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TORTURE AND TRANSITIONAL JUSTICE IN TIMOR LESTE

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Executive Summary

This report provides a snapshot of how the serious violation of torture is addressed within transitional justice mechanisms in Timor Leste; specifically, how torture is defined, investigated and indicted by the Serious Crimes Unit (SCU) and how the Special Panels for Serious Crimes (SPSC) respond to the torture cases that come before them. It draws on documentation released by the Serious Crimes Unit and the Special Panels for Serious Crimes. It also presents data gathered through interviews with staff of those organizations as well as with survivors of torture, victims' families, CAVR staff and workers of non-governmental organizations in Timor Leste.

The report finds that, although torture was extensively used during the Indonesian occupation, the serious crimes process in Timor Leste has failed to effectively investigate and prosecute this crime against humanity. The SCU has narrowed its mandate to such an extent that torture charges are secondary to counts of murder and rape. Further, all 26 of those who have faced torture charges in court have been Timorese. In processing low-level militia members who do not bear the greatest responsibility for serious crimes, the transitional justice system has failed to bring Indonesian commanding officers to trial.

The report demonstrates that there has been inconsistency regarding the response to torture in the serious crimes process. Within the SCU, there has not been a systematic approach to building cases and definitions have rested on the discretion and politics of individual prosecutors. In the court room, judges have also taken a confused approach to the definition of torture. With torture proven in just four out of nine cases, the report examines the issues of prosecutorial preparations and the reliability of witness testimony to show how prosecutors have struggled to convict torture.

There is also concern that the SCU has, on occasion, lowered the threshold of torture within indictments. Some alleged activities have not actually constituted the level of seriousness warranted for a torture charge. In some cases, 'serious crime' charges taken by the SCU overlap with 'non-serious crime' charges that have progressed through the Community Reconciliation Process of the Commission for Reception, Truth and Reconciliation (CAVR).

The report argues that attempts to ensure human rights standards across state institutions must be prioritized. The number of allegations of maltreatment has risen during 2004-2005 and it is evident that political leaders could do more to send clear signals that human rights should be protected.

Finally, it notes that the current judicial approach to torture goes against the human rights standards that are established through various human rights instruments and bodies. By law, torture survivors should receive acknowledgement, justice and reparation for the harms inflicted upon them. The attempts made by the serious crimes process in Dili has failed to effectively pursue these ends. Torture survivors have, in response, called for an international tribunal to meet their needs.

1. Introduction and Methodology

Torture was a major feature of Indonesian occupation in Timor Leste. From 1975 to 1999, torture was commonplace in prisons and detention facilities across the region. Among other things, torture was used to spread terror, to coerce compliance, to punish, to gather information, to humiliate, to create informers or regime 'supporters' and to make political opposition ineffective. Many individuals were tortured and then subsequently killed, accounting for some of the estimated 200,000 people who were murdered during the Indonesian occupation[1]. However, there are a significant number of Timorese people who also survived such serious violation. These individuals face many problems in the aftermath of their victimisation – international literature[2] repeatedly details that torture survivors face diverse psychological and physical difficulties; they may find themselves unable to work, or less able to cope with family life. They may also find it difficult to publicly acknowledge what has happened to them, particularly when the violence inflicted is regarded as particularly shameful. Such repercussions of torture are faced by survivors in Timor Leste on a daily basis[3].

At an international level, the seriousness of torture has been readily recognised. Through an array of human rights instruments and bodies (including the UN Convention against Torture, the Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights, three regional mechanisms[4], a Special Rapporteur and a focused UN Committee), torture is universally condemned[5]. It is one of the few rights that is universally applied and cannot be derogated from. Despite this, torturers are rarely punished[6]. Together with the fact that torture is infrequently reported in the media and seldom the subject of political discussion[7], survivors of torture are left with limited ideological or pragmatic support; in the wake of their suffering, they receive little recognition for the crimes inflicted against them[8].

In this context, this short report provides a snapshot of how the serious violation of torture is addressed within transitional justice mechanisms in Timor Leste;

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1 Human Rights Watch Asia (1994) The Limits of Openness: Human Rights in Indonesia and East Timor, NY: HRW; Pinto, C and Jardine, M (1997) East Timor's Unfinished Struggle: Inside the Timorese Resistance, Boston: South End Press; Taylor, J (1991) Indonesia's Forgotten War: The Hidden History of East Timor, London: Zed Books.

2 Agger, I & Buus Jensen, S (1996) Trauma and Healing under State Terrorism, London: Zed Books; Becker, D, Lira, E, Castillo, M, Gómez, E & Kovalskys, J (1990) 'Therapy with Victims of Political Repression in Chile: The Challenge of Social Reparation', Journal of Social Issues, vol 46, no 3, pp 133-149; Cienfuegos, A, J & Monelli, C (1983) 'The Testimony of Political Repression as a Therapeutic Instrument', American Journal of Orthopsychiatry, vol 53, no 1, pp 43-51; Turner, S & Gorst-Unsworth, C (1990) 'Psychological Sequelae of Torture: A Descriptive Model', British Journal of Psychiatry, vol 157, pp 475-480.

3 Detailed to the author by members of the Dili-based 'Program for Psychosocial Recovery and Development in East Timor (PRADET).

4 Specifically the European Convention on Human Rights, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights.

5 Rehman, J (2003) International Human Rights Law: A Practical Approach, Harlow: Pearson Education.

6 Conroy, J (2001) Unspeakable Acts, Ordinary People, London: Vision.

7 Albeit the small surge in debate regarding the treatment of prisoners held by the United States at Guantanamo Bay, Cuba and at Abu Ghraib prison, Iraq.

8 Stanley, E (2004) 'Torture, Silence and Recognition', Current Issues in Criminal Justice, vol 16, no 1, pp 5-25.

specifically, how torture is defined, investigated and indicted by the Serious Crimes Unit (SCU) and how the Special Panels for Serious Crimes (SPSC) respond to the torture cases that come before them.

The data for this report is taken from research undertaken by an academic associate of JSMP. It is based on analyses of documentation from the SPSC, the SCU and the Commission for Reception, Truth and Reconciliation (CAVR). In addition, in February 2004 and November-December 2004, the author undertook over 50 interviews and meetings with staff of those organizations as well as with survivors of torture, victims' families and workers of non-governmental organizations in Timor Leste. Finally, the author also used information taken from previous JSMP research reports. With further time and resources, it is hoped that in-depth research can also be undertaken on how survivors of torture think about the transitional justice mechanisms in Timor Leste. More research is required to detail survivors' perceptions of these processes and their future priorities for healing, justice and reconciliation.

2. Torture in East Timor

The Commission for Reception, Truth and Reconciliation (CAVR) has taken 8000 statements on human rights violations. Through interviews and written submissions, Timorese people have reported on the range and extent of violence suffered by the population – including forced removals, rape and sexual violence, murder, massacres, famine and political imprisonment. The serious crime of torture has appeared in many statements and CAVR staff indicate that 3558 of the 8000 testimonies highlight acts of torture and severe or inhumane suffering[9].

