



**Report on the Trial
of
Xanana Gusmao
in Dili,
East Timor**

JUST-REP-1*REP

International Commission of Jurists
Geneva, Switzerland

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Abbreviations and Terms

ABRI	Angkatan Bersenjata Republic Indonesia (Armed Forces of the Republic of Indonesia)
ASDT	Association of Timorese Social Democrats
CE	Comité Exécutif (Executive Committee)
CNRM	Conselho Nacional de Resistencia Maubere (National Council of the Maubere Resistance)
FALINTIL	Forcas Armadas de Libertacas Nacional de Timor Leste
FRETILIN	Frente Revolucionaria Timor Leste Independente (Revolutionary Front of Independent East Timor)
ICJ	International Commission of Jurists
KUHAP	Kitab Undang-Undang Hukum Acara Pidana (Indonesian Code of Criminal Procedure)
KUHP	Kitab Undang-Undang Hukum Pidana (Indonesian Penal Code)
LBH	Yayasan Lembaga Bantuan Hukum Indonesia (Indonesian Legal Aid Foundation)

Preface

This is a report on the trial of Mr Xanana Gusmao, in the District Court at Dili, the capital of East Timor. Mr Fredun De Vitre, an Advocate of the High Court, Bombay, India observed the trial on behalf of the International Commission of Jurists (ICJ). The observers essential concern was the fairness of the trial process adopted against Xanana Gusmao.

Xanana Gusmao, the East Timorese resistance leader, was arrested by the Indonesian military authorities on 20 November 1992 in Dili. The trial commenced on 1 February 1993 and concluded on 21 May 1993, when the court sentenced Xanana to life imprisonment. The life sentence was reduced to 20 years, on the orders of President Suharto, on 12 August 1993.

Mr De Vitre was in Dili from 28 February 1993 to 5 March 1993 and attended the trial on 4 March 1993, the only day on which the court convened for the trial during the observer's stay in Dili. In Dili and Jakarta, the ICJ observer met and interviewed many persons including the Chief Judge, lawyers and Xanana's family members but was not permitted to meet the accused or the Prosecutors. His attempt to discuss matters with officers in military intelligence also met with a negative response.

The ICJ observer found that, in several respects, the trial process violated the accused's rights and was not in conformity with international standards of fair trial procedure and even breached the safeguards provided by the Indonesian Code of Criminal Procedure (KUHAP).

A preliminary report on the trial was issued in August 1993. The ICJ is grateful to the Indonesian authorities for their assistance and we also wish to thank all those who helped the

observer in Dili and in Jakarta. We are also very grateful to CAFOD (United Kingdom) and SIDA (Sweden) whose generous financial contributions enabled us to publish this report.

Adama Dieng
Secretary General

Geneva, November 1993

Historical Background

The historical background to the problem in East Timor has been elaborately set out in previous ICJ publications.¹ Only some of the salient historical facts, bearing on Xanana's trial, need be set out here.

East Timor was a Portuguese Colony for over 450 years from about 1520 A.D. Even prior to the Indonesian annexation of East Timor and the consequent armed movement for independence from Indonesia, the East Timorese had struggled against alien domination by the Portuguese.

The April 1974 coup in Portugal and the installation of a democratic government, which made the decolonisation of East Timor its stated objective, led to the formation of various political parties in East Timor, each advocating different political set-ups in the post-colonisation period. In May 1974, the "Association of Timorese Social Democrats" (ASDT) was formed; in September 1974, ASDT became the Revolutionary Front for Independent East Timor (FRETILIN).

On or about 26 August 1975, the Portuguese governor and his staff left Dili, East Timor and on 11 October 1975, FRETILIN announced that it was in full control of the territory and had established a transitional administration. The Indonesian Government countered these claims and in November 1975, the Foreign Ministers of Indonesia and Portugal issued a joint declaration from Rome, declaring that Portugal represented the "legitimate authority" in East Timor and was responsible for its decolonisation.

1 "Indonesia and the Rule of Law - Twenty Years of 'New Order' Government", ICJ, 1987, pp. 16 - 21, See also : "Tragedy in East Timor - Report on the Trials in Dili and Jakarta", ICJ, 1992, pp. 13 - 17.

On 28 November 1975, FRETILIN declared East Timor to be an independent Democratic Republic under its administration. At least one country, Mozambique, recognised this new nation on 1 December 1975. From 7 December 1975, the Indonesian government took military action in East Timor, gained control of the capital, Dili and drove FRETILIN members and supporters into the hills.

