisonment, Agapito Cardoso to ten months and Domingos Barreto to 6 months.

Appeal

294. João Freitas da Camara, Fernando de Araújo, Virgilio Guterres and Agapito Cardoso appealed to the Jakarta High Court to review the decisions of the Central Jakarta District Court.

295. João Freitas da Camara's appeal was based on a number of grounds: first, that Indonesian courts did not have the authority to determine his case; and second, that the ruling of the Central Jakarta District Court had violated the prevailing law because the court had ignored essence and purpose of the KUHAP, which was to seek the material truth and uphold the appellant's rights. Specifically, João Freitas da Camara's lawyers alleged that:

> 1. All indictments against the appellant were groundless, unproven and illegitimate, because all of the appellant's actions were within his rights as an East Timorese protesting against the perpetration of major human rights violations in East Timor by its government and apparatus including ABRI, that [his actions were deemed] legitimate and legal by UN resolutions issued between 1975 and 1982;
>
> 2. Law 7, 1976 on the Integration of East Timor into Indonesia was illegal because it did not reflect the wishes of the East Timorese people and that therefore it was more of an annexation than an integration and that Law 7,1976 resulted from the Indonesian government's political manipulation after East Timor's annexation into Indonesia. With this action the Indonesian government violated those basic principles clearly stated in the Preamble [of the Indonesian 1945 Constitution] and violated the second and fifth tenets of Pancasila by terrorizing and oppressing the people of East Timor.[191]

[*] No documentation on judgments could be obtained by the Commission.

296. On 30 July 1992, the Court of Appeal in Jakarta rejected João Freitas da Camara's appeal.[192] On 29 October 1992, João Freitas da Camara proposed filing an appeal to the Indonesian Supreme Court. On 27 February 1993 the Supreme Court rejected this application, holding that the objections to the Court of Appeal ruling had not been proven. No justification or reasons for this decision were given.

297. The appeal application by Fernando de Araújo to the High Court was based on the following grounds: first, the defendant was denied access to legal assistance during the investigation even though legal assistance is required by law in serious cases of this nature; second, although some of the witnesses were not present at trial, nonetheless their RoIs were submitted as evidence by the prosecutor in violation of Article 185 (1) of KUHAP; and finally the indictment was based on the Anti-Subversion Law, which he claimed was unconstitutional. His appeal was rejected without reasons.

298. Virgilio da Silva Guterres similarly appealed to the High Court and the appeal was rejected without justification. On 30 January 1993, his appeal to the Supreme Court was also rejected. In his application, the defendant asked that the court's ruling be in accordance with the values enshrined in Pancasila, while it should also comply with the principles stated in the UN Charter. The Supreme Court rejected all objections filed by the appellant.

299. Agapito Cardoso specifically appealed the ten month prison sentence handed down by the Central Jakarta District Court. He considered it unfair, disproportionate and lacking objectivity. In his appeal, he further claimed that the Central Jakarta District Court preferred the presumption of guilt over the the presumption of innocence and that the District Court was more interested in knowing whether the defendants were the recipients of government scholarships rather than whether they were connected with the demonstration. The appeal also claimed the judges ignored the reasons why the demonstration was held, preferring to compare the level of development during Portuguese times to development under Indonesian occupation. Like all other appeals, it was rejected.

Conclusion

300. There are many similarities between the trial of the East Timorese activists prosecuted for demonstrating in Jakarta and those tried in relation to the demonstration in Dili. The major procedural flaws and violations of the requirements of both international legal standards and the particular applicable sections of KUHAP were present during both sets of trials. In both situations it is clear from the inquiries conducted by the Commission that the trials were organised and conducted not because of a real desire to pursue justice but in order to achieve political goals. The fabrication of evidence, distortion of answers recorded in the records of interview, false evidence given by members of the security forces, forceful prevention of other defence witnesses from appearing were all tools designed to achieve the foregone conclusion of the conviction and severe punishment of the defendants.

301. The following procedural violations took place during the Jakarta trials:

- Pre-trial conditions did not include physical torture, although all defendants complained about the use of sleep deprivation as a means of interrogation. It should be clearly understood that this may constitute a form of torture. Keeping subjects of interrogation awake for prolongued periods of time is an extremely traumatic experience, the effect of which should not be underestimated because it leaves no residual physical markings. The treatment was more severe in the case of Fernando de Araújo, who was placed naked in a darkened cell and interrogated in the presence of machinery used to deliver electric shocks and was threatened by loaded guns being placed to his head. All of these actions are outrageous distortions of the legal process which destroyed any hope of a legitimate trial process based on evidence and testimony recorded under these conditions.
- Interviews conducted using these illegitimate and illegal pre-trial practices led defendants to give certain information to their interrogators. Because these responses are the result of improper practices they should not have been relied on at trial. Moreover a large proportion of the Records of Interview was not information that the defendants had supplied but was fabricated by their interrogators.
- The trials were held in conditions that were not open to the public, thus violating not only international human rights standards but also the provisions of KUHAP.
- Defence counsels were not able to conduct their work freely and professionally due to intimidation by agents of the Indonesian military. They were blocked from pursuing certain lines of inquiry which were relevant to the defence of their clients. Despite this the independent defence counsel should be commended for their dedication and commitment to the ideals of justice.
- No defence witnesses were called in any of the trials. The intimidation of potential witnesses distorted the trial process to such a degree that it cannot be said that what ensued was free and fair, as there is no way of knowing what evidence would have been led from those witnesses had they not been forcefully dissuaded from appearing at trial.
- Members of the security forces fabricated evidence and colluded in giving false evidence to the court.
- The defendants' right to appeal was denied to them in a practical sense as the arguments and evidence which the defendants raised during the appeal process were not considered on their merits. In this manner, similar to the Santa Cruz trials, the the appeal process was merely a "rubber-stamping" of the trial court decision, designed to achieve a political goal.

7.6.5 The trial of Xanana Gusmão

302. The Indonesian authorities regarded the capture of the Falantil commander, Xanana Gusmão, in November 1992 as an historic moment in its campaign to subjugate Timor-Leste. From the arrest, to his detention in Bali and Dili, through to the trial and its aftermath they sought to control and manipulate the process for maximum propaganda effect. The Indonesian military had a cameraman on hand to film the arrest, which was then broadcast throughout Indonesia. While in detention, Xanana Gusmão was forced to give several interviews. The Indonesian media followed the trial from start to finish, providing highly selective coverage.[193]

303. The Commission was unable to gain access to the court documents for Xanana Gusmão's trial. As a result, the case analysis relies heavily on secondary accounts, in particular a trial report by Asia Watch, as well as other reports and newspaper articles. The Commission conducted an interview with Xanana Gusmão himself, and analysed those documents that were available to it, such as his defence plea and a letter he wrote to the International Commission of Jurists (ICJ). These sources form the basis of the analysis below.

Pre-trial

Arrest

304. Xanana Gusmão was arrested on the morning of 20 November 1992 by members of the Indonesian armed forces. He was hiding in a specially built room, only accessible through a trap door concealed under a wardrobe, at the house of Augusto Pereira in Lahane, Dili.[194] According to Xanana Gusmão, intelligence officials arrived at 4.00am:

> *And I had three alternatives: surrender, commit suicide or offer resistance. If I surrendered: as the person in command of the struggle, I would have an opportunity to speak. If I had been a thief, suicide would have meant the end to my problems. If I had resisted, all the innocent people around me would have become victims. So when they came to arrest me, I said: "Here I am."*[195]

305. From the house, Xanana Gusmão was immediately taken to the home of Brigadier General Theo Syafei, commander of Kolakops.[196] Later on the same day, he was flown to Bali where he was detained at the Regional Military Command (Kodam) headquarters for three days and three nights.[197]

306. Xanana Gusmão described his arrest:

> *The arrest warrant, let's not make an issue of it, because this was an operation and I was the guerrilla commander, but when they arrested me, they did it with respect. If they had done it violently, then it would have been different, because they were afraid I would have made a run for it.*[198]

307. There were no procedural formalities such as the production of a valid arrest warrant. The filming of the arrest and evidence that the Xanana Gusmão's whereabouts had been disclosed by a civilian informant both suggest that the military had had time to plan the arrest, and if they wished to do so, to have gone through the prescribed legal formalities.[199]

308. Xanana Gusmão's arrest was followed by the arrest of several of his relatives and associates. By 4 December 1992, some two weeks after his arrest, at least 20 of his close associates and relatives were reported to be in detention.[200] Nine family members, including his sister, her husband and two of their children, were among those detained.[201] Amnesty International alleged that several of those detained in Dili were subject to serious maltreatment and torture.[202] These arrests increased the leverage the Indonesian authorities were able to apply against Xanana Gusmão when they pressured him to make statements and cooperate with their investigation.

Pre-trial detention

309. For the first 17 days in detention, Xanana Gusmão was not allowed contact with the outside world. His place of detention was unknown, there were great fears for his safety and the lack of information led to much speculation about his treatment.[203] During this period Xanana Gusmão was not allowed contact with family or lawyers.[204] This ended on 7 December 1992 when the ICRC was given permission to see him after considerable international pressure and high-level negotiation between the UN, the Indonesian Minister for Foreign Affairs and the ICRC.[205] The visit occurred at the National Police Headquarters (Mabes Polri) in Jakarta.[206]

310. Following the visit, it became apparent that Xanana Gusmão had in the meantime been transferred from Bali to the custody of Kopassus in Jakarta[207] before being taken to the Mabes Polri. He told the Commission that that he received the worst treatment during his three days in Bali. Sleep deprivation was commonly employed:

> *The first method they used, when I was in Bali, was not to let me sleep. If I was sleepy during the day, they screamed at me. If I was sleepy, at night, they screamed at me some more. They would talk to me at 2 in the morning. One I remember is [Brigadier General] PT4, because I knew him from 1983 when he was a major. So he spoke about this and that. He banged the table and I banged the table. We each banged the table!*[208]

311. It appears that during this initial period of detention, sleep deprivation was used to gain information and force Xanana Gusmão to make positive statements about the Indonesian presence in East Timor:

> *I was in there for three days and three nights, and was not given a chance to sleep. I was afraid that I would pass out, and I conceded that integration was better. I [thought] I better move to a better place where I could regain my strength.*[209]

312. This type of treatment during pre-trial detention constitutes a serious breach of Indonesian law. Under Article 59 of the KUHAP, the family of a suspect has the right to be informed about his detention at each stage of investigation leading to trial. Clearly this did not occur as no one was aware of Xanana Gusmão's place of detention for 17 days. Suspects also have the right to be visited by family members (Articles 60 and 61); a doctor (Article 58); and a spiritual counsellor (Article 63). By holding Xanana Gusmão incommunicado for an extended period, the Indonesian authorities breached these fundamental guarantees.

313. In a statement that was video-taped in Jakarta and broadcast widely, Xanana Gusmão renounced Timor-Leste's struggle for independence and encouraged other East Timorese to do the same.[210] The tape was made five days after his arrest. In the defence statement he prepared, Xanana Gusmão stated that he had not made the video-taped statement of his own free will:

> [I]n Jakarta I stated, in conformity with specific instructions from Abilio Osorio, the puppet governor of East Timor, that I was prepared to surrender.[211]

314. Xanana Gusmão explained to the Commission the context of his statement:

> *I forget a lot of what I said. I was a guerrilla [fighter]. And a guerrilla wants to – he refuses to end a war. They wanted me to make all sorts of declarations. It was only me. If I died, it was only me. Through all of this I was losing consciousness, until I couldn't [go on]. And so I acknowledged, and this made them pleased…But I said to them, after half an hour, "I do not accept this"…and because of this I said in my [defence] plea, "The Generals, we say a few words, just from our mouths, and they believe them. Where is their capacity to analyse?"*[212]

315. In his defence statement, Xanana Gusmão opened by saying that the video-taped statement was elicited under coercion:

> I wish firstly to take this opportunity to express myself with complete freedom…that is, without coercion of any kind…I have always affirmed that the circumstances under which my earlier statements in Jakarta were made were such that they could not be viewed as credible.[213]

316. Xanana was also forced to make a statement to the government of Portugal:

> *I said Portugal doesn't need to bother. Indonesia has a large military force that encircles the island of Timor. If you [Portugal] want to come, you'd better come fully equipped just like the Indonesians are.*[214]

317. At the 50th session of the UN Commission on Human Rights, the Portuguese government referred to these statements, claiming that Xanana Gusmão was:

> [E]xhibited a number of times in televised "conversations" and "interviews", carefully watched and censored, in which he reneged on his long-standing convictions and expressed "repentance", appealing to his companions in East Timor to surrender.[215]

318. These statements seemed to be part of an Indonesian strategy designed to use the capture of Xanana Gusmão to demoralise his supporters in Timor-Leste and to demonstrate to the Portuguese government that East Timor was now firmly under Indonesian control. In that sense they are at one with the underlying objective of the trial. The trial was more than just the prosecution of the commander of a separatist rebellion; it was also intended to be a carefully orchestrated attempt to bolster Indonesia's claim that it had gained full control over the territory and that with its leader broken, pro-independence forces should accept that further resistance was futile.

319. Just before the trial began, Xanana Gusmão was returned to Dili where he was subjected to new forms of intimidation:

> *At night I could see from their attitude that they were becoming threatening, so I called the ones that were being threatening…some of them spoke Tetum…and I told them that if they wanted to kill me, they were welcome…—my voice was raised with emotion…—"because you have killed so many people". Then I went to sleep and no one bothered me anymore.* [216]

320. During the period between Xanana Gusmão's incommunicado detention and his trial, he did not experience ill-treatment other than isolation, sleep deprivation and psychological pressure. In his defence statement Xanana Gusmão states that this comparatively mild treatment had a sinister purpose:

> I have been getting all sorts of flattering treatment aimed at making me into a docile Indonesian and as such I had to appear, just as the witnesses brought to this court had to appear, that way.[217]

Investigation

321. Following his arrest, Xanana Gusmão was subjected to intense interrogation from Strategic Intelligence Agency (Badan Intelejen Strategis, known as Bais, Indonesia's military intelligence agency created in 1983), Bakin and Kopassus. In Bali he was interrogated by Brigadier General PT4 and the head of Bais at that time:

> *PT4 was in Bali, the head of Bais I forget his name, he was a general, Hendropriyono went to Bais later. Then they ordered me to go to Bakin to make a statement, and then Bakin asked a Kopassus soldier to keep an eye on me.*[218]

322. During interrogation, because of Xanana Gusmão's limited knowledge of Indonesian, an interpreter was present.[219] It appears that interrogation was not restricted to gathering information that might form the basis of charges against Xanana, but also had the broader purpose of obtaining intelligence about Falintil's troop strength, deployment and plans.[220] This unfocused approach strengthens the impression that at this stage of his detention, Xanana was not treated as a civilian.