This initial CAVR 'count' re-iterates the data put forward by human rights organisations, such as Amnesty, Human Rights Watch, TAPOL and ETAN. While torture was certainly used by pro-independence militia members (the extent of which may become apparent through the publication of the CAVR report), it formed a central plank of Indonesian control. Thus, Human Rights Watch Asia[10] detailed that torture was used throughout East Timorese detention centres but it was endemic in the military interrogation centres used to detain East Timorese immediately after arrest. The Indonesian Commission on Human Rights Violations in East Timor[11] similarly proposed that torture was a vital element of pro-Indonesian militia activity:

> *In almost every case of violence committed by members of the TNI, Polri and militias, there is proof that the civilian public was subject to torture and ill-treatment due to their differing political views. Before the popular consultation, the militias tortured and ill-treated civilians who refused to become militia members. After the announcement of the results of the popular consultation, terror, intimidation and death threats occurred during every attack and assault and destruction of physical infrastructure, including attacks on fleeing refugees.*

9 Sanne Van den Bergh, CAVR, in interview with the author, 17 November 2004.
10 Human Rights Watch Asia (1994), see note 1.
11 KPP-HAM, Indonesian Commission on Human Rights Violations in East Timor (2000) Executive Summary Report on the Investigation of Human Rights Violations in East Timor, accessed at: http://www.etan.org/news/2000a/3exec.htm.

In 2000, the International Rehabilitation Council for Torture Victims (IRCT) undertook a national psychosocial needs assessment in East Timor. Having interviewed members of 1033 households, they show that, despite under-reporting, 587 respondents said that they had been exposed to torture[12]. As they further detail:

> *Psychological torture (411 [40%]), physical beating or mauling (336 [33%]), and beating the head with or without a helmet (267 [26%]) were the most common forms reported, and other forms of torture included submersion in water (126 [12%]), electric shock (124 [12%]), crushing of hands (102 [10%]), and rape or sexual abuse (54 [5%])…207 (20%) respondents believed that they would never recover from their experiences, and a further 424 (41%) believed they would only recover with some help.*

With regard to rehabilitation, it is clear that survivors require specific medical care together with community-oriented psychosocial and rehabilitation programmes. Thus, rare Timorese organisations, like the Program for Psychosocial Recovery and Development in East Timor (PRADET) have faced overwhelming workloads with limited staff and budgets; given the lack of appropriate services, most survivors have had to draw on church and traditional community measures for support[13].

However, as wider international literature[14] shows, survivors of serious human rights violations also connect their recovery to justice. At a social level, survivors regularly seek support in employment, training, education or other welfare assistance; however, many also place emphasis on opportunities for criminal justice. From initial interviews with survivors of torture in Timor Leste, the desire for the prosecution of torturers and their superiors is clear. As Maria[15] explained her involvement in a CAVR public hearing:

> *I agreed to talk about reconciliation but those who were involved should be brought to justice because only justice can ensure that this country will be well. In a country which has law and order, there must be justice.*

While Antonio[16] argued:

> *There must be justice…how can we make reconciliation without justice? This is the scene proposed by Xanana and the UN. But, there will only be good relations among the people if there is justice…the peace can only be maintained if there is justice.*

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12 Modvig J, Pagaduan-Lopez J, Rodenburg J, Salud C M D, Cabigon R V and Panelo C I A (2000) 'Torture and Trauma in Post-Conflict East Timor', The Lancet, 18 November, vol 356, p 1763.

13 Silove D, Coello M, Tang K, Aroche J, Soares, M, Lingam R, Chaussivert M, Manicavasagar V and Steel Z (2002) 'Towards a Researcher-Advocacy Model for Asylum Seekers: A Pilot Study Amongst East Timorese Living in Australia', Transcultural Psychiatry, vol 39, no 4, 452-468.

14 Bacic, R (2002) 'Dealing with the Past: Chile – Human Rights and Human Wrongs', Race and Class, vol 44, no 1, pp 17-31; Stanley (2004), see note 8.

15 In interview with author, 23 November 2004.

16 In interview with author, 24 November 2004.

Evidently, trials and punishment are an important part of 'dealing with the past' for torture survivors. This report now turns to an examination of the mechanisms established to pursue criminal justice for past human rights violations in Timor Leste.

3. Transitional Justice in Timor Leste

At the start of the transition from Indonesian occupation in Timor Leste, the UN made a commitment to participate in bringing those 'responsible for grave violations of international humanitarian and human rights law' to account[17]. To this end, the United Nations Transitional Authority in East Timor (UNTAET) established a number of bodies that would assist in bringing both truth and justice to Timor Leste.

The Special Panels for Serious Crimes (SPSC) – a judicial tribunal that brings together international and national judges – was formed[18] to deal with serious criminal offences. The SPSC has universal jurisdiction over murder and sexual offences if they occurred between 1 January 1999 and 25 October 1999, while there is no limit imposed on charges of genocide, war crimes and crimes against humanity - these latter crimes can be tried regardless of whenever they occurred.

The Serious Crimes Unit (SCU) was set up[19] to conduct investigations and prosecute cases in the SPSC. Like the SPSC and the Defence Unit, the SCU is primarily staffed and funded through the UN although it operates directly under the authority of the Prosecutor General. Thus, the UN has significant control over the serious crimes process – UN resources have impacted on the scale of operations and UN instructions have, as detailed below, underpinned the extent of investigations. While the SCU was due to close on 20 May 2004, the UN has extended its mandate: it completed investigations in November 2004 and the SPSC is to complete all trials by 20 May 2005. It is still not clear what will happen to judicial attempts to deal with serious crimes after this date.

Finally, under UNTAET Regulation 2001/10, the Commission for Reception, Truth and Reconciliation (CAVR) was established. The CAVR, due to complete its work in July 2005, has operated: to seek and establish the truth regarding the nature, causes and extent of human rights violations that occurred between April 1974 and October 1999; to support the reception and reintegration of individuals who caused harm to their communities through minor criminal offences; and, to compile a report of findings, and make recommendations to the government. While the Commission has operated independently from judicial mechanisms, it has taken a close working relationship with the SCU through its Community Reconciliation Process (CRP).

The CRP was designed to provide an alternative to the formal justice system for resolving 'less serious' crimes (such as theft, minor assault, arson, killing of livestock and destruction of crops)[20] committed between April 1974 and October 1999. CRP hearings were initiated at the request of a perpetrator, who submitted a written

17 United Nations Security Council Resolution 1319 (2000).
18 UNTAET Regulation 2000/15.
19 UNTAET Regulation 2000/16.
20 Schedule 1 of UNTAET Regulation 2001/10 also states that serious criminal offences (such as murder, torture and sexual offences) shall not be dealt with in a Community Reconciliation Process.

statement that included an admission of their guilt[21]. This statement was then forwarded to the Office of the General Prosecutor (OGP), which determined whether it was an appropriate matter for the serious crimes process. All statements involving serious violations were to be retained by the SCU. Statements based on less serious offences were to progress to the CRP stage (in which deponents would face their victims and other community members, explain their actions and undertake an Act of Reconciliation). Thus, while pursuing distinctly different ends, there is a sense of continuity between the transitional mechanisms of the SCU and CAVR. Indeed, as shown below, the CAVR has operated on the basis that the SCU will indict, and bring to trial, perpetrators of serious crimes in Timor Leste.