Portugal broke off diplomatic relations with Indonesia. In response, Indonesia stated that Portugal's sovereignty over East Timor had ended on 28 November 1975 when FRETILIN declared independence. Subsequently, acting on the petition made to it by the "People's Representative Council of East Timor", Indonesia passed an Act on 15/17 July 1976, (Act No.7 of 1976) legalising the annexation and making East Timor the 27th Province of the Republic of Indonesia.

The Indonesian government outlawed FRETILIN. Despite the ban, FRETILIN continued to exist, operating as a sort of "guerrilla" group from the hills, and continued to advocate the cause of independence for East Timor.

The Trial

Background: The trial of Xanana Gusmao, the accused, commenced in the Dili District Court on 1 February 1993 and concluded on 21 May 1993, when the court sentenced Xanana to life imprisonment. He was arrested by the Military authorities on 20 November 1992 in Dili, from the house of Augusto Pereira and was taken to Denpasar, Bali and Jakarta. On 27 November 1992, Xanana was interviewed for the local T.V. Station TVRI by the Governor of East Timor, Mr Abilio Jose' Osorio Soares. The interview was telecast on 1 December 1992. In this interview,

Xanana appealed to his followers in FRETILIN to give up their armed struggle and to surrender to the Indonesian Government. For someone who had waged an armed struggle for the independence of East Timor for more than 17 years, such a complete volte-face in attitude gave rise to legitimate concerns that pressure, including torture, had been used on Xanana, whilst in military custody. These concerns were aggravated by the Indonesian Government's refusal to permit access to Xanana. The International Committee of the Red Cross (ICRC) was allowed to meet Xanana in Jakarta only on or about 7 December 1992, i.e. 17 days after his arrest.

Around the time of Xanana's arrest, other members of his family including his sister Armandina, his brother-in-law and their children were also taken into custody. As far as the ICJ Observer could ascertain, no charges have been brought against them. The enforced separation from their 13 year old daughter (whom the Observer met at the Gusmao home in Dili) is obviously causing great stress to the young girl, whose grief and bewilderment were plain and transparent.

According to press reports, more than 10 FRETILIN members surrendered and laid down their arms in response to Xanana's call. These included Alcino Soares, Mario Soares, Manuel Da Silva, Coliato Letelo, Augustus Paedade, Mario Barros and Marcus de Aranjó from Desa Hatulia, and two more in village Tuson, District Same, Manufahi.² Even after Xanana's arrest, there were reports of encounters between FRETILIN members and the Indonesian Armed Forces (Angkatan Bersenjata Republic Indonesia - ABRI), in one of which, as reported in the press, two members, Bonefacio and Carolonia were shot dead, and one, Domingo Soares, surrendered.³

2 *Suara Timur Timor*, 8 February 1993 and 17 February 1993.

3 *Suara Timur Timor*, 19 February 1993; *The Jakarta Post*, 19 February 1993.

No lawyer was allowed to remain present or had access to Xanana during his interrogation, in clear breach of Article 54 of the Indonesian Code of Criminal Procedure (KUHP).

The Yayasan Lembaga Bantuan Hukum Indonesia (Indonesian Legal Aid Foundation), Jakarta (LBH), called upon the authorities to let them remain present during Xanana's interrogation. Around 22 December 1992, LBH obtained a power of attorney/authority letter from Xanana's family sources authorising LBH to represent the accused during his interrogation. This was not heeded by the authorities.

The ICJ Observer learnt that at Xanana's request, a priest was allowed to visit Xanana in custody for a confession. In his defence statement, however, Xanana claimed that he had asked for the Bishop, but was visited by a priest sympathetic to his captors. Sources in East Timor claimed that after Xanana's arrest, the harassment of Catholic youth in East Timor had increased, and that attempts were made in the course of the trial to implicate the Church in Xanana's activities. BBC's Monitoring Services Shortwave Broadcast Sheet dated 13 February 1993 (Internal Affairs FE 1612-B/1) recorded the transcript of an interview stated to have been given by Bishop Dom Ximenes Belo, head of the Roman Catholic Church in East Timor, to Radio Renascenca's (Portuguese Catholic Radio) Pedro Adao on 11 February 1993, in Portuguese. Amongst the things stated were:

"Since Xanana's arrest they started calling up and arresting clandestines who are beaten and tortured and a week or two later, released. They are forced to take a sort of oath, they drink the blood of a cockerel or of a goat mixed with wine in order to say they accept the integration and reject Xanana Gusmao and FRETILIN. The first thing they do is to beat them up. I have read letters from prisoners telling me

about all kinds of torture, electric shocks, burning of genitals with cigarettes, placing people in barrels of cold water, whipping until they say they are collaborators of FRETILIN. They are made to confirm and confess that Bishops and priests organised the demonstration and are against Indonesia. Lately, I have noticed a certain veiled threat to the Church to reduce its influence. Last month, I was so upset, I wrote to the Papal Nuncio...”