323. A central theme throughout the interrogation process was to make Xanana Gusmão acknowledge his responsibility for the actions of Falintil guerrillas:

> *The most important thing was that I admitted responsibility, that it was all my responsibility as I opposed Indonesia, my men killed them, it was all my responsibility, because I was the supreme commander. Once I admitted responsibility, they were happy, and then they moved me to Mabes Polri (police headquarter).*[221]

324. This attempt to extract a confession from Xanana Gusmão probably amounted to a breach of his right not to provide evidence under Article 66 of KUHAP.

325. Throughout his interrogation, Xanana Gusmão was not offered or provided with legal representation as required under Article 54 of KUHAP. According to Asia Watch, an official from Bais stated that Xanana Gusmão was interrogated without a lawyer present because he was a prisoner of war.[222] This is partly supported by the fact that he was interrogated about military topics.[*] Yet from the time Xanana Gusmão was moved to Mabes Polri in Jakarta and allowed contact with the outside world, the Indonesian authorities appeared to be treating Xanana Gusmão as a civilian subject to criminal law, rather than as a soldier. Xanana Gusmão ultimately appeared before a civilian court, facing civilian charges.

Access to a lawyer

326. As stated above, for 17 days after his arrest Xanana Gusmão was denied contact with the outside world, including with a lawyer. Only in mid-January, some two months after his arrest, did Xanana Gusmão receive legal representation. However, Xanana Gusmão was not allowed to appoint counsel freely, but was provided with a lawyer who had strong ties to the Indonesian military and intelligence agencies. Before the appointment of this lawyer, the Indonesian Legal Aid Foundation (YLBHI) attempted to represent Xanana Gusmão. Xanana Gusmão's wife and parents had obtained power of attorney and requested YLBHI to act as his lawyer.[223] From this point on, however, the Indonesian authorities repeatedly interfered with efforts by Xanana

[*] It should be noted that interrogation by military and intelligence was commonplace throughout trials during the Indonesian occupation.

Gusmão to communicate with YLBHI in apparent breach of Xanana Gusmão's right under Indonesian law to appoint an independent lawyer.

327. While detained at police headquarters in Jakarta, Xanana Gusmão received a letter from YLBHI offering to take up his family's request that its lawyers represent him.[224] Around this time the legal aid lawyers also sent a letter to General Try Sutrisno, the Commander of the Indonesian Armed Forces, requesting him to allow Xanana Gusmão to appoint counsel of his own choosing in accordance with KUHAP.[225] In clear violation of KUHAP provisions, on 17 December Police Colonel Ahwil Lutan, the head of the General Sub-directorate of Police of the Republic of Indonesia (Kepala Sub Direktorat Umum, Kasubdit Umum Polri), refused the YLBHI lawyers permission to meet their prospective client.[226] The justification given was that the legal aid lawyers had not produced a document demonstrating that their interest in the case was because they had been approached by Xanana Gusmão's family.[227]

328. Despite being refused permission to meet him face to face, YLBHI sent a letter to Xanana Gusmão offering to represent him. In his defence statement Xanana Gusmão described what happened:

> On 22 December last, I was given a letter sent to me by the LBH. On 23 December I replied to them, accepting a lawyer. But I was forced to withdraw my acceptance, and on 30 December I had to write a letter to the LBH, rejecting their offer. My first letter, which had been intercepted, was returned to me.[228]

329. The only explanation given in Xanana Gusmao's letter refusing the assistance of the YLBHI lawyers was that he would not require their services.[229] Indonesian officials interviewed by Asia Watch claimed that Xanana Gusmão had decided himself that he did not want the assistance of the legal aid lawyers. They claimed that by following Xanana Gusmão's instructions in this matter, they had been upholding Xanana Gusmão's rights.[230] Xanana Gusmão denied this, claiming instead that he had been pressured to reject the legal aid lawyers:

> [The Indonesian authorities] tried to convince me to be careful about my choice [of lawyer] and used many arguments to this effect.[231]

330. Xanana Gusmão was also informed that no one could trust the LBH.[232] This criticism was based on the way in which YLBHI had represented defendants in the trials arising from the demonstration in Jakarta on 19 November 1991 after the Santa Cruz Massacre (see section on Jakarta Trials above). In the event, under pressure from the Indonesian authorities, Xanana Gusmão turned down the legal aid lawyers' offer: "What choice did I have?"[233]

331. After Xanana Gusmão was forced to reject the assistance of YLBHI in late December 1993, the Indonesian authorities attempted to appoint Sudjono, an Indonesian lawyer, as his counsel. In a letter to the International Commission of Jurists (ICJ), Xanana Gusmão described what occurred:

> In the second half of January, (when I was) already in the custody of the Attorney-General, (Major-) General Hendro came to see me, accompanied by Sudjono. I had no choice but to sign the declaration acknowledging him as my counsel.[234]

332. Accordingly, Sudjono was officially appointed Xanana Gusmão's lawyer on 26 January 1993.[235] Xanana Gusmão discusses the situation:

> *They tried to find a way to communicate with me to urge me to drop LBH, then they sent a police lawyer, a military lawyer. LBH sent a letter and the military also sent a letter to show that they could undertake my defence. Fortunately, they [the military] was rather stupid, they did not send the information on time. I saw all this and they called me, I said: "Ethically speaking, if I don't know you, then, I don't know any of you, if I don't want you, then I don't want any of you." Others said: "I can defend you." With this, they made me go all over the place. When Hendropriyono told Sujono that I did not want him, they wanted to make a Record of Interrogation and all that. Then they said if I didn't have a lawyer, then I wouldn't go [to court]. But I wanted to go to court. That's why I agreed to get on the plane and go through all that to-ing and fro-ing. So I accepted Sudjono as my lawyer.*[236]

333. It appears then that Xanana Gusmão resigned himself to being represented by Sudjono to ensure that his case went to court. Nevertheless, it is clear that Xanana Gusmão was not happy with this outcome. Just before the two of them left for Dili to prepare for trial, Xanana Gusmão told Sudjono: "I do not really want you, but it's all right, I'll sign."[237]

334. From the very beginning, it was clear that Sudjono was not an independent lawyer. Major-General Hendropriyono of Bais was present when Xanana signed the letter appointing Sudjono as his counsel. Sudjono was a personal friend of Colonel Ahwil and it was common knowledge in the Indonesian legal community that Sudjono was friendly with the police and prosecutors.[238] Members of the Indonesian Association of Advocates (Ikatan Advokat Indonesia, Ikadin) reportedly voiced concerns about the ethics of Sudjono's selection.[239] The Asia Watch report on Xanana Gusmão's trial summarises an interview with Sudjono conducted by the *Jakarta Jakarta* magazine, in which the lawyer explained how he became involved in the case:

> Colonel Ahwil had been Sudjono's student at Pancasila University in Jakarta and they were close friends. When Sudjono saw Colonel Ahwil on television, accompanying the ICRC to see Xanana Gusmão, he rang him up, and Colonel Ahwil said: "How would you like to handle the Xanana case?" Sudjono said it would be difficult, but Ahwil pressed him. Sudjono wavered, but he ran into a prosecutor who also urged him to take the case, and then Colonel Ahwil rang him again. He finally agreed to take it. (This was all presumably done without consultation with Xanana Gusmão.) When the interviewer said: "You're known as a lawyer famous for being close to the police and bureaucracy", Sudjono responded: "What's wrong with that? Why should they be the enemy? Hey, that's how I make my living." Sudjono later said the magazine was factually correct but he was unhappy with the way he was portrayed.[240]

335. Indonesian Criminal Code Procedure (KUHAP) provides that suspects have the right to legal representation at every stage of the investigation process (Article 54 KUHAP), the right to choose their own legal adviser (Article 55 KUHAP) and the right to contact their lawyer (Article 57 KUHAP). By intervening to making sure that Xanana Gusmão was not able to have a lawyer of his own choosing and by foisting on him one who was widely seen as being close to the military, the Indonesian authorities were clearly violating the rules laid down in the KUHAP. This aspect distinguishes Xanana Gusmão's trial from others, such as the Santa Cruz trials in both Dili and

Jakarta, where legal aid lawyers were eventually able to represent East Timorese political prisoners (see for example the discussion of the Santa Cruz trials above). The determination of the Indonesian authorities to engage a defence lawyer sympathetic to their interests was just one of several indications of the determination of the Indonesian authorities to control the trial of Xanana Gusmão to an even greater extent than it had controlled some of the earlier trials. It is likely that the Indonesian authorities were aware that the trial of Xanana Gusmão would receive international scrutiny. As a result it felt the need to ensure that Xanana Gusmão had a lawyer appointed by the state rather than one of his own choosing.

Trial

Indictment

336. Xanana Gusmão's indictment was drafted on 25 January 1993. He was charged under the treason provision, Article 106 of the Indonesian Criminal Code (KUHP). Interestingly, this charge was made in conjunction with a charge of conspiracy to commit treason under Article 110 of the KUHP. It is likely that the prosecutor thought this was necessary because Xanana Gusmão was not present at most of events which formed the basis of the charges against him. In any event, both treason and conspiracy to commit treason attract a maximum sentence of life imprisonment. Xanana Gusmão was also charged with illegally owning and storing two firearms,[241] which carried a maximum penalty of death under Law No 12/1951.

337. It is noteworthy that prosecutors did not charge Xanana Gusmão with subversion. The Anti-Subversion Law had been employed in previous political trials (see for example the trials of Gregório Saldanha and Francisco Branco in the discussion on the Santa Cruz trials above), and it arguably has greater political impact than conspiracy to commit treason and the illegal possession of firearms. The official reason given to the Asia Watch trial observer for the decision was that subversion could only be charged in cases where underground activities were alleged. Because Xanana Gusmão was leading open military attacks, subversion was not applicable.[242] The indictment, however, does allege clandestine activities, including the establishment of an underground communication network.[243] This seems to undermine the official explanation of why subversion was not charged. It is possible that the Indonesian government did not want such a high-profile case to attract attention to the controversial Anti-Subversion Law or that it was responding to international criticism of the law.[244] Xanana Gusmão himself adds weight to this possibility. He told the Commission:

> *Initially it was subversion, but we talked. I let him because I was preparing my letter., They discussed it with me…they could not say subversion because before they invaded UDT and Fretilin had already taken up arms…so I just let him and I agreed because what I was concerned about was that I would be able to speak…I was the one defending my case, wasn't I? I let everything be prepared so that I could win. So they did not present another indictment, apart from unlawful possession of firearms. They withdrew the subversion charge.*[245]

338. As the indictment did not in the end include subversion charges, it appears that the Indonesian position must have changed.

339. The indictment contains a number of factual allegations relating to both Xanana Gusmão's military and organisational activities. The allegations start from 17 July 1976, the day that the Indonesian parliament formally approved the annexation of Timor-Leste.[246] The indictment alleges that Xanana Gusmão was appointed commander of Falintil at the National Fretilin Conference on 3 March 1981 in Viqueque ("National Reorganisation Conference"), and

was responsible for approximately 25 attacks conducted against Indonesian soldiers and civilians between 1981 and the date of his arrest.[247] These attacks included Falintil ambushes and the Krasas massacre. Xanana Gusmão was accused of direct involvement in only one attack—an ambush of Indonesian soldiers at the Laclo River between Alas and Fatuberliu in Manufahi in December 1988.[248] The role he played in the other attacks is not explained but there is implied responsibility due to his position as overall commander of Falintil. His organisational activities were alleged to include forming the National Council of Maubere Resistance (Concelho Nacional da Resistencia Maubere, CNRM) on 31 December 1988, with the Directing Committee as the political front, Falintil as the military front, and the Executive Committee as the clandestine front.[249] Under CNRM Xanana also allegedly established the clandestine network, the National Student Resistance of East Timor (Resistencia Nacional Estudantes Timor Leste, Renetil) and the Catholic Students Organisation of East Timor (Organisação Juvens Estudantes Catolica Timor-Leste, Ojectil).[250] Among the specific charges was one alleging that Xanana Gusmão instructed Constancio Pinto to organise the Santa Cruz demonstration on 12 November 1991.[251]

Courtroom conditions

340. The trial began on 1 February 1993. Although the trial was attended by observers from Asia Watch, the International Commission of Jurists (ICJ), members of the diplomatic community and local and international journalists, it was not freely open to the general public.[252] Amnesty International was refused permission to send an observer and delays in granting the observer from Asia Watch a visa meant that he attended only one session of the trial. During his stay in Dili, the Asia Watch observer was under military intelligence surveillance and was always accompanied by a representative of the Indonesian Ministry of Foreign Affairs. Journalists were warned not to report on an incident where a witness shouted pro-independence slogans in the courtroom (see below).[253]

341. The restrictions on members of the public were even more stringent. All people who attended the trial had to have prior approval, have their names checked against a list and pass through two checkpoints before they could enter the courtroom.[254] Members of Xanana Gusmão's family were not allowed to attend, and the court was mainly filled with Indonesian intelligence agents.[255] Xanana Gusmão described his impressions of the courtroom in his defence statement:

> In the rooms of this building which they call a court, I see only Indonesians, and above all Indonesian military personnel from Kopassus or Bais…In Indonesia law trials of this kind are, or should be, held in public. But when I come into the room the only public I see are military authorities, some of whom are the ones who conceived this trial.[256]

342. According to one trial observer, his taxi driver was so intimidated by the atmosphere around the courthouse that he did not wish to drive near the building.[257]

343. It should be noted that a public speaker system was set up outside the courtroom to enable the public to listen to trial proceedings.[258] The speaker, however, was reportedly turned off on perhaps the most controversial day of the trial, when Xanana Gusmão was due to read his defence statement.[259] This incident was just one example of how public access to the proceedings was most restricted when they were expected to be potentially unfavourable to Indonesian interests. According to an aide-memoire presented by the Government of Portugal to the UN Secretary-General:

> It is curious to note how the access [to the courtroom] was facilitated at the beginning of the trial and how it was obstructed in its final phase, when Xanana Gusmão had given clear signals that he was going to denounce the political manipulation of the entire trial and recant his initial declarations of repentance which he considered he had been forced to make.[260]

344. The fact that towards the end of the trial, a representative of the UN, Mr Tamrat Samuel, was prevented from attending two trial sessions and foreign diplomats were prevented from listening to proceedings lends further weight to the Government of Portugal's proposition.[261] It appears that the trial was orchestrated to such an extent that some observers were allowed to be present at stages in the proceedings that were expected to show the Indonesian government in a favourable light and excluded when there was a danger that it might be embarrassed.