3.1. The Prosecutorial Focus of the SCU

The investigation and prosecution of serious crimes in the SPSC is directed and supervised by the Deputy General Prosecutor (DGP) for Serious Crimes, the UN appointed and funded head of the SCU. UNTAET Regulation 2000/16 (s14.4) states that the DGP has 'exclusive prosecutorial authority' over this process. Of course, as inferred above, the DGP has to operate within certain guidelines - the mandate of the SCU is to investigate and prosecute the serious criminal offences of genocide, war crimes, crimes against humanity, murder, sexual offences and torture – however, he/she has a key role in setting the boundaries of the serious crimes process.

The SCU's jurisdiction is exclusive over the crimes of murder and sexual offences if committed between 1 January 1999 and 25 October 1999 and over the other crimes within its mandate no matter when they were committed. Therefore, the scope of the SCU's jurisdiction is not temporally limited through UNTAET regulation[22] - all genocide, war crimes and crimes against humanity cases, regardless of when and where they were committed, may potentially be tried before the SPSC.

Despite this mandate, the SCU has failed to bring any charges for events that occurred before 1999. While some commentators[23] propose that this 1999 focus is a matter of policy that has not been subject to serious reconsideration, 'a significant degree of uncertainty' does continue to exist 'over whether the SCU and the SPSC are required to investigate and prosecute' pre-1999 crimes[24]. Certainly, the former DGP, Nicholas Koumjian[25], argues vehemently that the 1999 focus is based on a number of factors, namely:

- Neither the UN Security Council nor the UN Secretary General have instructed the SCU to investigate pre-1999 cases. Instead, they 'have consistently directed the unit to concentrate on concluding the 10 priority cases and widespread pattern cases from 1999'

21 See JSMP (2004) Unfulfilled Expectations: Community Views on CAVR's Community Reconciliation Process, August, Dili: JSMP.
22 Open Society and the Coalition for International Justice (2004) Unfulfilled Promises: Achieving Justice for Crimes against Humanity in East Timor, November, Open Society and CIJ.
23 Such as the Open Society and CIJ (see note 22).
24 JSMP (2004) The Future of the Serious Crimes Unit, January, Dili: JSMP, page 4.
25 In interview with the author, 23 November 2004.

- Neither the General Prosecutor nor the Timorese government has 'instructed or requested the unit to investigate or prosecute pre-1999 cases'

- The jurisdiction of the SPSC, and SCU, has been restricted by the new Constitution of Timor Leste (which has taken precedence since independence in May 2002). Section 163.1 of the Constitution provides:

> *The collective judicial instance existing in East Timor, composed of national and international judges with competencies to judge serious crimes committed between 1st of January and 25th of October 1999, shall remain operational for the time deemed strictly necessary to conclude the cases under investigation.*

From this, in the DGP's view, the Timorese constitution bars the SCU from considering cases that fall outside of 1999.

While this 1999 focus can be understood – the violations received international attention; the UN felt that its authority had been attacked; the evidence would be more readily remembered and collected[26]– this practical narrowing of the UNTAET mandate is at odds with the wishes of the general public in Timor Leste. JSMP consultations have repeatedly shown that there is a widespread desire to hold trials for serious human rights abuses committed from 1975 onwards. As highlighted in other transitional states, like Chile, Guatemala and South Africa, this issue will not likely go away[27].

Given the 1999 focus, many survivors of torture are unlikely to experience the justice they demand. This situation is made worse, however, by a further narrowing of the SCU mandate from October 2003. With the arrival of the former DGP, Nicholas Koumjian, written guidelines on the prioritization of investigations and indictments were issued. These guidelines imposed further restrictions on the crimes to be pursued by SCU staff. As the DGP[28] explains,

> *Under this current policy, indictments have been restricted to cases against those who organised the violence and direct perpetrators of murders or sexual assaults where the evidence was particularly strong…The current policy is not to file cases where an accused is "only" charged with crimes such as…torture, even when those crimes qualify as crimes against humanity.*

From October 2003, then, the SCU has concentrated on cases of murder and rape. The particular reason why this focus was taken was based on the DGP's assessment of the CAVR. As he details, the willingness of communities to accept back those who were aligned with the militia is

26 Open Society and CIJ (2004), see note 22.
27 Stanley, E (2002) 'What Next? The Aftermath of Organised Truth Telling', Race and Class, vol 44, no 1, pp 1-15.
28 In interview with the author, 23 November 2004.

dependent on justice for those perpetrators of the most serious crimes. Timorese communities are willing to forgive arsons and forced deportations but not the murder or rape of loved ones.

One could ask: are Timorese communities more willing to forgive the torture of loved ones? From the remarks of survivors made earlier, as well as the decision of the CAVR to exclude torture from CRPs, one might argue 'no'.

The distinction between the seriousness of rape and torture, in particular, seems to be misplaced. Following murder, rape and torture represent the most serious violations that can be inflicted on an individual. SCU prosecutors[29] have proposed that rape was retained as a focus due to the vigorous campaigning of feminist groups on the issue as well as a political commitment to prosecuting rape by some SCU staff. Rape as a crime against humanity has, since the rulings at the Ad Hoc Courts of the Former Yugoslavia and Rwanda, finally started to gather the judicial attention it deserves. JSMP is encouraged that such violations have been taken seriously by the SCU. However, the exclusion of torture from investigations and indictments does appear to be incongruous, given its comparative level of severity with rape. Invariably, this omission will mean that the severity and extent of torture, used throughout Timor Leste, will be missed from official judicial registration.

From October 2003, torture has not been a key concern in the investigations and indictments of the SCU. As detailed below, this does not mean to state that torture has been ignored completely – as it has formed counts in subsequent cases – however, it does indicate that it has lesser prominence. Moreover, some SCU staff[30] have suggested that counts of torture have been taken out of recent indictments despite clear evidence and reliable witnesses. The reason why this has occurred remains unclear.

3.2. Statistics

Detailed statistics on cases indicted and brought to trial by the Serious Crimes Unit (SCU) have not been readily available. Until relatively recently, SCU staff have not enjoyed the benefits of a reliable database that could provide hard data on accused persons, victims, witnesses, details of charges, status of cases, and so on. While this issue is finally beginning to be addressed, SCU staff continue to indicate reservations on data provided. Moreover, as cases are subject to change – with indictments being added or amended, cases progressing to trial, etc – the situation on firm data is further compromised. The data below therefore, albeit generally useful, must be viewed in this light[31].

By the end of January 2005, the SCU had issued 98 indictments, of which 24 contained initial counts of torture. 124 of the 403 individuals listed in the indictments were charged with torture, with some accused being charged in multiple indictments. Thus, it is clear that these indictments represent the 'tip of the iceberg' with regard to

29 Essa Fael (23 Feb 2004; 1 Dec 2004), Shymala Alagendra (24 Feb 2004) and Marek Michon (1 Dec 2004), in interviews with the author.
30 These individuals asked to retain anonymity.
31 JSMP has sought to verify the numbers presented here, by tracking through SCU documentation.

the number of people who have perpetrated torture during 1999, and throughout the occupation. It can also be noted that, as detailed above, the narrow prosecutorial focus of the Serious Crimes Unit has resulted in a situation where the crime of torture has not been indicted on its own. Instead, torture charges tend to be dove-tailed with 'more serious' charges of murder and rape[32].