General

On 25 January 1993, the Prosecution filed its charges against Xanana. Mr Sudjono SH was appointed as the defence advocate in circumstances that gave rise to considerable doubts as to whether Xanana had made the choice voluntarily and of his own free will. Persons to whom the ICJ Observer spoke, felt that the appointment was forced on Xanana to prevent LBH lawyers from representing him. Mr Sudjono, SH is a Senior Advocate who stated at the commencement of the trial that he was representing Xanana free of charge.

The trial commenced on 1 February 1993, with, according to one newspaper report, about 500 people in attendance⁴. Several foreign and Indonesian journalists attended. The trial received extensive coverage, in the local as well as the national press. East Timor's first local-language newspaper – “Suara Timur Timor”, a tabloid – commenced publication on the same day as the commencement of the trial and gave the trial prominent

4 *Suara Timur Timor*, 2 February 1993.

coverage – front page reports, features, interviews with the defence advocate, the Governor, University law professors, background material on the accused and his family, photographs, etc. An editorial in the inaugural issue urged the State to ensure a fair trial to the accused, in accordance with the standards laid down in the Universal Declaration of Human Rights. The entire charge, the defence exceptions, the prosecution reply to the exceptions and much of the evidence were serialised verbatim.

On the first day of the trial, Xanana informed the court that he accepted Indonesian citizenship. This was retracted by Xanana in his defence statement presented to the court on 17 May 1993, wherein he made a fierce recommittment to his Portuguese citizenship and included a strong denunciation of Indonesia and all things Indonesian. Shortly after the trial commenced, reports appeared that six journalists from Portugal, who were staying at the Turismo Hotel, Dili, were ordered to be deported, for breaching the understanding with the Indonesian government by indulging in “non-journalistic” activities. The 6 journalists clarified that during their stay, they had visited Manatuto (Xanana’s birth-place), had met Governor Abilio and the head of the Regional Assembly, Antonio Pareda da Freitas, and Bishop Belo.⁵ Some days later, government sources clarified that the 6 journalists were not to be deported, both the Territorial Commander, Brig-General Theo Syafei and Governor Abilio stating that they had not issued any deportation order.⁶

Xanana was charged with organising the demonstration on 12 November 1991 in Dili. The trials of the demonstrators have been documented in the ICJ publication, “Tragedy in East Timor”. Two of the Dili demonstrators and two of the Jakarta

5 *Suara Timur Timor*, 6 February 1993.

6 *Suara Timur Timor*, 8 February 1993.

demonstrators were charged under the notorious Anti-Subversion Law. Fernando de Araujo (in Jakarta) and Francisco Miranda Branco and Gregorio Da Cunha Saldanha (in Dili) were also charged with “having contacts with and receiving instructions from Xanana Gusmao as far back as 1986 and from Jose Ramos Horta of FRETILIN since 1987” and with “being members of the clandestine organisation known as the “Executive Committee” (Comite’ Executif, CE) of the Conselho Nacional De Resistencia Maubere (CNRM) led by Xanana Gusmao, the political motives of which were opposition to the integration of East Timor with Indonesia.”⁷ The use of the Anti-Subversion law against the demonstrators was widely criticised. Xanana was not charged under the Anti-Subversion law. The Attorney General, Mr Singgih denied that this had resulted from international pressure, clarifying that it was done after a study of the legal factors involved. It appeared to the ICJ Observer that the international outcry and harsh criticism of the use of the Anti-Subversion law against the November 1991 demonstrators weighed in the decision not to charge Xanana under that law.

The Attorney General was reported to have told a Parliamentary Sub-Committee on 4 February 1993 in Jakarta (in response to queries regarding the use of that law against the November 1991 demonstrators) that Xanana had indulged in “Pemberontak” (treason) but not subversion, adding that subversion was necessarily clandestine.⁸ The Attorney General’s efforts to differentiate Xanana’s case from that against the demonstrators, viz-a-viz the use of the Anti-Subversion law, lacks conviction.

7 “Tragedy in East Timor”, ICJ, 1992, pp. 31 and 56.