345. There were clear deficiencies in relation to the openness of the trial. Articles 64 and 153 (3) of KUHAP require that court sessions be open to the public. If this requirement is not fulfilled, as appears to be the case in Xanana Gusmão's trial, according to Article 153(4) of the code the decision of the court should be annulled.

Language

346. Unlike some of the defendants in other political trials, Xanana Gusmão had a limited understanding of the Indonesian language. Accordingly effective translation was crucial if he was to be able follow the proceedings. At trial there were two court-appointed interpreters who translated between Indonesian, Portuguese and Tetum.[262] Not all proceedings were translated, and the translations provided were not always accurate.[263] In one session, the Asia Watch trial observer noted, testimony of one witness was not translated at all.[264] The general pattern was that communications between the judges and Xanana Gusmão were translated, while the rest of the proceedings were not.[265] The inadequacies of translation are supported by Xanana Gusmão's account: "I listened through the translation which was often wrong."[266]

347. Xanana Gusmão observed that rather than ensure the translation was to an acceptable standard or simply appoint a more proficient interpreter, the judges made fun of the interpreter:

> *He would ask them something and they would tease him. I understood that they were teasing him because they were laughing.*[267]

348. Indonesian law requires that the judges appoint an interpreter if a defendant or a witness cannot understand Indonesian (Article 177 of KUHAP). Although an interpreter was appointed, his proficiency was not sufficient to ensure that Xanana Gusmão could fully understand the proceedings.

Witnesses

349. In an apt indication of the unbalanced nature of the trial, 20 witnesses testified for the prosecution while no witnesses testified for the defence.[268] Serious questions must be asked about the independence of many of the prosecution witnesses. Four of the witnesses scheduled to appear were on the Indonesian official list of detainees, and Asia Watch reported that other witnesses were also in detention but their names were not on the official list.[269] These witnesses who were not on the official list were not entitled to have a lawyer present during interrogation. This is of particularly concern given the reliance placed on RoIs at the trial.[270] At trial, witnesses' RoIs were read out and appeared to be given equal weighting to oral testimony provided in court.

As interrogation occurred without lawyers being present, this reliance on RoIs gives rise to a concern that the court accepted testimony that could have been elicited by intimidation or that simply did not reflect what witnesses had actually said during interrogation. Concern about this latter possibility is given further weight by at least one witness's evident ignorance of Indonesian. Mariano da Silva, an illiterate witness, was questioned on his RoI, but his knowledge of Indonesian was insufficient to understand the contents of his statement, although he had signed it.[271] The fact that some prosecution witnesses were detained, interrogated without lawyers present, and could not understand the contents of their RoI raises questions as to whether prosecution witnesses felt free to give truthful testimony during interrogation and at trial. According to Xanana Gusmão: There were witnesses but they were all manipulated. The witnesses were there just to facilitate the process.[272]

350. The prosecution witness Saturnino da Costa Belo illustrates this point. Saturnino was convicted of treason for his involvement in the Santa Cruz demonstration and at the time of Xanana Gusmão's trial was serving a nine-year sentence. He was called as a witness on 4 March 1993. When he entered the courtroom, he shouted:

> *Viva independencia! Viva Timor Leste! Viva Xanana!…I ask the government of Indonesia to respect human rights in East Timor!*[273]

351. He was then hastily removed from the courtroom, the hearing was suspended, and a doctor was called to examine him. Forty-five minutes later the doctor informed the court that the witness had a mental disorder and was unfit to give testimony.[274] Following this episode Saturnino's RoI was read to the court.[*] Amnesty International reported that after his outburst Saturnino was told by the military that if he tried something of that kind again, he would be shot on the spot.[275] Further, after the incident, access to Saturnino and the other Santa Cruz detainees was restricted.[276]

352. Amnesty International, in a statement to the Decolonisation Committee, referred to a letter written by a confidential source inside Becora Prison about the treatment of Saturnino:

> Recent information confirms earlier fears that he was subjected to threats and ill-treatment in retaliation for his remarks. According to the letter from prison cited above:
>
> "Because of the demand he made to the Indonesian government while at the court to respect human rights in East Timor he was severely beaten and interrogated by the military police. They threatened him by placing the barrel of a pistol in his ear and he was put in a cell and left there in total darkness…Since he continued to refuse to apologise to the judge and did not admit to any wrongdoing, he was never again brought to the court as a witness on the grounds that he was ill, when in fact he was not ill at all."[277]

353. In his defence statement Xanana Gusmão referred to the incident:

[*] *Suara Timor Timur* newspaper reported the incident as, although Saturnino was unable to attend, with the permission of the (Court) his statement from the interrogation report was read out. See International Commission of Jurists "Report on the Trial of José Alexandre Gusmão" reprinted in *A Travesty of Justice, East Timor's Defence*, East Timor Relief Association (ETRA), May 1996, p. 43.

> The witness Saturnino da Costa Belo is a crystal-clear example of the heroism of this people. The farce of the hastily drafted medical document stating that Saturnino was ill should make you gentlemen ashamed because you know full well that this case rests here with you.[278]

354. Although Saturnino's behaviour was unruly, it clearly did not preclude him from giving evidence, and efforts could have been made to calm him down and allow him to give testimony. Further it was in the court's interest to do so, as Saturnino was a witness who might have shed light on Xanana Gusmão's involvement in planning the Santa Cruz demonstration.

355. As already mentioned, no witnesses appeared for the defence. Although it is not known whether Xanana Gusmão's lawyer, Sudjono, tried to find any defence witnesses, it is quite possible that the reason none appeared was that prospective witnesses were too afraid to testify. The atmosphere of fear generated by the actions of the authorities before and during the trial, from the treatment of Xanana Gusmão and his family and associates, after arrest to the tightly controlled proceedings themselves could well have been sufficient to deter any potential defence witnesses. In addition specific steps were taken to ensure that no defence witnesses appeared. The Governor of East Timor, Abilio José Osorio Soares, said that he himself would not appear as a defence witness and announced a prohibition on any other public servants testifying for the defence.[279]

356. Article 65 of KUHAP guarantees the right of defendants to seek out and call witnesses. Perhaps it could be argued that this right was not breached, as it is possible that no witnesses were willing to testify. The prohibition on civil servants testifying and the atmosphere in which the trial was held all served to produce this outcome. Without defence witnesses present, Xanana Gusmão's lawyer could not raise fundamental issues such as the legality of Indonesia's occupation of Timor-Leste and whether the court had jurisdiction in this matter. The trial appeared one-sided and there seemed to be little concern with establishing a truthful account of events.

Performance of defence counsel

357. As stated previously, there were serious reservations about Sudjono's professionalism and independence from the moment he was appointed as Xanana Gusmão 's lawyer. These concerns were not lessened by his performance during the trial. The Asia Watch report lists a number of instances where Sudjono failed to exercise due diligence in his representation of Xanana Gusmão. First, he appears not to have inquired into the circumstances of Xanana Gusmão's arrest, detention and interrogation, even though there were strong suggestions of impropriety.[280] Second, six weeks after the beginning of the trial Sudjono stated that he had not discussed his strategy with Xanana Gusmão.[281] Third, Sudjono stated that his lack of a common language with his client was not important because Xanana Gusmão's ability to understand Indonesian was improving.[282] This is despite Xanana Gusmão's constant requests for interpreters throughout the trial process. Finally, as will be described in more detail below, it appears that Sudjono made false representations about Xanana Gusmão's appeal for clemency.

358. In his defence statement Xanana Gusmão gave an example of Sudjono's political viewpoint: "Mr Sudjono claims that Timor-Leste has always accepted that it is a part of Indonesian territory."[283] This belief raises serious doubts about Sudjono's impartiality and independence. Further, in his letter to the International Commission of Jurists, Xanana Gusmão discussed the relationship between Sudjono and military intelligence officials:

> During the whole process, it was noticeable that there was close cooperation between Sudjono and Bais. He told me that he had a duty to report to the authorities the details of each session.[284]

359. An example which illustrates both Sudjono's lack of professionalism and lack of independence is the defence response to the indictment, known as the *eksepsi* (exception). According to the Asia Watch observer, the judges suggested that Sudjono should have a week to prepare the *eksepsi*. Sudjono responded saying he would need only five days, and then both parties settled on three days.[285] This was an extraordinarily short time, especially in view of the fact that Sudjono was officially recognised as Xanana Gusmão's lawyer only six days before the trial opened.[286] Further, the *eksepsi* he submitted was perfunctory and relatively short at nine pages.[287]

360. The *eksepsi* failed to raise the issue of the violations of KUHAP that had occurred during Xanana Gusmão's arrest and detention or to make substantive legal arguments.[288] It raised no arguments based on the status of Timor-Leste under international law. Instead Sudjono argued that because Fretilin was a pro-independence group that did not recognise the authority of Indonesia or its legal system, the court had no authority to try defendants.[289] The illegality of Indonesia's occupation under international law appears not to have been raised. When the *eksepsi* was rejected, Sudjono reportedly wanted to appeal the decision and told the press:

> I am appealing to the High Court over the Judge's decision because integration is not valid juridically and is still an issue at the United Nations.[290]

361. However, as far as the Commission is aware, no such appeal was submitted. Sudjono made this statement not in court, but to the media. This suggests perhaps that Sudjono was intent on impressing the press by presenting himself as an ethical and professional lawyer, but was not prepared to follow through on these words in the courtroom by acting in his client's best interests.

362. It should be noted that not all reports of Sudjono were negative. He was praised for his willingness to take on the case pro bono and to pay his own expenses.[291] There were almost certainly real difficulties in finding defence witnesses to testify, as he himself claimed. During the trial he managed to discredit some prosecution witnesses by establishing that their testimony was second-hand.[292] Finally, Sudjono raised in mitigation Xanana Gusmão's general cooperativeness and his readiness to accept responsibility for the actions of Falintil guerrillas.[293]

363. However, Xanana Gusmão was dissatisfied with the performance of his lawyer. In his letter to the International Commission of Jurists Xanana Gusmão wrote:

> *The only thing on which he helped me, at my insistent request, was to convince the Judges to avoid confrontation with me during the session in which I was cross-examined.*[294]

364. The inadequacy of Sudjono's performance was most apparent in his failure to intervene when Xanana Gusmão was prevented from reading his defence statement. Xanana Gusmão was initially prevented from reading his defence plea on 13 May 1993 because it had not been translated into Indonesian.[295] The decision prompted Xanana Gusmão to announce that Sudjono was no longer his counsel.[296] Proceedings were then adjourned so the two could discuss the problem and Xanana Gusmão laid down the conditions under which Sudjono could continue to act as his lawyer. According to Xanana, faced with these conditions, Sudjono agreed that Xanana would be given the opportunity to read his statement.[297]

365. When Xanana Gusmão began reading out his defence plea, the prosecution objected after he had read only three pages, arguing that the statement was irrelevant to the charges.[298] The judges agreed.[299] Despite his earlier guarantee and the fact that the right to state a defence is provided for in Article 182(1)(b) of the KUHAP, Sudjono did not intervene on Xanana Gusmão's

behalf. Instead, he took Xanana Gusmão's document from him and handed it to the judge.[300] In the words of Xanana Gusmão:

> *The judges interrupted [my defence], and then they did not give me any chance to ask [why they were doing this], Sudjono took [my statement from me] and gave me no chance [of reading it].*[301]

366. In his letter to the International Commission of Jurists Xanana elaborated on this incident:

> We had arranged that in the final session I would have the opportunity to express my opinion on the verdict which would be pronounced that day. Since the prosecutor and the judge described me as an Indonesian citizen, I pointed out to Sudjono during the break that he should object to this and that, at the end, I would clarify this point as well. I was just about to start speaking when the Judge declared the trial was finished, without any reaction from Mr Sudjono.[302]

367. Regardless of the relevance of Xanana Gusmão's defence statement, Sudjono should at the very least have objected to the judges forcing Xanana Gusmão to stop reading it after such a short period and should have ensured that Xanana Gusmão's rights under the KUHAP were upheld. Sudjono did protest to reporters afterwards that the decision was unfair and against Indonesian law, but it appears he failed to do so in the courtroom.[303]

368. Incensed by the actions of Sudjono during the trial, after being sentenced Xanana Gusmão wrote to the International Commission of Jurists on 1 December 1993 from Cipinang prison in Jakarta telling them that he wanted another lawyer.