Of the 124 individuals that have been indicted with torture, the majority (80) are of Timorese nationality. Only 20 accused are known to be Indonesian and 24 are of Unknown or Uncertain Nationality. This crime-specific nationality breakdown reflects the statistics on accused persons more broadly. Less than 60 of the 403 accused persons are Indonesian nationals.

By 11 January 2005, the SCU had completed trials for 76 accused persons, with 74 being convicted on one or more charges. As noted by the Open Society Institute and the Coalition for International Justice[33], this large number of convictions surpasses the number reached by any international or hybrid tribunal. Workers within the Serious Crimes Unit have indicated that this rate of convictions is, variously, indicative of thorough investigations, sound preparation of files, firm evidence and competence of the prosecutorial team[34]. However, some defence counsel[35] have argued that the conviction rate reflects a judicial eagerness to convict as well as significant problems in defence resources and administration. Certainly, compared to the prosecution team, it is clear that defence counsel have been less qualified and less experienced to take cases of international law, and their unit has suffered significant under-funding (to the extent that those charged are not independently represented).

4. Definitions of Torture

Given the international acceptability of conventions and jurisprudence relating to torture, the SPSC have noted that torture is a norm of customary international law and a crime of *jus cogens*, ie. compelling or higher law that cannot be violated anywhere.

The widely signed UN Convention against Torture (Art 1.1) defines torture as an act of severe pain or suffering, whether physical or mental,

> *intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*

32 Interview with Nicholas Koumjian, 23 November 2004.
33 See note 22.
34 Dave Savage (21 Feb 2004; 21 Nov 2004), Nicholas Koumjian (23 Nov 04), Essa Fael (23 Feb 2004; 1 Dec 2004), Shymala Alagendra (24 Feb 2004) and Marek Michon (1 Dec 2004), in interviews with the author.
35 The author has interviewed a number of members of Defence Counsel however these individuals have asked to remain anonymous.

However, in Timor Leste, the crime of torture is defined differently. Further, under UNTAET Regulation 2000/15 torture has two definitions, dependent on whether it is classed as a crime against humanity or as an autonomous crime.

Section 7.1 of UNTAET Regulation 2000/15 establishes torture as an autonomous offence, and notes that,

> *Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him/her or a third person information or a confession, punishing him/her for an act he/she or a third person has committed or is suspected or having committed, or humiliating, intimidating or coercing him/her or a third person, or for any reason based on discrimination of any kind. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*

Although this definition is similar to that found in the UN Convention, there is a firm difference as Section 7.1 does not require that torture be linked to a person of official standing or with official approval. Instead, Section 7.1 is noted to be consistent with the jurisprudence of the International Criminal Tribunal of the Former Yugoslavia (ICTY) which held that 'the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture[36]. Thus, as an autonomous crime, the element of torture that the perpetrator of torture must be a public official has been abandoned.

As a crime against humanity, an act of torture is defined more broadly still. Section 5.2(d) of UNTAET Regulation 2000/15 provides that,

> *"Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions*

This definition of torture, taken verbatim from that found in the Rome Statute of the International Criminal Court (article 7(2)(e)), does not require that torture be conducted for a specific purpose, or that the perpetrator has some official standing or support. Of course, to prove this charge, the act must qualify as a crime against humanity. As such, under the *chapeau* requirements, the conduct must be knowingly committed as part of a widespread or systematic attack directed against a civilian population.

4.1. SPSC Confusion over Torture's Definition

The SPSC have questioned the two definitions found in the UNTAET regulation and note that they have caused some confusion, particularly in resolving cases where the purpose or aim of torture is not clear. The element of purpose or aim, is a crucial

36 The Trial Chamber in Prosecutor v Dragoljub Kunarak, Radomic Kovac and Zoran Vukovic, IT-96-23/1, Judgment, at 148.

element of torture under Section 7 of the UNTAET regulation, however it is omitted in the definition of Section 5.

In *Salvador Soares* (7/2000, Judgment:222) the court declared that the crime of torture '*has to be accompanied by an intention (subjective element) to torture'*. As such, while a murder can follow an act of torture,

> *an action primarily aimed at causing the death of a person cannot be regarded as torture for the mere reason of being painful or unnecessarily painful. If such an idea would be admitted almost every murder could be considered torture.*

Therefore, despite the charge of torture as a crime against humanity[37], the Judges in *Soares (7/2000)* argue that if the aim or intention of an attack is to cause the death of a victim, then torture cannot be proven.

This approach to intent was also taken by the Judges in the case of *Rusdin Maubere* (23/2003). Maubere was indicted for the torture and forced disappearance of André de Oliveira. In court, it was proven that Oliveira's injuries were so serious that he died on the night of the attack and his body was buried in a shallow grave. For unknown reasons, the body was not found when an exhumation was conducted. The judges found that the perpetrator had beaten the victim in a way that would inevitably cause death from injuries. Following this, they acquitted Maubere of torture and forced disappearance but then 're-qualified' the material facts and found Maubere guilty of voluntary homicide. As they argue, 'the norm that punishes homicide…consumes the protection that is sought after in the crime of torture' (23/2003 Judgment: 17). Oliveira's death indicated to the Panel that Maubere intended to kill, rather than torture, him; he was subsequently found guilty of murder and sentenced to three years in prison[38].

This decision contrasts with the judges in the recent *Mesquita* case (28/2003, Judgment:104) as they argued

> *…it is enough to demonstrate that the accused have willingly participated in the severe beating of the victims, in the case a beating of such severity as to provoke them to bleed, to faint and probably die, being restrain by ligatures for part of the time, therefore causing an intentional physical suffering for their conducts qualify as a torture under the meaning of the term in the context of crimes against humanity* (Quoted directly from transcript).

37 Which does not require that torture be linked to a specific purpose.

38 The decision in Maubere appears to breach UNTAET Regulation 2000/30 (Section 32.4) that says: 'The accused shall not be convicted of a crime that was not included in the indictment, as it may have been amended, or of which the accused was not informed by the judge. For purposes of the present subsection, a crime which is a lesser included offense of an offense which is stated in the indictment shall be deemed to be included in the indictment'.

According to the judges in *Mesquita* (28/2003), regardless of aim or intention, a severe beating that will probably cause death can be defined as torture[39]. While this latter judgment, that dismisses the aim of severe violence, fits with the Regulation definition of torture as a crime against humanity, it does contradict the *Soares* (7/2000) and *Maubere* (23/2003) judgments. In sum, there has not been a consistent approach taken by the SPSC judges to the definition of torture.

5. Indicting Torture

Notwithstanding the issues of jurisdiction and mandate, outlined above, the serious crimes process in Timor Leste will still provide one of the few means by which Timorese people, as well as the international community, can learn about the violence inflicted during Indonesian occupation. As well as providing a sense of justice, such processes also have a key role in establishing an official truth of events. It is useful, therefore, to consider how torture has been represented within the serious crimes process.

An analysis of the 24 indictments, containing counts of torture, indicates that torture has been most readily linked to acts of severe beating. In many instances, individuals were arrested and detained by militia members or Indonesian military and subject to physical attack. Such beatings, often undertaken with sticks, rifle butts and iron bars, regularly involved multiple assailants – and they were often undertaken while the victim was detained in a militia house or tied to a tree or a post outside. These kind of acts reflect the wider violence inflicted during the chaotic period of 1999.

5.1. Lowering the Threshold of Torture?

The Open Society Institute and the Coalition for International Justice[40] proposed that the mandate of the SCU has been stretched 'beyond recognition' by the indictment and trial of 'low-level perpetrators whose offences fall far short of the threshold for crimes against humanity…individual beatings that might properly be charged as simple or aggravated assault have been charged as "torture"'[41]. The concern that such commentators have is that some activities, albeit serious, may not actually constitute the level of seriousness warranted for a torture charge. So, while an argument can be made that the SCU has not charged enough torture cases, it could be said that they have also sought to broaden out the definition; that is, they have lowered the threshold of torture.

Certainly, in some indictments, the violence charged as torture does not readily illustrate the seriousness one might expect. The line between serious assault and torture does, at times, appear to be finely drawn. In the indictment of *Maliana (18/2003: para 65-70)*, for example, the charge of torture is described as follows:

39 This approach can also been seen in Marcelino Soares (11/2003). Here, the judges held that torture could be proven despite the fact that 'The accused was aware that the death of Luis would occur in the ordinary course of events as a result of the severe injuries inflicted' (s.5). Death was an inevitable result of the injuries being inflicted, however that act could still be charged as torture.
40 See note 22, at 37.
41 Ibid.

> *Manuel Tilman…was accused of being a FALINTIL member, he was then beaten by TNI members…TNI members…also beat Abelio Cardoso…Abelio Cardoso and Manuel Pinto Tilman were then taken to the Loumea river where they were beaten with an electrical cable by a militia member.*

While such activities may be violent, can they be said to constitute torture? In the case of *Mesquita (28/2003)*, the 8 defendants who were convicted with torture were collectively charged with beating 2 victims 'very severely'. The Judgment details that one victim, Thomas Ximenes, was beaten 'until blood came out of his mouth and nose' (para 51) and the second, Sebastião Gusmao, 'became unconscious as a result' (para 58). Again, one might ask whether this was torture. The Defence Counsel in this case struggled to accept that the actions did constitute torture; the Judges, however, did not. In their Judgment, they detailed that the collective force of the beating ensured that it reached the torture threshold,

> *Therefore, a single bare-hands punch that in a street fight wouldn't be considered as torture is transformed, by means of the participation of the group, in a contribution to a severe beating that causes enough physical pain and injury as to fail within the concept of torture* (Quoted directly from Mesquita Judgment, 28/2003: 59).

It would appear then that there is not always much to distinguish between torture and common assault[42]. In fact, out of the nine torture cases that have reached trial, there have been two, *Sufa (4/2003)* and *Correia (19/2001)*, in which torture charges were dropped as the SPSC regarded that the facts did not support the charges.

The *Anton Lelan Sufa* case (4/2003) initially involved eight defendants (charges were eventually dropped against one). All eight were indicted with the torture of Fransisco Beto in the district of Oecussi[43], an event in which Beto was tied to a bamboo tree and beaten and kicked for approximately thirty minutes by militia members. Conflicting with the Judgment in *Mesquita (28/2003)*, regarding the seriousness of group violence, the Court in Sufa pointed out that the acts did not sufficiently support the charge of torture. Following this, the Prosecutor amended the indictment and charged Inhumane Acts[44].

Abilio Mendez Correia (19/2001) was initially indicted with torture and inhumane acts for his involvement in the beating of Mariano da Costa[45]. The Court denied the Defence Counsel's motion to dismiss the case, based on insufficient evidence; yet, in the end, torture was not substantiated. Correia pleaded guilty to inhumane acts, and the count of torture was withdrawn. In Judgment (*19/2001*: para 48), the court found that 'several militiamen…beat Costa severely. Correia was ordered to participate in

42 This point was also made by Essa Fael, SCU Prosecutor, in interview with the author, 1 Dec 2004.
43 They were also charged with the murder of Anton Beti and Leonardo Anin.
44 JSMP has recently noted that SPSC decisions in this case appeared to have been made with direct or implied reference to the fact that cases need to be completed quickly. While delays are to be avoided, JSMP has been concerned that this is balanced with the defendant's right to a fair hearing guaranteed under UNTAET Regulation 2000/15 s 2.
45 He was also indicted with the murder of Tobias Alves Correia and Elias Ataidi in Liquiçá . These charges were subsequently dropped.

the beating and struck Costa numerous times'. He was subsequently sentenced to three years imprisonment.

Such examples do indicate that, in some cases, the SCU has lowered the threshold on torture charges. In response to this suggestion, the former DGP argued that, since his arrival in October 2003, torture charges have only be brought where the violence is viewed as being particularly brutal[46].

5.2.Torture as Severe Pain or Suffering

Despite the issues regarding threshold, SCU indictments have also demonstrated the severity of physical violence in 1999. Thus, indictments have regularly connected torture to activities where victims were burnt with cigarettes or heated metal, cut with knifes, subject to multiple rapes, suffocated, tied up and placed in unbearable positions, electrocuted, blinded with chemicals, stabbed, slashed with razor blades, attacked by dogs, starved and forced to abuse other victims.

In some cases, SCU prosecutors have charged the same act with two counts, in an effort to make a particular point about severity. As shown below, this can be seen in *Atabae (8/2002)* but it is also evident in *Lolotoe (4/2001)*, a case in which the perpetrators had cut an ear off their victim and then made him eat it. The Prosecutors in the case commented[47] that they pursued two counts, of torture and inhumane acts, for the actions against the victim, Mario Goncalves, as they wanted to draw public attention to the brutality of the action. At trial, the Judges agreed and it was held that the act of cutting off an ear was torture while forcing a man to eat his own flesh was an inhumane act.

The psychological suffering that is endured through torture has also been highlighted in the serious crimes process. Time and again, indictments allege that victims were threatened with death during torture, or their families were threatened, and that some victims were placed in isolation, while others suffered humiliation techniques. In the cases that have reached the Special Panels, *Los Palos* (9/2000) represents the only example where the SPSC have commented on psychological torture.

The *Los Palos* (9/2000) indictment charged 10 men with 7 counts (that included 13 murders, deportation or forcible transfer of population, persecution and torture). The specific count of torture related to the activities of four deponents (Joni Marques, João da Costa, Mautersa Monis and Gilberto Fernandes) in the torture and subsequent murder of Evaristo Lopes. The facts detail that Evaristo Lopes was beaten with iron rods, punched, kicked, stamped on, stripped to his underwear and an iron rod was pushed into his genitals as he was being questioned. He was then hit with an electrical cable, stabbed with a knife, had parts of his body mutilated and his hair was cut. Finally, his throat was cut and thereafter, he died. While the violence inflicted on Evaristo Lopes is undoubtedly severe, the Court also made the point that the cutting of hair was an act of psychological torture. As the Judgment (9/2000: s.707) details:

46 Nicholas Koumjian, in interview with author, 23 November 2004.
47 Essa Fael (23 Feb 2004) and Shymala Alagendra (24 Feb 2004), in interviews with the author.