> I appeal to the ICJ and all international bodies connected with international law to launch a protest, including through using this document, and to campaign for the annulment of the previous trial process. As a foreigner, as a Timorese citizen before my own conscience, and as a Portuguese citizen under international law, I request the intervention of a Portuguese counsel, in order to facilitate communication, who will be assisted by lawyers of LBH.[304]

Xanana's defence plea

369. Even though Xanana Gusmão was allowed to read out only three pages of his defence plea in court, the document was published abroad after being smuggled out of prison and gained widespread publicity.[305] The document was handwritten in pencil in Portuguese by Xanana and was drafted in difficult conditions:

> *At that time, they did not let me sleep. They kept me busy to deny me time to think, playing cards from early morning to late at night. Even after I was fed up with it, they forced me to go on playing. I suggested that from now on perhaps we could play some other game. Often we played cards until midnight, then I said to them that it was time to sleep, and some of them slept in the room while others slept on the floor, and I used such moments to drink coffee and write. Towards dawn I hid my writing. I made two copies of my defence.*[306]

370. In his defence statement Xanana Gusmão relied heavily on appeals to international law, arguing that Timor-Leste's status as a non-self-governing territory and the illegality of the Indonesian invasion meant that an Indonesian court had no jurisdiction to try him:

> The case of Timor-Leste is the responsibility of the international community, a question of international law. It is a case in which universal principles are at stake, a case in which the UN provisions on decolonisation have been manipulated, a case in which Indonesia has flaunted its disrespect for the resolutions of the UN and which therefore constitutes a flagrant violation by Indonesia of the principles of the Non-Aligned Movement and of the universal standards of law, peace and justice.[307]
>
> The UN continues to this moment to refuse to legitimise Indonesian sovereignty over Timor-Leste, a sovereignty won by the use of force and violence, and through the systematic violation of the most fundamental human rights.[308]

371. Xanana Gusmão also argued that the process through which Timor-Leste had been integrated into Indonesia was plainly invalid. He based his argument on a detailed account of the process itself, from the Balibo Declaration to the Popular Assembly's petition to the Indonesian government, and on the refusal of the international community to recognise that process. But he also appealed to his audience's common sense:

> Could it possibly have been this people who suffered in the bush, who saw their homes and possessions destroyed by the Indonesians, against whom they carried out a scorched earth policy, was it really this people who "of their own free will" requested integration with Indonesia, without a referendum?[309]
>
> Thousands and thousands of citizens of Timor-Leste were slaughtered by the forces of occupation throughout virtually the entire territory. The only politics has been the law of terror, imposed to scare the Timorese into saying that they're happy about integration.[310]

372. In keeping with the logic of these arguments, at the end of his plea he appealed over the heads of the court to a variety of bodies and individuals, including the international community, the governments of Indonesia, Portugal and the US, and all friends of Timor-Leste who could play a part in bringing about a just resolution. He also appealed several times to the sense of justice of the Indonesian people, in particular of its younger generation:

> It is my hope that the new generation in Indonesia, or rather, the youth of Indonesia, will appreciate the significance of law and liberty, two fundamental components of human life today and of the society in which we live.[311]
>
> I appeal to the Indonesian people to understand that in conformity with universal principles and international law Timor-Leste should be considered a non-self-governing territory in accordance with the provisions governing the process of decolonisation.[312]
>
> I appeal to the new generation of Indonesians to understand that the People of Timor-Leste attach much more value to freedom, justice and peace than to the so-called development[313]

373. At the same time he accepts the logic of the situation he describes where his fate depends not on the merits of his arguments to the court, but on whether he is willing to submit to the political demands of those who, in his words, had staged his trial. Xanana Gusmão told the Commission: "Everything was engineered. The trial followed a strategy, and so it became political theatre."[314] His response to this situation was as much one of political defiance as of legal rebuttal, as indicated in several comments in his written defence plea:

> Never could I legitimise the criminal annexation of Timor-Leste, just so as to be able to live a few more years of life. My struggle is of greater value than my own life. The People of Timor-Leste have sacrificed their lives and continue to suffer.[315]
>
> As from today I am starting a hunger strike as a practical way of appealing to the EC and the governments of the United States and Australia. No agreement can be reached between a prisoner and his gaoler…[316]
>
> As a political prisoner in the hands of occupiers of my country it is no consequence to me whatever if I am sentenced to death today in this court. They have killed more than a third of the defenceless population of Timor-Leste; they are killing my people and I am worth no more than the heroic struggle of my People.[317]

374. Xanana Gusmão's defence statement is a significant document in the history of the East Timorese struggle for independence. From a prison cell, Xanana Gusmão crafted a range of arguments that were legally, politically and emotionally powerful. The judges, however, considered this statement to be irrelevant before they had even heard its contents.

Judges

375. There are many indications to suggest the judges were not independent or impartial. This is most apparent in their refusal to allow Xanana Gusmão to read the entirety of his defence plea. As described above, after three pages, the presiding judge considered the statement irrelevant. In fact, although controversial and passionately worded, Xanana Gusmão's defence statement raised legal issues that went to the very heart of the fairness of the trial.

376. It appears the judges may have considered that the arguments raised by Xanana Gusmão, rather than being irrelevant, broached matters that were too sensitive to be allowed a

public airing. When defendants in previous political trials had made similar arguments (though in less forthright terms), their relevance was not questioned (see for example the trials of Gregório Saldanha and Francisco Branco in the Santa Cruz trials). When it became apparent that controversial arguments would be raised in Xanana Gusmão's defence statement, however, Xanana Gusmão was silenced. His own standing and the publicity surrounding the trial may well have been factors in this decision. Whatever the reason for their decision, the judges breached the defendant's right to state a defence under Article 182(1)(b) of the KUHAP.[*]

377. Interviews conducted by Asia Watch suggest that there were other areas in which the judges displayed a lack of professionalism. The judges were apparently unaware that some of the witnesses were in detention and might face trial themselves.[318] They further stated that it was beyond their role to investigate allegations that witnesses had been ill-treated, maintaining that the treatment of witnesses had no bearing on the weight to be given to their testimony.[319] Witness testimony and RoIs are the foundation of an Indonesian criminal trial. By failing to consider that coercion may have influenced witness statements, the judges not only breached Indonesian law, but also greatly reduced the possibility of statements favourable to Xanana Gusmão being raised in court. Article 153(2)(b) of KUHAP requires that the judge shall see to it that nothing shall be done or that no question shall be asked that will cause the defendant or witness not to give his answers freely. If this Article was breached, the decision should have been annulled under Article 153(4) of the KUHAP. As there are doubts as to whether witness testimony was given voluntarily, the judges appear not to have fulfilled their obligations under the KUHAP.

378. Xanana Gusmão's impression was that his trial was staged and that the judges were heavily influenced by the military, intelligence and the Indonesian government:

> In my case both the Bais and the Indonesian government decided to take the least possible risks by manipulating the whole process of my trial.[320]
>
> I know that the Bais made the arrangements necessary to spare me the death penalty and that if I were to praise integration I would be acquitted.[321]

379. Xanana Gusmão told the Commission that he thought the judges were influenced by the military:

> *I saw their faces. They [the judges] seemed afraid of the Kopassus.*[322]

380. The judges found Xanana Gusmão guilty of all charges on 21 May 1993, and sentenced him to life imprisonment. Given the extensive indications of military and government influence throughout the process from arrest to sentencing, questions must be asked about the independence and impartiality of this decision.

Application for clemency

381. Xanana Gusmão has accused his lawyer, Sudjono, of deceit by acting against his wishes in pursuing an application for clemency (*grasi*). Sudjono visited Xanana Gusmão in June 1993 to discuss clemency, and once Sudjono explained the nature of an appeal to the president for clemency, Xanana Gusmão rejected the proposal: "I refused straight away and told him I did not accept any sentence from the Indonesian Court."[323]

[*] Article 182(1)(b) KUHAP: The defendant and/or his legal advisor shall state their defence which can be replied by the public prosecutor with the stipulation that the defendant or his legal advisor shall always be given the last opportunity

382. Xanana Gusmão explains the situation further:

> *Then Sudjono came and talked to me. He talked about executive clemency. I asked what it was. He explained it to me. We did not agree. I said that I did not acknowledge him [as my lawyer] because I had wanted LBH and I did not get them. Then we talked again. I asked him to defend my political crime[s]. He said that we would appeal, and would go back to court to present an appeal, and would not ask for clemency.*[324]

383. In the end Sudjono seems to have convinced Xanana Gusmão to lodge an appeal for clemency, after assuring him that there would be no publicity, that Xanana Gusmão's political views would not be twisted and that Sudjono was acting on his own initiative rather than at the prompting of the military. On the basis of these assurances, Xanana Gusmão said that he was persuaded to sign a letter drawn up by Sudjono and giving the latter the authority to apply for clemency. Since the letter was written in Indonesian, there is a strong presumption that Xanana Gusmão did not fully appreciate its implications and may not have wished to apply for clemency. Nevertheless on 4 June 1993 Sudjono breached his agreement with Xanana Gusmão by publicly announcing that he had lodged an application for clemency, resulting in a series of media articles.

384. In August 1993 President Soeharto granted clemency to Xanana Gusmão by reducing his sentence to 20 years imprisonment.[325] Xanana Gusmão was entirely dissatisfied that he had been granted clemency: "I was annoyed with the executive clemency, I didn't care if I didn't get it."[326] In a letter to YLBHI later that year, Xanana Gusmão reiterated his rejection of clemency: "I reject that clemency because it contradicts my principles, since it implies that I accepted my sentence."[327]

385. Reports of the incident in the Indonesian media shed light on the motives of Sudjono and the Indonesian authorities. On 5 June 1993 the newspaper *Kompas* ran an Article entitled "Xanana: I beg forgiveness", which stated that Xanana Gusmão wrote a private plea for clemency of his own volition.[328] On 6 June the *Surya* and *Surabaya Pos* newspaper ran articles entitled "Xanana admits the benefits of East Timorese integration."[329] In a letter to YLBHI on 30 November 1993 Xanana Gusmão denied the media version of events:

> I have found out about the manoeuvres/tricks surrounding this clemency which resulted in an intensive, widespread propaganda campaign through the radio and the press.[330]

386. The media's portrayal of the clemency application as an admission by Xanana Gusmão of the defeat of the Resistance and acceptance of the Indonesian occupation is consistent with earlier efforts to use Xanana Gusmão's arrest and trial for a similar purpose. The application for clemency may well have been contrived to embarrass Xanana Gusmão and demoralise East Timorese still struggling for independence. Towards the end of the trial, the Indonesian authorities appear to have lost control over the proceedings, especially when Xanana Gusmão began to read out his defiant defence statement. By characterising the clemency application as an admission of defeat by Xanana Gusmão, it appears the Indonesian authorities were attempting to regain control over the trial process.

Judicial review

387. After clemency was granted, Xanana Gusmão once again tried to obtain independent legal counsel with a view to applying for judicial review of his case. Yet again, the Indonesian authorities attempted to prevent this from occurring. When LBH lawyers were restricted from visiting Xanana Gusmão in prison, Indonesia's Director-General of Corrections reportedly said:

> What is Xanana's interest in meeting lawyers of the LBH? If all people who want to [are allowed to] visit him, his cell will be full.[331]

388. The Minister for Justice took a similar position stating that anyone except lawyers from LBH could visit Xanana Gusmão. The reason given was that the purpose of their visits was not clear.[332] Xanana Gusmão was finally allowed to meet LBH lawyers in March 1994. At this time he signed a letter authorising LBH lawyers to act on his behalf and instructed them to seek judicial review.[333] Subsequently, the lawyers filed an application for judicial review. The Minister for Justice justified the rejection of the application by stating that the legal process against Xanana Gusmão had been completed and that in granting a retrial, the Indonesian government would set a bad precedent.[334]

The sentence

389. After the trial, Xanana Gusmão was taken to Semarang, where he was held for about two and a half months.[335] Amnesty International reported on 27 May 1993 that Xanana Gusmão was on a hunger strike and had been allowed no visitors except Sudjono since he was taken from court six days earlier.[336] According to Xanana Gusmão:

> *I went on a hunger strike. After 12 days and I almost couldn't bear it anymore. Then they got scared that I was getting ill, so they took me to Cipinang [prison in Jakarta].*[337]

390. In August 1993 Xanana Gusmão was moved to Cipinang. On 9 April 1994 he wrote to Amnesty International complaining of being humiliated, vexed and threatened every day from morning until night.[338] He further stated that criminal prisoners in Cipinang were encouraged to insult and harass him constantly:

> If I avoid speaking it's because "I'm frightened'; if I leave the cell and then return it's "from fear". If they speak to me and I respond it's because "I'm frightened'; and then there's the distortions of my words and phrases, the manipulation of what I say to provoke and make fun of me and so on. They invent "stories" to tell the guards who laugh at my expense.[339]

391. In his interview with the Commission Xanana Gusmão confirmed that he was persistently harassed after his transfer to Cipinang:

> *They told other prisoners in my block to provoke, threaten and insult me by calling me a murderer…They continuously provoked me. In the end I asked the prison authorities to move me close to my friends, but they took no notice. Only after I hit two people did they move me to another block. I was put in a steel cage and not allowed out for five days. Then they gave me a little bit of freedom to move around the prison.*[340]

Conclusion

392. The trial of Xanana Gusmão involved extensive breaches of due process.

- The pre-trial detention conditions in Bali and Jakarta, which included no contact with the outside world for 17 days, and the use of sleep deprivation and psychological pressure to extract information and force Xanana to make a televised statement renouncing his commitment to the independence cause and calling on his comrades-in-arms to surrender.
- Being denied a lawyer during the first 17 days of detention and interrogation. Xanana Gusmão was then prevented from appointing independent counsel and was forced to accept an Indonesian lawyer known to have close ties to the military and the police.
- During this period of pre-trial detention Xanana Gusmão's status as a prisoner was undefined. He did not enjoy the protections available to either a civilian detainee or a prisoner of war, and was placed in a juridical no-man's land where he was denied the status of being either.
- East Timorese were denied free access to the trial in Dili. Some international observers were denied permission to monitor the trial; those who were allowed in as observers were given only limited access to the trial.
- The interpretation provided was inadequate.
- As a result of the failure to create an environment where potential defence witnesses felt secure in testifying not a single witness appeared for the defence. There is reason to believe that the fact that several of the witnesses for the prosecution were in detention when they testified may have coloured their testimony.
- The counsel who was appointed to defend Xanana Gusmão showed a lack of professionalism and independence at several crucial points in the trial, which often, such as in his handling of Xanana's application for clemency, was indistinguishable from unethical conduct.
- The judges displayed a lack of independence and impartiality which, as in their ruling that Xanana Gusmão's defence statement was irrelevant, resulted in the infringement of the rights of the accused. As the defendant was facing the death penalty, it was particularly crucial that he be granted the full protection of the law.

393. By virtue of the defendant's eminence and his symbolic status as the leader of the Resistance, the trial of Xanana Gusmão was the most politically significant trial to be run during the Indonesian occupation of Timor-Leste. The Commission concludes that because of this, the Indonesian authorities conducted it in such a way as to derive the maximum political capital from it. That this outcome was not always achieved does not detract from the fact that in staging the trial the authorities comprehensively failed to carry out their obligations to the defendant under Indonesian law.