> *The cutting of hair as an isolated act can not itself be considered as torture, but, under the victim's circumstances and together with other maltreatments inflicted to obtain information from the victim, the cutting must be assessed as an act of torture, since it was a way to humiliate the victim and also to threaten him. Joni used a knife, an instrument generally applied not to cut hair, but to harm and to kill.*

The SPSC recognised, then, that a non-physically violent act could, in particular circumstances, be viewed as severe mental suffering.

5.3.Torture's Connection to Rape

The violence and psychological impact of rape is seen to be of similar seriousness as the impact of torture. Moreover, it has been widely argued that women, who are detained, may be more likely to experience rape, as a form of torture, than other violence – such as electro-shock or physical beatings[48].

SCU prosecutors have not taken a systematic approach to this issue. Decisions about whether rapes should be connected to torture have ultimately come down to the discretion of individual prosecutors. For example, in the *Atabae* (8/2002) indictment, prosecutors charged 6 events with both torture and rape. The female victims had each been systematically raped over a period of time, and had suffered questioning, beatings and intimidation. Prosecutors[49] involved in the case decided that the level of rape's brutality was such that torture should also be charged. Conversely, in the case of *Laksaur Militia (9/2003),* there are four female victims who have suffered systematic rape, of similar severity to the Atabae women. Yet, in this case, the events are charged solely as rape. The prosecutor involved in this case personally thinks that rape should always be separated out from torture[50]. The official representations of torture and other violations rest, ultimately, on the discretion and politics of individual prosecutors.

6. Cases before the Special Panels for Serious Crimes

At the time of writing, the SCU had brought 9 of the 24 indictments containing torture to the SPSC. The 26[51] individuals who have faced torture charges in court have all been Timorese. As JSMP has previously stated, this situation is concerning as it appears that the Special Panels are processing low-level Timorese militia members who do not bear the greatest responsibility for serious crimes. While this will provide some sense of justice for those who have suffered, it cannot hide the issue that those who bear most responsibility are free, and seemingly untouchable, in Indonesia. In some cases, these commanders remain in active service in Indonesia. The transitional justice system in Timor Leste has failed to bring any Indonesian commanding officers charged with crimes of torture to trial – while the majority of those indicted are

48 Agger & Buus Jensen (1996), see note 2; Hinshelwood G (1996) 'Women, Children and the Family' in Forrest D (ed) A Glimpse of Hell, London: Amnesty International; Kois, L (1998) 'Dance, Sister, Dance!' in Dunér B (ed) An End to Torture: Strategies for Its Eradication, London: Zed Books.
49 Shymala Alagendra (24 Feb 2004) and Wambui Naunya (25 Feb 2004), in meetings with the author.
50 Essa Fael, in interview with the author, 1 Dec 2004.
51 Florindo Morreira was brought before the court in both Morreira (29/2003) and Mesquita (28/2003).

presumed to be in Indonesia, little has been done by the SCU, government or the international community to find and detain them.

6.1.Securing Convictions

At the time of writing, torture has been proven in just 4 cases; 16 individuals have been prosecuted and convicted on a count of torture. A list of these individuals, their acts and sentence can be found in Appendix A.

The most common sentence for torture, handed down by the court to 11 men, has been a term of five years imprisonment. The clear exceptions to this rule are found in the *Los Palos* (9/2000) case. *Los Palos* was the first trial involving crimes against humanity to come before the SPSC and, in terms of sentencing, the Judges imposed heavy punishments – sentencing three men to 33 years and 4 months in prison (these were later reduced to 25 years, to bring the sentence in line with UNTAET regulations)[52]. The sentences for torture in this case were similarly harsher: Joni Marques received 8 years in prison and Joao da Costa received 7 years in prison for their involvement in torture. The level set by the Judges in this case has been much reduced in proceedings that have followed. At the other end of the scale, Sabino Gouveia Leite (*Lolotoe*, 4/2001) was given a collective sentence, of 3 years in prison, for three counts of imprisonment, torture and inhumane acts. The light sentencing here is stated to have reflected Leite's guilty plea and remorse[53].

The *Los Palos* (9/2000) case has also illustrated the way in which the court has calculated sentences when there is a conjunction of punishable acts. In line with the Indonesian Penal Code, the court provides that should an act fall within different provisions, only one of the most severe punishments shall be imposed. As such, in *Los Palos*, it was proved that the torture victim, Evaristo Lopes, died as a result of torture. The two accused, Joni Marques and Joao da Costa, were charged and convicted for both torture and murder; however, the SPSC notes that only 'the punishment for the crime of murder, having been considered more severe, shall apply' (*Los Palos* Judgment, 9/2000: s.1025). Under the conjunction principle, the sentence for torture will not be served.

6.2.Acquittals and Withdrawals

With torture proven in just 4 of the 9 cases that came before the court, it could be argued that although the SCU has generally been incredibly successful in securing convictions, on closer inspection cases concerning torture have not always run smoothly.

Of the remaining 5 cases: *Florindo Morreira (29/2003)* culminated in a complete acquittal of the defendant as two key prosecution witnesses were declared by the Court to be 'completely unconvincing'; *Abilio Mendez Correia (19/2001)* pleaded guilty to inhumane acts and the prosecution team, sensing inadequate evidence, withdrew the charges of murder and torture; the Court intervened at a preliminary stage in *Anton Lelan Sufa* (4/2003) stating that the facts alleged in the indictment 'did

52 In line with the Indonesian Penal Code, sentences are to be served cumulatively but not to exceed one third more than the most severe maximum punishment.
53 JSMP (2004) The Lolotoe Case: A Small Step Forward, Dili: JSMP.

not sufficiently support the charge of torture' and that the seven accused should instead be charged with inhumane acts; *Rusdin Maubere (23/2003)* was acquitted of charges of torture and forced disappearance although the material facts were 're-qualified' in Court by the judges and he was subsequently found guilty of murder; and, *Salvador Soares (7/2002)* was similarly acquitted of a torture charge but convicted on a second count of murder.

6.3. Witness Testimony

Given the focus on 1999 cases, the SCU hoped that reliable witness testimony would be relatively accessible to investigators and prosecutors. However, through trials, it has been evident that witnesses have occasionally brought some consternation to the court. Part of the problem, as SCU investigators have explained, is that Timorese people have their own cultural understandings of events, which may not always equate with the 'facts' required in a court room[54]. As such, investigators have reported that some Timorese people do not provide legal information about distances, time, space, and so on. This issue has, of course, impacted on how the prosecution and defence counsel have undertaken their work.

Yet, the issue of witness testimony in the court room may also reflect poor preparation by the prosecutorial team. The *Florindo Morreira* (29/2003) case, for example, should not have come to court. Morreira was indicted with the Dili-based torture and murder of Mantus de Araujo and Martinho Vidal. These charges collapsed, however, during the trial as the Court heard two Prosecution witnesses who were 'entirely unconvincing', 'contradictory' and 'lacking in corroboration' (29/2003 Judgment:2). Neither of the witnesses had been on the scene when the events took place and both had relied on the evidence of a third-party, who was now reported to be dead (ibid). While Defence Counsel argued in Court that the witnesses had 'personal motivations against the defendant' (ibid), they have also indicated that the witnesses claimed that they had been pressured to appear by SCU investigators[55]. In response to these events, the Prosecutor sought to withdraw the indictment; the Judges dismissed this motion and, instead, acquitted Morreira on both counts.