7.6.6 Mahkota trial, 1997

394. In March 1997 the UN Secretary-General sent his personal representative, Mr Jamsheed Marker, to Timor-Leste. When they learned of the coming visit, the Resistance commander-in-chief, Xanana Gusmão, who was serving a prison sentence in Cipinang prison in Jakarta, asked David Ximenes (Mandati) to deliver a letter to all clandestine organisations. The letter instructed Vasco da Gama (Criado) and Andre da Costa (L-4) to organise a public demonstration and to lobby the UN through the Secretary-General's representative.[341] Indonesian security agents in Timor-Leste found out about the plan and on 22 March 1997 assigned a military police unit to seal off the Hotel Mahkota (Dili), where the envoy was staying, in anticipation of the demonstration.[*]

[*] Proceedings of Witness Investigation, Suhaedar, 29 March 1997, p. 3: Tight security measures at Mahkota Hotel

395. According to Celina Pires da Costa the demonstration's objective was to "lobby Jamsheed Marker, for a peaceful solution to the issue of Timor-Leste."[342] Vasco da Gama said that Xanana Gusmão had sent a letter through a courier network calling for a demonstration:

> *[T]o show the world that regardless of the murders and arrests of Resistance and clandestine leaders by the Indonesian military, the people of Timor-Leste would never accept Indonesian rule. That was the objective, national independence.*[343]

396. Pro-independence supporters held preparatory meetings on 17 and 22 March 1997 at Andre da Costa's house to plan the 23 March demonstration.[344] Olga Amaral, Celina da Costa, Thomás A. Correia and others were present at the meeting. Between 5.00 and 8.00 on the morning of 23 March, a demonstration took place in front of the Hotel Mahkota, East Dili. Between 50 and 100 protesters displayed banners and Fretilin flags, while shouting: "Viva Xanana Gusmão, Viva Ramos-Horta, Viva Timor-Leste, Viva Povo Maubere!"[345] The demonstration was intended to peacefully convey the people's hopes to the UN representative. But Indonesian security forces fired shots, beat protesters and arrested a number of people. After the protest 33 people faced trial, primarily for treason. Unfortunately many of the documents from the trials of the 33 defendants were destroyed and the Commission has been unable to obtain sufficient information to analyse all of the trials and verdicts in detail. The focus of the following analysis is therefore the joint trial of 16 of the 33 defendants.

Arrest

397. The presence of between 50 and 100 protesters at the Hotel Mahkota prompted the arrival of the Indonesian police, the mobile police brigade, intelligence agents (in civilian clothes) and the anti-riot unit. They attempted to deter people from participating in the demonstration. As the demonstration continued, the mobile police brigade and intelligent agents began firing revolvers in the direction of the protesters and several protesters were wounded. The military were guarding the area around the port.

398. The security forces arrested between 43 and 60 people.[346] These were mostly students, youths and farmers. All were taken to the Dili District police station (Polres) at Mercado Lama (Dili) and detained in prison cells.[347] Some of the injured protesters, like José Sarmento Boavida, were arrested. Others managed to escape and sought refuge in the Motael Church, inlcuding Abel José Ximenes and others, but they were later arrested and taken to the Dili District police station.[348] Still others ran to the convent of the Canossian sisters in Balide (Dili) and to Manuel Carrascalão's house.

399. Some of the protesters were beaten by police and intelligence agents at the site of the protest, like Miguel Alves and Celina da Costa, who were beaten with wooden rods and kicked unconscious.[349] Anacleto da Silva was brutally assaulted by being beaten with an iron rod until he bled profusely from his head and kicked in the mouth until his mouth was torn and bleeding. He was subsequently locked up in a toilet of the Mahkota Hotel. While there, he saw an Indonesian police officer shoot José da Silva in the buttocks. He also witnessed the police stripping victims, throwing them into a truck and taking them to the Dili District police station.[350]

400. Indonesian security agents used brutal tactics to counter what they considered to be a criminal act against the Indonesian government. All of the arrests were made without an official arrest warrant. Under KUHAP this may have been lawful as the detainees were allegedly in the act of committing a crime. The police issued arrest warrants after the protesters had been taken to the Dili District police station on 23 and 24 March 1997.[351]

401. In July 1997, a few months after the Mahkota Hotel demonstration, the Garuda Task Force, made up of members of Rajawali (codename for the Army Strategic Reserve Command, Komando Cadangan Strategis Angkatan Darat, Kostrad), Kopassus, police and the Koramil, arrested Vasco da Gama at his house in Becora. An ABRI Captain PT5 from Kupang, head of the police operational unit, and his deputy, PT6, made the arrest [352] Vasco da Gama described his treatment after the arrest:

> *They tortured me all the way from the house to Polda…they tied my hands and legs…they pushed me out of the car and I fell rolling on the ground. They asked [me questions] but I did not know anything, so in the end they pushed me into a drum full of water, and I swallowed some of it.*[353]

402. According to Vasco da Gama, the police did not produce an official arrest warrant at the time of his arrest, however he was informed of the following reasons for his arrest:[354]

> *First, because I was clandestine in Dili. Second, because I contributed Rp 9,000,000 towards the demonstration at the Mahkota Hotel. Third, that I attacked the Mobile Police Unit with an M-16 rifle and three grenades. Fourth, that I continuously sent news or information overseas. Fifth, that I have a connection with rebels such as Conis Santana, David Alex and Matan Ruak and finally, that all the demonstrations are under my command.*[355]

403. On the day of the demonstration, protesters who suffered serious gunshot wounds and beatings at the demonstration or injuries from torture and ill-treatment when they were detained were taken to the Wira Husada Hospital (Lahane, West Dili) for medical treatment. Some of the uninjured protesters were interrogated while others were taken to Regional police headquarters. Some were subsequently released because their participation was considered marginal while others were released after their families intervened on their behalf. After their discharge, those treated at the Wira Husada Hospital were taken to District police station and interrogated along with the other detainees.

Pre-trial detention

404. The arrested demonstrators were taken by police, intelligence agents, and the Mobile Police Brigade to the Dili District police station. Here, more officers from the police and the Police Mobile Brigade were waiting. It is alleged that these officers started beating and kicking the protesters as soon as they alighted from the truck and then put them into cells. Celina da Costa recalls:

> *We were put into the cells and after one hour or two we were taken out for interrogation. We were beaten, kicked and burned with cigarettes.*[356]

405. Sixty people were detained at District police station. The police stripped them of their clothes before handing them over to the intelligence agents for interrogation in their cells. The names of the agents were not given. The agents interrogated and beat Amaro Pereira from 1.00 in the morning until daybreak.[357] After that, Amaro was moved to the Regional police headquarters at Comoro, and from there to Becora Prison some weeks later. The prison warden refused an earlier transfer for Amaro as he was seriously injured and needed intensive medical care. Amaro therefore spent three days at the Wira Husada Hospital in Lahane and when

discharged, returned to the District police station, where he spent a week in detention before being moved to Becora Prison.[358]

406. Thomás Correia's account illustrates the extent of the violence detainees were subject to:

> *Eleven [colleagues] were injured and taken to Wira Husada. On 23 March 1997 we were arrested and taken to the District police station where, on the same day, we were tortured and then taken to Wira Husada. The ICRC came immediately after we arrived at the hospital, and recorded our names. Three days later, when they noticed that our condition had improved, we were taken back to the District police station. Actually I was not one of the 11 detainees who were taken to Wira Husada [immediately after the demonstration] because I was not wounded when they opened fire. However, when I was taken to District police station I was tortured and beaten with an iron rod. Because of the injuries I sustained I was sent with them to Wira Husada.*[359]

407. After three days of treatment, Thomás Correia and others were taken back to the Dili District police station for interrogation. According to Thomás Correia, during interrogation detainees were tortured:

> *They continued the interrogation. They also used torture, such as electrocution, burning our skin with cigarette butts and beatings.*[360]

408. Vasco da Gama was arrested and taken to the Regional police headquarters. Here he was subject to physical and psychological torture. He also saw others tied up:

> *They dragged me into a prison cell. As I stood in front of it, I saw Agustinho Carvalho from Hatulia [Ermera], his hands and legs were tied up separately. I entered the cell, and the police interrogated me. Soon after they tied my hands behind my back. They put me into a 50 kg rice bag, tied my legs to the chair, and kicked and beat me.*[361]

409. Vasco da Gama described additional torture techniques such as where the interrogators spun detainees around while saying "feel this" until they almost collapsed. He added:

> *There, a man standing next to me hit me and I fell. I do not know how long I stayed on the floor. I was unconscious. [As I came to] they were untying my hands and told me to sit on a chair. Then they spun me again until I fainted. When I regained consciousness, they put me in cell number five at the Regional police headquarters.* [362]

410. The suspects were held in police custody for 15 to 20 days. During this time, detainees were tortured physically and mentally, especially during interrogation. After 15 to20 days, between ten and 17 detainees were released and 33[*] were transferred to the Becora Prison to

[*] The 33 detainees were: Thomás A. Correia (Baucau/Laga), Mateus da Costa Belo (Baucau/Venilale), Olga Amaral (Turiscai), Celina Pires da Costa (Baucau/Laga), Hermenegildo da Costa (Baucau/Laga), Cancio A. Henrique Guterres (Baucau/Venilale), Bendito Amaral (Liquiça), Miguel Alves (Viqueque/Uatu-Lari), Mariano da Silva (Baucau/Laga), José Sarmento Boavida (Baucau/Quelicai), Abel José Ximenes Baucau/Laga), Rafael de Almeida (Baucau/Laga), Moises

await trial.[363] In Becora Prison the detainees were kept in a dark cell for a week. [364] Clementino dos Reis Amaral and a colleague, in their capacity as members of the Indonesian National Commission on Human Rights (Komisi Nasional Hak Asasi Manusia, known as Komnas HAM), visited the detainees at Becora Prison.[365] Thomás Correia said:

> *Mr Clementino dos Reis Amaral came but he did not say anything. He looked at our physical condition, and at the time some of us still had wounds not fully healed and bloody. They photographed us.*[366]

411. Thus before the trial commenced the 33 defendants had been detained at three different locations…the District police station, the Regional police headquarters and Becora Prison…and had spent between three and four months in pre-trial detention.

Access to a lawyer

412. At the Dili District police station detainees were not granted access to an independent lawyer. The Indonesian authorities offered Abdul Hakim from Trisula Legal Aid Institution (LBH) in Kupang to defend Olga Amaral and Celina da Costa but both refused the offer.[367] Abdul Hakim from LBH Trisula was often appointed by the Indonesian government and many defendants and independent lawyers did not trust him. Thomás Correia said:

> *The military offered a lawyer, but we did not want him. We only accepted Aniceto Guterres because he was a good lawyer.*[368]

413. After their transfer to Becora Prison the detainees had access to independent lawyers through the Rights Foundation (Yayasan HAK). Lawyers from Yayasan HAK approached the detainees and offered their assistance.[369] Yet even though Aniceto Guterres Lopes had a power of attorney from the defendants' families, he was often refused access to his clients:

> *[T]hey made it difficult for me to see my clients. This was particularly true of the police. They said that the defendants already had a lawyer. But I had to do my job as a lawyer who had been given a power of attorney from the defendants and their families. So I said "today, as a representative of the defendants' families, I want to see the defendants." I intended to go inside, meet the defendants and ask them whether they accepted the government-appointed lawyer voluntarily or whether they had been forced to accept and sign the power of attorney or whether a lawyer had simply been assigned to them. I became aware that they had signed a power of attorney following some sort of psychological pressure, pressure by the police or simply through ignorance [of the law]. In the end, the defendants revoked the power of attorney and appointed me instead as their lawyer. So I went to the police, the magistrate and the judge and showed them the power of attorney.*[370]

Felisano Soares (Baucau/Venilale), Alipio Soares (Viqueque/Uatu-Lari), Anacleto da Silva (Viqueque/Ossu), Mositu Fraga Soares Viqueque/Uatu-Lari), Crispin da Silva (Viqueque/Ossu), Alberto da Costa (Viqueque/Ossu), Amaro Pereira (Aileu), João Henrique (Aileu), Celestino Manuel Pereira (Baucau/Laga), Nelson Pereira (Dili), Luis Bonanca (Dili), Constancio G. Leite (Maliana), Carlos Gusmão (Baucau/Laga), Aleixo da Silva Ximenes (Baucau/ Laga), Domingos da Costa (Baucau/Laga), José Gabriel (Baucau/Laga), Agusto Raimundo (Baucau/Laga), Jito Borges (Aileu), Mateus Ignacio da Costa (Baucau/Laga), Domingos Sarmento (Viqueque), Romaldo Brazil Januario (Los Palos).

414. Once the Indonesian authorities accepted him as the defendants' legal representative, Aniceto Guterres was allowed weekly access to his clients in Becora Prison: "[Our] lawyer [Aniceto Guterres]…visited us to assess our condition once a week."[371] Aniceto Guterres confirmed that this was a scheduled regular visit.[372]

415. For those detained at the Regional police headquarters, however, obtaining access to an independent lawyer was far more difficult. Aniceto Guterres, who also represented Vasco da Gama, went to the Polda to meet his client but was refused access. Similarly, Johnson Panjaitan, a lawyer from Jakarta, was refused access to his clients.[373]

416. Articles 54 and 55 of KUHAP clearly provide for the provision of a lawyer of a suspect's own choosing from the very beginning of legal proceedings. Similar to previous political trials, this provision was breached.

Investigation

417. The police investigator's record of interrogation, or RoI, appears to have involved a degree of coercion. If questions were not answered to the satisfaction of the interrogators, defendants were threatened with being shot. According to Celina da Costa:

> *I said, I don't know, I don't know, but they continued to hit me and threatened to hang and shoot me if I did not give honest answers.*[374]

418. Further, detainees were forced to sign untruthful and inaccurate RoIs, which were principally prepared by the police investigators, with some involvement of Special Forces personnel. Vasco da Gama, the leader of the Mahkota Hotel demonstration, elaborates:

> *Regarding all the information we gave during the interrogation, we were forced to speak, although none of us wanted to say anything. We told them what they forced us to say. We were forced to accept all the things written in the RoI already in their hands. In other words, the statements contained in the document were not our statements…They planned it all and when the time came for us to sign the document, we just signed it. During interrogation at the police station, I did not know why some Special Forces personnel were there to investigate and interrogate us.*[375]

419. This is in breach of the right to silence, which is guaranteed under Article 66 of KUHAP.

420. Thomas Correia describes that his RoI was false, with the investigators adding their own opinions and torturing him to illicit favourable answers:

> *I answered their questions, but my answers were not included in the RoI. Instead, they added their own opinions. In the end, they handed the document to me and I signed it without reading it. Besides, there was a police officer standing next to me, and he hit and burned me with a lit cigarette every time I gave the wrong answer.*[376]

421. Indeed, he claims that his RoI was prepared before the interrogation:

> *[T]hey had already written it and I just signed; I did not refuse, I immediately accepted…that letter [RoI] was made still under the Soeharto regime so they prepared everything. We signed the document in June 1997.*[377]

422. The blatant disregard for human dignity in torturing detainees and doing so in order to obtain particular information, as well as the preparation of RoIs before interrogation, clearly breaches the guarantees in KUHAP that suspects be allowed to give information freely without pressure of any kind. Thus the actions of interrogators were not only brutal, but they also set the tone for the proceedings that followed a trial process where the factual basis for conviction was inherently flawed.