The unreliability of witnesses does not however always lead to acquittals. The case of *Rusdin Maubere* (23/2003) is a case in point. In the judgment, the Judges note that they faced contradictions within witness statements,

> *'like for instance, about the colour of the clothes of the victim or of the accused, the distances, the number of people present or the number of participants in [a] certain scene, the time that the facts took place, how long was the hair of the victim or of the accused, the colour of the vehicles, the number of people that entered in the house where the victim was arrested, etc, etc'* (23/2003 Judgment:11-12).

54 One example told to the author was of a man who had been asked how he knew an event had happened, despite the fact that he was not in the area at the time. The man had replied that he knew because his soul had left his body, and passed over the scene, and that he had seen the event in that capacity.

55 In interview with author.

One might expect that such diverse inconsistencies may cause doubt however the Judges declare that these are 'minor issues' and 'errors of precision' (ibid). As the Judges explained: given the five year lag between offence and trial, together with the fact that 'witnesses are people of a low social status, extremely modest, illiterate and without studies, and therefore very limited in terms of reasoning capacities and memory' (ibid)[56], the contradictions did not eliminate the veracity and credibility of statements. Thus, the facts remained. This situation is further complicated by the accepted fact that most of the witnesses testifying against Maubere were also militia members who had also participated in the event. While defence counsel argued that their witness statements were inevitably constructed to 'hide their own responsibilities', the Judges decreed that this situation 'does not necessarily imply that those witnesses are not telling the truth'. Thus, once more, the facts remained and, ultimately, Maubere was convicted of murder (his acquittal regarding torture is detailed above).

7. The Serious Crimes Process and the CAVR

The Commission for Reception, Truth and Reconciliation (CAVR) was established to compliment the formal justice system. Alongside a remit to seek the truth regarding patterns of abuse throughout Indonesian occupation, the Commission has sought to facilitate community reconciliation, particularly for 'less serious crimes such as looting, burning and minor assaults'. The SPSC were to handle 'serious crimes', those acts that could be described as violations of international criminal law. However, as inferred in the section on 'lowering the threshold', the judicial process has addressed activities that resonate with acts that have come before the Community Reconciliation Process. This point can be seen clearly in the case of *Abilio Mendez Correia (19/2001).*

The *Correia* case was beset by long delays and the trial was repeatedly re-scheduled as a result of the unavailability of judges and the dominance of other court proceedings. After more than 2 years in pre-trial detention[57], Correia was released back to his home village to await trial. At that time, the Chefe de Suco (Village Chief) and a family member of one of Correia´s alleged victims declared that the village was willing to accept his return to the village in accordance with customary law[58]. When the case eventually came to trial in March 2004, Correia was (as shown above) acquitted of torture.

The Defence Counsel for Correia argued that this case was more suited to CAVR proceedings, for a number of reasons: (i) that the actions were not sufficiently serious for the court; (ii) that the defendant had pleaded guilty and demonstrated remorse in court; (iii) that the defendant had acted under duress during the attack and, (iv) that the perpetrator had retained support from his village and even from the victim's family. Indeed, it is evident that the CAVR has undertaken Community Reconciliation Processes on events in which beatings, that would fit the definition of

56 This connection between illiteracy and memory capacity is quite contentious in academic studies.
57 Correia was arrested and detained in May 2001 and released from custody on 19 June 2003, following a detention review hearing.
58 JSMP Press Release, 12 June 2003.

torture which has been accepted by the SPSC, have been undertaken[59]. This situation shows that although the boundaries between the CAVR and the Special Panels are quite clear on paper, in practice they have been quite blurred.

The CAVR's Community Reconciliation Process (CRP) operated on the basis that the SCU would indict and bring to trial those deponents who came forward with statements on serious crimes. Indeed, CAVR statement takers would regularly encourage individuals who had committed 'less serious' crimes to engage in the process by detailing that the judicial process would prosecute serious offenders. Yet, most of the 'serious crime' cases, retained by the SCU from statements passed over by the CAVR, have not reached indictment stage. In a 2004 report, prepared by the SCU on the status of cases at the close of the CAVR's implementation of the CRP, only 8 of the 84 cases in which they exercised jurisdiction had been indicted, 24 were under investigation at the time of writing and 52 were not likely to be indicted[60]. Anecdotal evidence from CAVR staff indicates that many of the 84 statements did not contain mention of acts that could be considered 'serious crime' and they presume that the statements simply contained further information on individuals already under SCU attention. This is not to suggest that the CAVR did not take statements that would constitute serious crimes – it is apparent that cases in which individuals admitted severe beatings, and even murder, have been approved by the Office of the General Prosecutor for CAVR processing, despite requests for closer scrutiny by CAVR staff[61].

Given that the SCU is now destined to complete its work by the end of May 2005, it seems that most of the cases brought through the CAVR may not reach trial. It is likely that perceptions of the CAVR will be undermined or devalued with this lack of prosecutions. For those people who gave statements to the CAVR, in a bid to clear their name or to ease tensions within the community, there is likely to be no formal solution to their situation. This situation could cause further conflict.

8. The Present Context of Torture and Ill-Treatment

Transitional justice mechanisms are established for different reasons; however, they do all seek to promote trust within state operations. It is often hoped that knowing the truth about a repressive past, and securing prosecutions for perpetrators, will also instil a human rights culture in the transitional state and deter future violations.

This, of course, is the ideal situation; but in Timor Leste, as in other emerging democracies, attempts to ensure human rights standards across state institutions have not always been successful. This issue can be viewed in the case of *Beny Ludji (16/2003)*. In 2002, Beny Ludji was arrested by police on the border with West Timor. Ludji was allegedly an Indonesian militia Commander in Dili and, in this role, he had been indicted with the murder of a pro-independence supporter. He was arrested by the National Police of Timor Leste (PNTL), who were working under UN

59 From meetings with various staff at CAVR.
60 Data given by Ben Larke, Co-ordinator of Community Reconciliation Processes, CAVR, in e-mail, 3 December 2004.
61 Ben Larke in interview with author, 18 November 2004.

Civilian Police officers. Following this arrest, Beny was detained and seriously beaten over a period of 2 days. An internal UNPOL investigation found that Ludji was beaten unconscious and that he was beaten in his stomach until he bled and defecated in his pants. In the end, Ludji signed a confession and he was then transferred to Dili to await trial. The SCU prosecutor used the statement during pre-trial detention hearings despite protests from the defence and despite being in violation of international law. The statement was also submitted for use at trial; however, following objections by Defence Counsel, the prosecutor stated that it would not be relied upon[62]. The officers responsible for these activities were charged with 'maltreatment' under the Indonesian Penal Code and were fined $US15[63].