The trial

423. The joint trial of 16 of the 33 detainees commenced on 24 July 1997 and, after numerous postponements, concluded on 20 September 1997.

Indictment

424. The primary charge was that the defendants committed treason:

> [T]he [16] defendants together with other defendants whose cases were submitted separately or who remained at large, on Sunday 23 March 1997 between 6.30 and 7.30 in the morning at the Mahkota Hotel, in Colmera, West Dili, district of Dili or in another place still under the jurisdiction of the Dili District Court, committed an act of rebellion with the objective to either subjugate all or part of Indonesia's territory (ie East Timor) and to surrender it to a foreign country with the intention to secede from Indonesia, or to establish an independent and sovereign state.[378]

425. Subsidiary charges of expressing hostility towards the Government of Indonesia were also included under Articles 154 and 155 of KUHP.[379]

426. The indictment listed a number of meetings that took place to prepare for the demonstration in front of the Hotel Mahkota on 23 March 1997. The alleged purpose of the demonstration was:

> [T]o show the UN envoy and the foreign press staying at the Mahkota Hotel that anti-integration groups remained active in Timor-Leste and that the people of Timor-Leste wanted independence from Indonesia.[380]

427. The indictment alleged that during the demonstration the defendants shouted chants such as: "Viva Xanana Gusmão, Viva Timor-Leste, Viva Ramos-Horta, Viva Fretilin, Viva Maubere." This was done with great zest with people enthusiastically raising their fists and accordingly disturbed the public order. Olga Amaral, José Gabriel, Agusto Raimundo Matos and others allegedly displayed Fretilin flags and 19 banners. These banners contained anti-Indonesian slogans, including demands for independence from Indonesia.

428. The 17 other defendants who were tried separately were indicted with similar charges. Vasco da Gama was charged with treason while three defendants, Marito Brafas Soares, Cancio

Henrique Guterres and Alberto da Costa (Bareto) were charged with publicly expressing feelings of hostility towards the Indonesian government under Article 154 of KUHP.

429. The other defendants, including Luis de Fatima Pereira, Domingos da Costa, Nelson Pereira, Anaro Pereira, Mateus da Costa Belo, Mariano da Silva, Moises Feliciano Soares, Alipio Soares, Hermenegildo da Costa and Thomas A. Correia faced a primary charge under Article 154 and a subsidiary charge under Article 155 of KUHP.[381]

430. The policy shift from individual to joint trials should be noted. In the Santa Cruz and Jakarta trials, large groups of defendants were tried individually, despite it being far more efficient to try them jointly. In the Mahkota trial, however, it appears that as the majority of defendants were mainly ordinary people (students and farmers) rather than senior clandestine members, there was little benefit in trying them individually. This would also explain why Vasco da Gama, the main organiser of the demonstration, was tried individually. Thus it appears that the Indonesian authorities preferred individual trials for the defendants who represented the greatest threat.* The lenient sentences that the defendants later received lends further weight to this notion.

The openness of the trial

431. On 24 July 1997, the presiding judge declared the trial open to the public stating that tight security measures had been put in place for the duration of the trial. The heavy presence of police, Kopassus, Korem, military personnel and other government agents meant that many Timorese were too afraid to attend. Thus although the trial was not closed, the tense environment due to the prevalence of members of security forces effectively prevented members of the public from observing trial proceedings.[382] The failure to guarantee a trial open to the public in a meaningful sense breaches Article 153(3) of the KUHAP.

Witnesses

432. Out of 15 witnesses interrogated during investigation, only 5 gave oral testimony at trial. They all testified for the prosecution, with no witnesses appearing for the defence. Most prosecution witnesses were members of the police or military who were present at the demonstration. An example of a witness account is that of Suhaedar, a military police officer:

> *At the time of the incident, I was in the Mahkota Hotel, in security room number 246 on the second floor. A friend told me a demonstration was taking place so I ran into the front yard and saw the demonstration…There were around 50 protesters…I also saw some colleagues from the navy and the intelligence unit there. I heard the protesters chant, "Viva Timor Leste, Viva Xanana Gusmão, Viva Maubere, Viva David Alex"…I also saw four banners, one of them a big white banner about two-by-one meter in size. I could not see it clearly because I was behind it…There was also a piece of cloth resembling a yellow, red and black flag with a star on it.*[383]

433. Another witness, police officer Soliquin, testified that:

* The Commission is aware of another political trial where East Timorese defendants were tried jointly – the 1997 trial for an attempted bombing in Semarang. The fact that the four co-defendants in this case were all ordinary students and were all acquitted of the illegal possession of explosives lends weight to the theory that individual trials were preferred for the defendants considered most dangerous by the Indonesian authorities.

> *In general I recognised the faces of the protesters…except those whose faces were covered.* [384]

434. Other witnesses claimed that Falintil fighters were among the protesters.[385]

435. The five prosecution witnesses were Dede Kuswandi, I Ketut Sudarma Wiasa, Muhamad Saleh, Suhaedar and I Gede Redama.[386] Explaining why only five witnesses were called, Aniceto Guterres Lopes said:

> *[A]t the trial the presiding judge told the prosecutor he was satisfied with the witnesses called [thus far] and that the prosecutor did not need to call other witnesses.*[387]

Evidence

436. A large amount of physical evidence was confiscated from the defendants at the time of the demonstration:

> During the 23 March 1997 demonstration, the authorities confiscated 19 banners of various dimensions with messages [written] in a foreign language, 2 Fretilin flags, 15 multi-coloured items of clothing, ten multi-coloured trousers.[388]

437. The messages written on the 19 confiscated banners were in Portuguese and at trial Carlos Boromeu translated them under oath into Indonesian. Below are a few examples of the banners submitted as evidence:

> Free Xanana Gusmão and all East Timorese political prisoners, Long live Xanana Gusmão the defender of the young Maubere generation.
>
> A Tri-Partite dialogue under the auspices of the United Nations: the Involvement of Xanana Gusmão for a peaceful Timor-Leste solution.
>
> A permanent UN Human Rights Commission Delegation in Timor-Leste.[389]

Performance of defence lawyers

438. The defence team from Yayasan HAK faced serious obstacles in its attempts to defend its clients. One significant issue, according to Aniceto Guterres Lopes, was that he did not have a strong relationship with the military:

> *As a lawyer, I had a good rapport with the police, but not with the military and the intelligence.*[390]

439. Aniceto Guterres Lopes states other impediments he faced while representing the defendants:

> *I had to deal with continuous attempts by the court [judges and prosecutors] and the police to refuse or obstruct independent lawyers. They always appointed the defence lawyer.*

> *They always politicised my defence…and my clients did not understand this. So they twisted the arguments a little bit and my clients accepted the lawyer[s] they appointed. The judges and the prosecutors even asked the police to urge the defendants to refuse independent lawyer[s] or they said something like "Mr Aniceto Guterres Lopes is not good enough. You may get heavy sentences."*
>
> *I dealt with an unfair process, filled with violence and disrespect for the defendants' rights. When independent lawyers intervened on behalf of the defendants or their families, they created obstacles such as threatening or imposing a more complicated procedure. For example, I had a power of attorney from the defendants and their families and that should have been sufficient, but they [the police] prepared a separate power of attorney appointing the lawyer that the police recommended, visited the defendants in jail and asked them to sign the document.*[391]

440. Aniceto Guterres Lopes adds that the lawyers did all they could to ensure the defendants' rights were upheld but that many of the defendants' rights were ignored:

> *They had already coached "witnesses" who had not seen the incident, but who, in the RoI testified that they had seen the Mahkota Hotel incident. The law prohibits such practices, yet they happened.*[392]

441. Thus when independent lawyers were allowed to act, after numerous interrogations had taken place, there were constant attempts by the Indonesian authorities to disrupt and undermine their work. Such intimidation undoubtedly impacted on the ability of the defence lawyers to represent their clients and accordingly impacted on the fairness of the trial.

The defence case

442. The substance of the defence case focused on both procedural aspects as well as broad historical arguments. The procedural flaws and breaches of rights included:

> [T]he violence that the defendants experienced during the preliminary investigation, and on the defendants' rights to obtain the RoI.[393]

443. In addition, it was argued that the arrest, the detention and the judicial process were illegal, as they did not comply with the applicable laws at the time. In regard to this, the defendants' lawyer, Aniceto Guterres Lopes, states:

> *Those involved in clandestine movements were known to the security forces. Subsequently they were arrested…The process of arrest, detention and [ultimately] justice was unfair as it did not comply with the stipulations of the Criminal Procedure Code [KUHAP] on arrest and detention of suspects. In the defence, their clandestine activities and demonstrations had a legitimate justification because they did not recognise Indonesia's annexation of Timor-Leste. Therefore their struggle was legitimate based on the right of self-determination, recognised by the international community.*[394]

444. As highlighted in the previous quote, international legal issues were also raised to argue the defence case:

> That international law stipulates that recognition is but one requirement in a nation's claim of sovereignty. In this case the integration of East Timor into Indonesia became legitimate with the recognition of at least one sovereign country. Therefore all objections submitted by the lawyers about East Timor's integration into Indonesia need to be dealt with by the United Nations, and therefore should not need to be considered in this court. [395]

445. Despite the validity of many of the defence arguments raised, they were rejected and by and large not even directly responded to.

Performance of judges

446. It appears that the independence and impartiality of the judges in the Mahkota trial should be questioned. There is evidence to suggest that there was communication between the judges and Indonesian security officials which may potentially have influenced the outcome of the trial. Rui Pereira, a lawyer, reveals that:

> *Before the case went to trial, the judges received phone calls from the Korem, Kodim and the intelligence task force. These calls certainly impacted on the judges' performance.*[396]

447. This statement was confirmed by Aniceto Guterres Lopes who stated that intelligence agents:

> *made contact with the judges outside or before the trial to sway their judgment.*[397]

448. Furthermore, Aniceto Guterres Lopes questioned why intelligence officials needed to be present at court sessions every day:

> *Why were intelligence officers in court every day? To monitor the trial, to signal or to remind the judges to watch out, this is an important case! We will watch closely. Your decision must comply. Intelligence officers from the police, the Kodim and the SGI attended the hearings almost daily. What business did intelligence have at the trial? None! They were there to intimidate and manipulate the Court's decision.*[398]

449. The conduct of the judges at trial lends further weight to their lack of impartiality. According to Aniceto Guterres Lopes:

> *Usually, we submitted our objections during or outside of the hearings but the judges never even considered them. For example, the prosecutor read the charges during the trial and, as a defence lawyer, I responded to the charges by saying that I did not understand them, but the presiding judge continued the trial.*[399]

450. Other aspects of the judges' performance that suggest a lack of impartiality include a failure to ensure that the trial was completely open to the public and a failure to take into account the impact that the absence of lawyers at the time of interrogation may have had on the reliability of the RoIs. This may have breached the judges' obligation under Article 185(6) of KUHAP to weigh up the reliability of evidence.

451. Further, according to Vasco da Gama (Criado), there was never any prospect of an impartial trial as the judges were the enemy of those on trial:

> *[F]rankly, we were enemies, and enemies never forgive each other unless there is a process undertaken [of forgiveness]…only then would things change. I saw myself that the court was under the control of the pro-integrationists. In other words, no mouse would dare put up a defence against a cat and seeing a defenceless mouse, obviously the cat would eat it. This was a fundamental problem.*[400]

Decision and sentences

452. On 20 September 1997, the presiding judge Agustinus Loto Runggum handed down a verdict for the sixteen co-defendants. All were found guilty of the primary charges in the indictment, namely treason:[401]

> Based on evidence and the above considerations, this panel of judges believes that the primary charge has been proven beyond reasonable doubt.[402]

453. Due to the primary charge being satisfied, the judges saw no need to consider the subsidiary charges. [403]

454. The following 16 defendants were sentenced to one year imprisonment for rebellion and attempts to secede from Indonesia:

1. Celina Pires da Costa
2. Olga Amaral

3. José Gabriel
4. João Henrique (Elias)
5. Costancio G. Leite
6. José Sarmento Boavida
7. Mateus da Costa Inacio
8. Bendito Amaral
9. Crispin da Silva (Anino da Silva)
10. Agusto Raimundo Matos
11. Domingos Sarmento
12. Rafael de Almeida
13. Zito Borges
14. Aleixo da Silva Ximenes
15. Ancleto da Silva
16. Abel Ximenes.[404]

455. The following 17 defendants who faced separate trials were also found guilty and received a one-year jail term:

17. Masitu Fraga Soares
18. Cancio A. Henrique Guterres
19. Alberto da Costa (Barreto)
20. Luis Bonanca
21. Domingos da Costa
22. Nelson Pereira
23. Amaro Pereira
24. Miguel Alves
25. Ronaldo Brazil Januario
26. Carlos Gusmão
27. Celestino Manuel Pereira
28. Mateus da Costa Belo
29. Mariano da Silva
30. Moises Feliciano Soares
31. Alipio Soares
32. Hermenegildo da Costa
33. Thomás A. Correia.[405]

456. Vasco da Gama (Criado) was also convicted on his primary charge and received a one-year jail sentence. For all defendants, time already served in detention was subtracted from the one-year sentence.

Appeal

457. All defendants accepted the verdict of the Dili District Court and expressed no intention to appeal.[406] Vasco da Gama elaborates:

> *We accepted the court's decision. My friends and I accepted the decision immediately. I told the judges that I would accept any decision even if it involved years of jail, because it [what I did] was my right. So we did not say much, we just accepted it. What we did was our right. Then they asked me whether on my release I would continue with clandestine activities. I replied that it would depend on their attitudes, which were merely a reflection of the New Order.*[407]

Conclusion

458. The trial of those involved in the Mahkota Hotel demonstration in March 1997 represents the most extensive trial of ordinary civilians (as opposed to clandestine leaders) during the Indonesian occupation. In previous sets of trials, the Indonesian authorities focused on the organisers or instigators of pro-independence activity, who were usually senior pro-independence leaders. The intention was to make an example of the leaders in an attempt to deter future action. The Mahkota trials, however, demonstrate a shift in policy. The trials targeted ordinary participants in a non-violent protest and tried them jointly. There appear to have been serious instances of maltreatment and torture during pre-trial detention, yet defendants received a comparatively lenient sentence of one year.

459. The reasons for this change in policy are not entirely clear, however it may signify an acceptance that the previous approach of targeting leaders was ineffectual. Despite the harsh sentences for the organisers of the Santa Cruz and Jakarta demonstrations, political protests still took place. To repeat that approach in relation to the Mahkota demonstration, for example by prosecuting only Vasco da Gama and a number of other senior clandestine members, would be likely to be similarly ineffectual. By putting a large number of participants on trial and subjecting them to torture, the objective may have been to attack the rank and file clandestine members, and send a message that anyone, not only leaders, who expressed anti-Indonesia sentiment would face trial. The relatively low sentences handed down also illustrate that despite the brutal treatment of detainees, the Indonesian government wished to appear lenient, perhaps in response to the international criticism of the extremely harsh sentences previously handed down to people such as Gregório Saldanha. This could therefore be characterised as a double-edged approach: on the one hand, to put ordinary people on trial for political crimes and thereby demonstrate the increased reach and legitimacy of Indonesian law and courts; on the other, to grant lenient sentences to maintain an appearance of a fair administration governed by the rule of law.

460. The most significant breaches of due process in the Mahkota trials include the use of torture, especially in relation to Vasco da Gama and Thomas A. Correia; the falsification of RoIs by interrogators; the failure to let lawyers be present during interrogation; deficiencies in the openness of the trial; and a lack of impartiality on behalf of the judges. The 33 defendants therefore faced a process in which their rights to a fair trial were systematically abused. In the Mahkota trials, for the first time, the Indonesian authorities convicted a large number of ordinary citizens of political crimes for participating in a non-violent protest. The expression of their fundamental rights to freedom of expression and association resulted in a one-year prison sentence on the basis of an unfair process, and in some cases, physical torture.

7.6.7 Findings

461. The Commission finds that:

1. Although the Indonesian legal system was functioning to some degree in Timor-Leste from 1977, political opponents of the occupation only began to be prosecuted in 1983. At this time the Indonesian security apparatus developed a policy of using the criminal law and the courts as tools to crush the resistance to Indonesian rule in Timor-Leste.
2. The implementation of this policy did not mean that previous methods, such as killing, arbitrary detention and torture of political opponents were discontinued. Rather the courts were used as a complementary tool, added to other means already employed, in order to achieve the political goal of crushing the Resistance.
3. The new role of the criminal law and courts did not mean that there was a movement towards respect for human rights and the rule of law. The trials were not fair trials. They were in general “show trials” similar in many ways to those which had occurred under other military dictatorships in other countries. The verdicts of those who were accused were never in doubt. The function of the trial was largely as a propaganda tool, calculated to provide the illusion of justice which would cover a vicious victimisation of political opponents.
4. The major method used for guaranteeing that the court found defendants guilty but ensuring that the proceedings did not appear to be totally corrupt was to fabricate and limit the evidence that the court was able to consider. To fabricate the evidence, interrogators tortured and intimidated defendants into making confessions, military and police witnesses concocted their evidence and created false material evidence, defence witnesses were prevented from appearing, and defence counsel who would not strongly contest a prosecution case were appointed.
5. The degree to which the trial process was corrupted in order to paint a veneer of legitimacy over predetermined guilty verdicts dictated by political goals is demonstrated by the following summary in relation to the first wave of political trials, from 1983-85:

   232 political trials were examined by the Commission. These resulted in:

- 232 convictions on charges involving treason and subversion
- 232 defendants were represented by government appointed defence counsel
- 0 defence witnesses were called
- 0 cases of acquittal of all charges were recorded
- 0 appeals against conviction were lodged.

6. The intelligence services of the Indonesian military forces were involved in guiding the outcome of the political trials at every stage of the interrogation and trial process.
7. The military officers who used terror and torture in interrogating prisoners, the police who prepared the cases, the prosecutors who presented the cases in court, the court appointed defence counsel who failed to rigorously defend their clients and the judges who acquiesced in allowing profound and repeated travesties of justice to take place were involved in a collaboration and collusion designed to ensure that defendants did not receive a fair trial.
8. Indonesian military officers arbitrarily detained political opponents of the occupation and held them for long periods of custody, often years, before trial, even though in many cases there was little or no evidence against them.

9. Indonesian military officers routinely used torture and intimidation as tools during interrogation in order to obtain confessions and other information. The results of the torture and intimidation were used as evidence at trial.
10. Many of those who were tortured were also threatened that if they did not cooperate and admit their guilt they would be detained indefinitely and continue to be tortured and mistreated. As a result they signed confessions of their involvement in the pro-independence movement, whether that was the truth or not. They also provided evidence against other persons, many of whom were actually unknown to them.
11. Members of the Indonesian security forces routinely signed false statements that provided evidence against persons accused of political crimes, and perjured themselves in the trials of those persons.
12. Members of the Indonesian security forces also routinely fabricated material evidence, for example producing weapons with no connection to the particular case, to substantiate the evidence relied on for prosecution.
13. Members of the Indonesian security forces failed to inform suspects that the information they provided would be used against them at trial, and that they were entitled to the presence of a lawyer, according to Indonesian law and international law.
14. Members of the Indonesian security forces routinely interrogated suspects and forced them to sign Records of Interview that had been fabricated and produced without interpretation in Indonesian, a language that the suspects did not fully understand.
15. Defendants were regularly refused the right to appoint lawyers of their choice to defend them at trial. The defence counsel appointed in most cases supported the prosecution case, did not call any defence witnesses and did not in reality provide a defence for their clients.
16. In a small number of cases independent defence counsel, from Indonesian legal aid non-government organisations and East Timorese lawyers, courageously provided a professional defence of their clients. They did this in pursuance of the principles of justice, despite intimidation and allegations of a lack of patriotism levelled at them both inside and outside the court, and other hindrances such as a lack of time to prepare cases.
17. During trials of political opponents prosecutors routinely ignored ethical issues that arose in relation to the evidence they presented to the court. This included confessional evidence obtained through torture and obviously fabricated evidence.
18. Judges presiding over the political trials failed in their duties to provide an independent and objective adjudication. These judges significantly contributed to the overall corruption of the legal system by allowing their positions of authority to be manipulated as a political tool of the military intelligence services.
19. The judges who presided over the political trials allowed obviously fabricated evidence to be admitted without objection. They did not consider allegations of torture and intimidation of witnesses to be a serious issue. They routinely based their verdicts of guilty on Records of Interview that had been signed as a result of torture, under illegal conditions. The judges also ignored defendants' requests to be represented by counsel of their choice.
20. Judges handed down sentences to persons convicted of political crimes that were disproportionate to the degree of criminality of the acts allegedly perpetrated. In some cases this involved sentences of years of imprisonment for actions such as supplying cigarettes or small quantities of food to persons suspected of being opponents to the occupation. Time served in military detention, up to seven years in the most extreme case, was generally not taken into account when determining sentences.
21. There was no meaningful appeal process available for persons who were convicted of political crimes.

[1] Article 64, Geneva Convention IV

[2] See for example Article 68 Geneva Convention IV

[3] Article 106 of the Indonesian Criminal Code (KUHP).

[4] CAVR Interview with Mário Viegas Carrascalão, Dili, 30 June 2004.

[5] Amnesty International, *Unfair trials and possible torture in East Timor*, December 1985.

[6] *Country Reports on Human rights Practices for 1984* , Report submitted to the Committee on Foreign Relations, U.S. Senate, February 1985.

[7] Case file of Zé Roberto S.M.J: No: 57/Pid/B/B4/PN.DIL.

[8] Case file of Zé Roberto S.M.J: No: 57/Pid/B/B4/PN.DIL. The documents indicate that this was through the Warrant of Chief of Nusa Tenggara Regional Police No. Pol. Sprin/33/II/84 dated 14 February 1984 regarding assignment of a member of the Indonesian National Police (Polri) on the Polri Task Force in the Sub-district police of East Timor (Polwil Tim-Tim).

[9] Case file of Zé Roberto S.M.J: No: 57/Pid/B/B4/PN.DIL.

[10] See Record of Interrogation dated 9 April 1984 in Case file of Henrique Belmiro, No. 83/Pid/B/84/PN.DIL.

[11] Case file of David Dias Ximenes, No.22/Pid/B/84/PN.DIL.

[12] See for example Article 9(3) of the International Convention on Civil and Political Rights, which reflects customary international law; and Article 71 Geneva Convention IV.

[13] Wanseslan G.Carvalo, Balenti Nunes and Salestino Dalosesat. See case file of David Dias Ximenes, No. 22/Pid/B/84/PN.DIL.

[14] Letter of the Kolakops Intelligence Task Force of East Timor (Satgas Intel Kolakops Timor Timur) No: R/463/III/1984, 24 March 1984.

[15] CAVR Interview with Caetano de Sousa Guterres, Dili, 22 May 2004.

[16] HRVD Statement 8055.

[17] CAVR interview with Aquelino Fraga Guterres, Dili, 17 May 2004.

[18] HRVD Statement 6983.

[19] CAVR Interview with Antonio Tomas Amaral da Costa (Aitahan Matak), Dili, 28 April 2004.

[20] "Is it Wrong for a Child to Return to the Mother who Gave it Birth?" *Sinar Harapan Newspaper* , 3 September 1985, excerpted and translated in Amnesty International, *Unfair trials and possible torture in East Timor*, December 1985.

[21] CAVR Interview with Antonio Tomás Amaral da Costa (Aitahan Matak), Dili, 28 April 2004.

[22] Amnesty International, *East Timor: Unfair Trials and Further Releases of Political Prisoners* , (summary) April 1988.

[23] Cristiano da Costa, Statement to the Human Rights Commission, 44th Session (item 12), 1988.

[24] Neil Barrett, interview with David da Conceição, The Neil Barrett Comarca Video Project, Submission to CAVR, August 2002

[25] For example, see case file of Abilio Tilman, No.72/Pid.B/1983/PN.DIL, and case file of Martinho Soares, No.119/Pid/85/PN.DIL

[26] Case file of João Soares, 24/Pid/B/84/P.N.DIL.

[27] Bill of Charges José Simoes, No:01/PK-23/1984, 23 January 1984.

[28] For example Case File of Henrique Belmiro, No. 83/Pid/B/84/PN.DIL and Notification of Decision of Dili Court in relation to Armindo Florindo, No. 43/Pid.B/1984/PN.DIL.

[29] Case file of Henrique Belmiro, No. 83/Pid/B/84/PN.DIL.

[30] CAVR Interview with Antonio Tomas Amaral da Costa (Aitahan Matak), Dili, 28 April 2004.

[31] CAVR Interview with Marito Reis, Baucau, 17 November 2002.

[32] Case file of Henrique Belmiro, No. 83/Pid/B/84/PN.DIL.

[33]Case file of Armindo Florindo, No. 43/Pid.B/1984/PN.DIL. See especially Bill of Charges No.41/PK/1984, 12 May 1984.

[34] Notification of Decision of Dili District Court in relation to Caetano de Sousa Gutteres, No. 51/Pid/B/1984/PN.DIL, 29 May 1984.

[35] Notification of Decision of Dili District Court in relation to David Dias Ximenes, No. 22//Pid/B/1984/PN.DIL.30 March 1984.

[36] Notification of Decision of Dili District Court about Domingos Seixas, No. 18/Pid/B/84/PN/DIL. pp.3-5, 31 March 1984.

[37] Case file of Francisco Mendez No.170/Pid/B/84/PN.DIL., see especially Indictment No.49/B/12/1984, p.1; Bill of Charges No.49/B/2/1985, p. 1; and the Notification of Decision No.170/PID/B/1984/PN.DILi, p. 2.

[38] Notification of Decision of Dili District Court about Fransisco Mendez, No.170/PID/B/1984/PN.DIL. p.2.

[39] Case File Jil [sic] Fernandes, No. 179/Pid/B/85/PN.DIL.

[40] Neil Barrett, CAVR Interview with Maria Immaculada, *Comarca Video Project* , Submission to the CAVR, Dili, August 2002.

[41] Notification of Decision of Dili District Court in relation to Zé Roberto Seixas Miranda Jeronimo. No: 57/Pid/B/1984/PN.DIL.

[42] Letter dated 30 April 1984 from Ali Alatas to Thomas Hammarberg, Secretary-General of Amnesty International.

[43] CAVR Interview with Antonio Tomás Amaral da Costa (Aitahan Matak), Dili, 28 April 2004.p.12

[44] Ibid p.16.

[45] Amnesty International Statement to the United Nations Special Committee on Decolonization (summary) August 1990.

[46] Letter dated 30 April 1984 from Ali Alatas to Thomas Hammarberg, Secretary-General of Amnesty International.

[47] Case file of Fracisco Mendez No. 170/Pid/B/84/PN.DIL.

[48] Stipulation of Dili District Court No. DC.UM 08.04.02, dated 7 January 1984 in case file of José Simoes No.03/Pid/B/84/PN.DIL.

[49] CAVR Interview with Marito Reis, Baucau, 27 May 2004.p.9.

[50] CAVR Interview with Marito Reis, Baucau, 27 May 2004, p.9; CAVR Interview with Antonio Tomás Amaral da Costa (Aitahan Matak), Dili, 28 April 2004, p.13.

[51] Defence Pleadings, Case file of Henrique Belmiro, No. 83/Pid/B/84/PN.DIL.

[52] Defence Pleadings in Criminal Case no.22/Pid/B/1984/PN.DIL, 23 March 1984.

[53] Transcript of Proceedings in the trial of Domingos Seixas, Dili, 19 March 1984, p.16.

[54] The Reply of the Public Prosecutor regarding the Legal Counsel Plea in the case No 64/PK/1983 on the accused Abilio Tilman. 14 December 1983.

[55] Far Eastern Economic Review, 8 August 1985, in Amnesty International, *Unfair trials and possible torture in East Timor*, December 1985

[56] CAVR Interview with Caetano de Saousa Guterres, Dili, 22 May 2004.