While this case does not reflect well on the Prosecution team, it raises significant issues about human rights thinking in state organizations in Timor Leste. Throughout 2004 and 2005, the number of allegations of maltreatment (including severe beatings, sexual harassment, cuts and burns with cigarette butts) of police suspects and prisoners have grown. There is still much progress to be made in terms of human rights training and practice; many allegations are not investigated and the penalties imposed, as the Ludji case suggests, do not appear to be in proportion to the violations committed. Moreover, it seems that Timorese leaders do not always send clear signals to the public that human rights should be protected. For instance, in July 2004, President Xanana Gusmao publicly denounced the violent handling by police of demonstrators demanding government reform. Then, in September 2004, when victims of police brutality reported an incident to President Xanana, he asked the government to investigate. But, in the case of the burning of a bridge in Kamanasa, Suai in October 2004, the President declared his support for the use of police force as those who destroyed infrastructure would merit such treatment. While missing a critical opportunity to understand why people will destroy public infrastructure that is meant to improve their lives, the President also illustrated that ill-treatment may well be acceptable, under the 'right' circumstances[64].

JSMP has been pleased to see that some allegations have been subject to further investigation. For example, in 2004 the Suai Court heard a case relating to the alleged assault of a person by a police officer working in Batugade on 26 May 2004. After considering the evidence, the Court found the police officer guilty and handed down a 19-month prison term. In sentencing, it was noted that the officer had harmed the good name of the police by his actions.

62 Interview with Defence Counsel.
63 This incident also reflects poorly on the UN since it occurred under UNPOL command. Any UN involvement or responsibility was not investigated.
64 Marilou Suplido, International Catholic Migration Commission in conversation with the author, 16 November 2004.

9. Conclusion

Initial statistics from the CAVR indicate that many individuals approached the Commission with testimonies of torture. Indeed, just under half of all testimonies included details of torture. In interviews with the author, torture survivors have consistently argued that their suffering must be officially acknowledged and that there must be some criminal justice response to their experiences. This correlates with the status of torture under international law – under legal principles, torture must be responded to with acknowledgement, punishment of perpetrators and reparations for survivors.

Despite the internationally-accepted severity of torture, this research indicates that torture has been sidelined within the serious crimes process in Timor Leste. The 1999-focus of the SCU on crimes of murder and rape has ensured that torture has not been a central feature of indictments. When it has appeared in cases, it has invariably been added as an extra count alongside crimes that are perceived to be 'more serious'. Thus, less than a quarter of indictments contain a count of torture, and torture charges have not stood on their own.

Torture cases within the SCU have rested heavily on the discretion of individual prosecutors. As such, while some indictments have demonstrated the brutal extent of violence during 1999, it can be shown that prosecutors have, on occasion, lowered the threshold of torture. Further, in cases of rape, counts of torture have emerged out of individual prosecutor's personal and political beliefs. There has, then, been a lack of consistency in building cases to take before the Panels.

Inconsistencies may go some way to explain the limited achievements of the prosecution team to secure convictions for torture. Despite the fact that the SCU has been overwhelmingly successful in convicting almost all of those who come before the SPSC judges - even when there seems to be weak evidence for conviction - 5 out of 9 cases have not ended in a positive, prosecutorial outcome for torture victims. The reasons for this are diverse but it may be mooted that the SCU has not always prepared cases to the level one might expect in the domain of international law.

When torture cases have reached the SPSC, the judicial response has also demonstrated inconsistencies. There appears to be some judicial confusion about the different definitions of torture contained in UNTAET regulations and the issue of intent has provoked diverse responses. There are also questions to be raised about the apparent reluctance of the Judges to acquit those indicted on relatively weak evidence.

Of particular concern is the overlap between the CAVR and cases presented at the SPSC. Some torture counts, pursued in indictments, have reflected a severity that is equal to the assault cases that have progressed through the Community Reconciliation Processes in the CAVR. This overlap may cause confusion, in local communities, about which activities should be regarded as court matters and which are of a level to be dealt with through traditional mechanisms. This research has also identified that the serious crimes process has not effectively picked up on the serious cases presented to them through the CAVR statements. It is evident that some serious crimes cases have been sent back to the CAVR, to progress through the Community Reconciliation

Process, while most of those that have been retained have not been pursued through indictments. For those deponents who presented to the Commission, as a means to clear their name, the opportunity to present their own perspectives in court will not occur. This could create further conflict and it can be expected that this lack of prosecutorial action may well undermine or devalue the CAVR process in the eyes of Timorese people.

Of course, with just 9 out of the 24 torture cases reaching the court, it is clear that most cases will not get through to trial stage. Given the impending May 2005 closure of the SCU and the SPSC, opportunities for justice are being eroded. JSMP has already noted that many Timorese people are not happy about this situation. Many people are further disillusioned by the fact that the serious crimes process has failed to bring those who orchestrated such violence to account. High-ranking Indonesian officials remain untouched in the SCU and SPSC concentration on low-level East Timorese militia members.

While it would be impossible for the Timorese or international system to prosecute all torturers, JSMP recommends that new structures should be formed to prosecute those high-ranking officials who ordered and sustained violations. The Ad Hoc Courts in Jakarta has evidently failed to bring any Indonesians to account and this situation has been intensified by the struggles of the Dili-based Tribunals to meet the UN demands made in Security Council Resolution 1272 that 'all those responsible for such violence be brought to justice'. All of the torture survivors interviewed for this research demanded that the UN establish an international tribunal in the region.

The judicial response to torture, and other violations, must not stop with the SPSC in Dili and the Ad Hoc Courts in Jakarta. To fail to bring high-ranking torturers, and their superiors to account, would indicate that torture is an acceptable form of state violence. Given the rising level of allegations about current police practice in the region, judicial interventions are required not only to deal with the past but to set a human rights-focused course for the future.

Appendix A: Torture Convictions in the SPSC

Name	Case	Conviction	Torture Sentence	Final Sentence
Joni Marques	*LosPalos, 9/2000*	Torture, Murder (x3), Forcible Transfer	8 years	33 years 4 months (reduced to 25 years)
Joao da Costa	-	Torture, Murder (x2)	7 years	33 years 4 months (reduced to 25 years)
Mautersa Moniz	-	Torture	4 years	4 years
Gilberto Fernandes	-	Torture	5 years	5 years
Joao Franca da Silva (aka Jhoni Franca)	*Lolotoe, 4/2001*	Imprisonment (x4), Torture (Guilty Plea)	5 years (combined sentence for conviction)	5 years (reduced by 6 months)
Jose Cardoso Fereira	-	Imprisonment (x4), Torture, Inhumane Acts (x2), Rape, Murder (x2)	5 years (combined sentence for imprisonment, torture & inhumane act)	12 years
Sabino Gouveia Leite	-	Imprisonment (x3). Torture, Inhumane Acts (Guilty plea)	3 years (combined sentence for conviction)	3 years
Marcelino Soares	*Soares, 11/2003*	Torture, Murder, Persecution	6 years (for torture of 3 individuals)	11 years
Alarico Mesquita	*Mesquita, 28/2003*	Torture, Persecution	5 years	6 years 8 months
Florindo Morreira	-	Torture, Persecution	5 years	6 years 8 months
Domingos Amati	-	Torture, Persecution	5 years	6 years
Fransisco Matos	-	Torture, Persecution	5 years	6 years
Laurindo da Costa	-	Torture	5 years	5 years
Laurenco Tavares	-	Torture	5 years	5 years
Mateus Guterres	-	Torture	5 years	5 years
Angelino da Costa	-	Torture	5 years	5 years