[57] CAVR Interview with Caetano de SousaGuterres, Dili, 22 May 2004.

[58] Statement by Cristiano da Costa, Commission on Human Rights, 44th Session (item 12), 1988.

[59] FEER, 8 August 1985, in Amnesty International, *Unfair trials and possible torture in East Timor* , December 1985.

[60] See case files for Abilio Tilman (No.72/Pid/B/83/PN.DIL), Caetano de Sousa Guterres (No. 51/Pid/B/1984/PN.DIL), José Simoes (No.03/Pid/B/84/PN.DIL).

[61] Notification of Decision of Dili District Court about Martinho Soares, No.119/Pid/85/PN.DIL, 1 August 1985. The three-page defence statement was submitted on 27 July 1985 by Merry Doko and Asmah Achmad.

[62] Case file of Martinho Soares, No.119/Pid/85/PN.DIL, 1 August 1985.

[63] Case file of Henrique Belmiro, No. 83/Pid/B/84/PN.DIL.

[64] Ibid.

[65] Country Reports on Human rights Practices for 1984, Report submitted to the Committee on Foreign Relations, U.S. Senate, February 1985.

[66] Notification of Decision of Dili District Court about Markus Assis, 115/Pid/B/1984/PN.DIL, 10 November 1984.

[67] "Is it Wrong for a Child to Return to the Mother who Gave it Birth?" Sinar Harapan newspaper, 3 September 1985, excerpted and translated in Amnesty International, *Unfair trials and possible torture in East Timor*, December 1985.

[68] Ibid.

[69] Amnesty International, *East Timor: Unfair Trials and Further Releases of Political Prisoners* , (summary) April 1988.

[70] CAVR Interview with Johnson Panjaitan, Dili, Dili, 14 May 2004.

[71] CAVR Interview with Mário Carrasacalão, Dili, 30 May 2004.p.3.

[72] CAVR Interview with Marito Reis, Baucau, 27 May 2004.p.10.

[73] Letter dated April 30 1984 from Ali Alatas to Thomas Hammarberg.

[74] Amnesty International, East Timor: *Unfair Trials and Further Releases of Political Prisoners* , (summary) April 1988.

[75] "Is it Wrong for a Child to Return to the Mother who Gave it Birth?" *Sinar Harapan* newspaper.

[76] CAVR Interview with Antonio Tomás Amaral da Costa (Aitahan Matak), Dili, 28 April 2004.

[77] Amnesty International, East Timor: *Unfair Trials and Further Releases of Political Prisoners* , (summary) April 1988.

[78] Amnesty International, *Indonesia/East Timor: Santa Cruz: The Government Response* , 6 February 1992, p. 9.

[79] Amnesty International, *Indonesia/East Timor: In Accordance with the Law: Statement to the United Nations Special Committee on Decolonization*, July 1992, p. 5.

[80] Francisco Branco, *Statement to the Serious Crimes Unit*, Dili, 15 May 2001.

[81] Amnesty International, *Indonesia/East Timor: In Accordance with the Law*, p. 2.

[82] Case file of Gregório da Cunha Saldanha 13/PID.B/1992/PD.DIL, Notification of Decision of Dili District Court, p. 153.

[83] Ibid, p. 156.

[84] Commission on Human Rights, Fifty-first Session, Report by the Special Rapporteur, Mr Bruce Waly Ndiaye, on his mission to Indonesia and East Timor from 3 to 13 July 1994, 1 November 1994, p. 5.

[85] Ibid.

[86] Amnesty International, *East Timor: The Santa Cruz Massacre*, p. 2.

[87] Amnesty International, *Indonesia/East Timor: Fernando Lasama de Araujo Prisoner of Conscience* , May 1993, p. 2.

[88] Gregório Saldanha, Statement to the Serious Crimes Unit, 31 March 2001.

[89] Jacinto Alves, Statement to the Serious Crimes Unit, 11 June 2001.

[90] CAVR Interview with Francisco Branco, Dili, 24 November 2002.

[91] CAVR Interview with Francisco Branco, Dili, 30 July 2004.

[92] Bonifacio Magno Statement to the Serious Crimes Unit, Dili, 21 June 2001.

[93] CAVR Interview with Francisco Branco, Dili, 30 July 2004.

[94] Bonifacio Magno, Statement to the Serious Crimes Unit, Dili, 21 June 2001.

[95] Gregório Saldanha, Statement to the Serious Crimes Unit, Dili, 31 March 2001.

[96] CAVR Interview with Francisco Branco, Dili, 24 November 2002.

[97] CAVR Interview with Francisco Branco, Dili, 1 August 2004.

[98] CAVR Interview with Jacinto Alves, Dili, 5 May 2004.

[99] Ibid.

[100] CAVR Interview with Francisco Branco, Dili, 24 November 2002.

[101] CAVR Interview with Francisco Branco, Dili, 1 August 2004.

[102] CAVR Interview with Jacinto Alves, Dili, 5 May 2004.

[103] CAVR Interview with Gregório Saldanha, Dili, 4 June 2004.

[104] Case File of Gregório Saldanha 13/PID.B/1992/PD.DIL, Transcript of Proceeding, p. 99.

[105] Case File of Gregório Saldanha 13/PID.B/1992/PD.DIL, Notification of Decision of Dili District Court, p. 169.

[106] Amnesty International, *Indonesia/East Timor: In Accordance with the Law: Statement to the United Nations Special Committee on Decolonization*, July 1992, p. 3.

[107] CAVR Interview with Jacinto Alves, Dili, 5 May 2004.

[108] Amnesty International, *Indonesia/East Timor: Political Prisoners and the "Rule of Law'* , January 1995, p. 10.

[109] CAVR Interview with Jacinto Alves, Dili, 5 August 2004.

[110] Ibid.

[111] CAVR Interview with Gregório Saldanha, Dili, 4 June 2004.

[112] CAVR Interview with Francisco Branco, Dili, 1 August 2004.

[113] Case file of Francisco Branco, 14/PID.B/1992/PD.DIL, Record of Interrogation of Francisco Branco on 13-15 January 1992, p. 1.

[114] Case file of Francisco Branco, 14/PID.B/1992/PD.DIL, Transcript of Proceeding, p. 3.

[115] Yayasan Lembaga Bantuan Hukum Indonesia (YLBHI) , "Indonesian Human Rights Forum", *YLBHI Newsletter,* No. 4/1992 of April-June 1992, p. 16.

[116] Case File of Francisco Branco, 14/PID.B/1992/PD.DIL, Transcript of Proceeding, p. 7.

[117] The telegram was referred to in Gregório Saldanha's trial, see Case File of Gregório Saldanha 13/PID.B/1992/PD.DIL, Transcript of Proceeding, p. 18.

[118] Amnesty International, Indonesia/East Timor: In Accordance with the Law: Statement to the United Nations Special Committee on Decolonization, July 1992, p. 3.

[119] See Article 55(1) KUHP.

[120] See Article 110(1) KUHP.

[121] CAVR Interview with Gregório Saldanha, Dili, 4 June 2004.

[122] CAVR Interview with Francisco Branco, Dili, 1 August 2004.

[123] CAVR Interview with Jacinto Alves, Dili, 5 May 2004.

[124] Commission on Human Rights, Forty-Ninth Session, Situation in East Timor: Report of the Secretary-General, 10 February 1993, p. 15.

[125] International Commission of Jurists, "Tragedy in East Timor", October 1992, as summarised in Commission on Human Rights, Forty-Ninth Session, Situation in East Timor: Report of the Secretary-General, 10 February 1993, pp. 14-15.

[126] Commission on Human Rights, Forty-Ninth Session, Situation in East Timor: Report of the Secretary-General, 10 February 1993, pp. 14-15.

[127] Case File of Gregório Saldanha 13/PID.B/1992/PD.DIL, Transcript of Proceeding, p. 218.

[128] CAVR Interview with Gregório Saldanha, Dili, 4 June 2004, p. 3.

[129] Case file of Gregório Saldanha 13/PID.B/1992/PD.DIL, Notification of Decision of Dili District Court, p. 159.

[130] Case file of Gregório Saldanha 13/PID.B/1992/PD.DIL, Defence submissions summarised in Counter Appeal Memo, p. 4.

[131] Luhut M.P. Pangaribuan, testimony to the CAVR National Public Hearing on Political Imprisonment, Dili, 18 February 2003.

[132] CAVR Interview with Jacinto Alves, Dili, 5 May 2004.

[133] CAVR Interview with Francisco Branco, Dili, 1 August 2004.

[134] Case file of Gregório Saldanha No.13/PID.B/1992/PD.DIL, Prosecution response to the defence exception, p. 8.

[135] Case file of Francisco Branco, No. 14/PID.B/1992/PD.DIL, Defence statement, p. 1.

[136] Ibid, p. 2.

[137] CAVR Interview with Francisco Branco, Dili, 1 August 2004.

[138] Ibid.

[139] Case file of *Gregório* Saldanha No. 13/PID.B/1992/PD.DIL, Defence written response to the prosecution indictment.

[140] Case file of Jacinto das Neves Raimundo Alves, No. 15/PID/B/1992/PN.DIL, Defence statement, p. 9.

[141] Ibid, p. 28.

[142] CAVR Interview with Francisco Branco, Dili, 1 August 2004.

[143] Case File of Gregório Saldanha 13/PID.B/1992/PD.Dili, Trial transcript, p. 67.

[144] Case file of Jacinto Alves, No.15/PID/B/1992/PN.DIL, Decision of Dili District Court, p. 235.

[145] Ibid, p. 218.

[146] Amnesty International, Indonesia/East Timor: In Accordance with the Law: Statement to the United Nations Special Committee on Decolonization, July 1992, p. 4.

[147] Case file of Francisco Branco, No.14/PID.B/1992/PD.DIL, Decision of Dili District Court, p. 116.

[148] Case file of Gregório Saldanha No. 13/PID.B/1992/PD.DIL, Notification of Decision of Dili District Court of Instance, p. 217.

[149] See for example Case File of Francisco Branco No. 14/PID.B/1992/PD.DIL, Decision of Dili District Court of Instance, p. 155, Case file of Jacinto Alves, No.15/PID/B/1992/PN.DIL, Decision of Dili District Court of Instance, p. 236.

[150] In court files there are appeal decisions from the Kupang High Court for Francisco Branco, Gregório Saldanha, Jacinto Alves, Filomeno Pereirra and Juvencio Martins.

[151] CAVR Interview with Francisco Branco, Parliament House, 1 August 2004, p. 6.

[152] Article 14(5) of the ICCPR: Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

[153] Kupang High Court Decision No. 56/PID/1992/PTK, p. 63. in Case file of Gregório Saldanha No. 13/PID.B/1992/PD.DIL,

[154] Case file of Bonafacio Magno, No. 97/PID/B/84/PN.DIL., Applications and Decision re Clemency.

[155] Amnesty International, Indonesia/East Timor: In Accordance with the Law: Statement to the United Nations Special Committee on Decolonization, July 1992, p. 2.

[156] International Commission of Jurists, *Tragedy in East Timor*, October 1992, p. 15.

[157] YLBHI, *East Timor case: Case Handling Report*, Jakarta, 1992.

[158] Ibid.

[159] Case Files of Fernando Lasama de Araújo, Virgilio da Silva Guterres, Agapito Cardoso and Domingos Barreto.

[160] CAVR Interviews with João Freitas da Camara, Dili, 5 June 2004; Fernando de Araújo, Dili, 5 May 2004; Virgilio da Silva Guterres, Dili, 5 May 2004; Domingos de Jesus Barreto, Dili, 6 May 2004.

[161] CAVR Interviews with Asmara Nababan, Jakarta Pusat, 8 June 2004; Luhut M.P. Pangaribuan, Jakarta Pusat, 9 June 2004; Munir, S.H, Jakarta Pusat, 9 June 2004; Artidjo Alkostar, S.H., LL.M, Jakarta Pusat; June 2004; Hendardi, Jakarta Pusat, 10 June 2004.

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[168] *Eksepsi*, Fernando Lasama de Araújo, Jakarta 23 March 1992, pp. 4-5.

[169] YLBHI, *East Timor case: Case Handling Report*, Jakarta, 1991, p. 6

[170] CAVR Interview with João Freitas da Camara, Dili, 5 June 2004.

[171] CAVR Interview with Domingos de Jesus Barreto, Dili, 6 May 2004.

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[173] CAVR Interview with Fernando de Araújo, Dili, 5 May 2004.

[174] Fernando Lasama de Araújo, "Pleadings", p. 7

[175] *Duplik* in the case of João Freitas da Camara, read in Central Jakarta District Court, 13 May 1992, p. 7.

[176] Record of Interrogation João Freitas da Camara, 10 December 1991.

[177] *Duplik* in the case of João Freitas da Camara, p. 8.

[178] Fernando de Araújo, Consideration on the reply of the prosecutor regarding our plea and that of our legal counsel. Jakarta, 18 May 1992, p. 9.

[179] CAVR Interview with João Freitas da Camara, Dili, 2004.

[180] CAVR Interview with Fernando de Araújo, Dili, 5 May 2004.

[181] Ibid.

[182] Central Jakarta Office of General Prosecutor, Letter of Indictment Subversion Case, Defendant João Freitas da Camara, Jakarta, 3 March 1992, p.23.

[183] Central Jakarta Office of General Prosecutor, Letter of Indictment of Subversion Case, Defendant Fernando de Araújo, Jakarta, 2 March 1992.

[184] CAVR Interview with Fernando de Araújo, Dili, 5 May 2004.

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[186] See Letters of Indictment for the Defendants.

[187] Criminal Charge on the Defendant Virgilio Da Silva Guterres, Jakarta, 25 April 1992, pp. 36-37.

[188] CAVR Interview with Fernando de Araújo, Dili, 5 May 2004.

[189] CAVR Interview with João Freitas da Camara, Dili, 5 June 2004.

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[194] Ibid.

[195] CAVR Interview with Xanana Gusmão, Dili, 10 August 2004, p. 3.

[196] Asia Watch, *Remembering History in East Timor*, p. 8

[197] CAVR Interview with Xanana Gusmão, Dili, 10 August 2004, p. 2.

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[205] Ibid, p. 9.

[206] Ibid.

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[208] CAVR Interview with Xanana Gusmão, 10 August 2004.

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