8 *Suara Timur Timor*, 5 February 1993.

The Attorney General also cautioned public prosecutors in general to be more prudent in using the Anti-Subversion law, stating that this should be done only after deep study and with sensitivity.⁹ Whether this represents a permanent shift in Government policy will be known only after the ongoing process of amendments to the existing Criminal Procedure Code and Penal Code is completed.

The response of the Attorney General must be seen also in the context of the fact that there was near unanimity among those to whom the ICJ Observer spoke long before the verdict was announced, that Xanana would not be given the death sentence, (this was even before the Prosecutor sought only a sentence of life imprisonment against Xanana). There appeared to be a definite attempt to underplay the fact that one of the charges against Xanana – illegal possession of fire-arms – carried a maximum sentence of death.

As the trial progressed, fewer people attended the hearings, according to press reports. Understandably people in Dili were not prepared to openly acknowledge or publicise their interest in the trial. The ‘man-on-the-street’ tended to respond to queries by stating that he did not wish to say anything. The apparent fall in public interest was interpreted in varying ways. Governor Abilio attributed this to Xanana’s acceptance of Indonesian citizenship. Others felt that the fear of attracting military attention was the overriding consideration. One view was that Xanana’s conviction was foregone and that the trial itself was a farce.

The Indonesian Ambassador to the United Nations in New York, Mr Nugroho Wisnumurthy, who visited Dili whilst the trial was in progress, stated that dwindling interest in the trial showed that Xanana’s fate as the leader of an outlawed organisation, was

9 *The Jakarta Post*, 19 February 1993.

not a matter of grave concern, even internationally and the outcome was irrelevant from an international view-point. The Ambassador met Xanana in jail when Xanana offered to help in resolving the East Timor problem in the United Nations. The Ambassador's version of the meeting was that Xanana told the Ambassador that FRETILIN's fight for independence had become futile ('of no use') and would be stopped and that the development of East Timor under the Indonesian Government should continue.¹⁰

An encouraging fallout of the harsh international criticism of the Indonesian Government's handling of the earlier trials against the East Timorese demonstrators in Dili, was the increased access to East Timor. The ICJ Observer's application for a visa was granted by the Consulate Office in Bombay within a day. The visa specified the purpose of the visit to Indonesia as: "To observe the trial of Mr Xanana Gusmao in the court at Dili, East Timor". The Observer's travel to Jakarta, Denpasar and then to Dili was unhindered, with no questions asked. Access to Xanana's family in Dili was also unhindered, there being no police or military presence at or around the Gusmao house. At the hearing on 22 February 1993, diplomats from the EC, Canada and Australia attended. On 4 March 1993, Mr Ian Donaldson, from the British Embassy in Jakarta and Mr David Lucas, representing the Australian Section of the International Commission of Jurists (ASICJ) also attended as observers. The press regularly reported the presence of international observers at the trial.

The ICJ Observer and his interpreter were, however, being constantly observed by plainclothes policemen. The ICJ Observer was pointedly informed that his visit to Bishop Belo had been duly noted. There was also an attempt at censorship relating to

10 *Suara Timur Timor*, 11 and 13 February 1993.

the display of defiance by the second witness, Saturnino da Costa Belo who entered the court room on 4 March, 1993 yelling "Viva Independence" and "Viva Timur Timor". At the conclusion of the day's hearing, an uniformed military spokesman made a request to the journalists gathered in court, to avoid reporting the actual words used by the witness in court. Next day, the local newspaper, Suara Timur Timor reported the incident without reproducing the actual words, referring to it only as a commotion in court. Other national newspapers, including Kompas, (Jakarta) and the Strait Times (Hongkong) published the actual words.

Particulars of the Accused

The accused's full name as stated in the charge, is "Jose Alexandre Gusmao" alias Kay Rala Xanana Gusmao alias Xanana. He was born on 20 June 1946 at Manatuto in East Timor, and is a Catholic. The accused's formal education ended with Senior High School. He is one of 9 children.

The accused spent some time during his youth at a Christian Seminary, training to be a priest. He attended at least one Portuguese Military camp during Portuguese rule in East Timor. The accused's wife and child are presently living in Sydney, Australia.

On 4 March 1993, when the ICJ Observer attended the trial, the accused's demeanour in court was exemplary. He was subdued, dignified, respectful to the Bench and to Prosecution counsel, going so far as to politely refuse to shake hands with one of the witnesses, Saturnino da Costa Belo, who entered the courtroom with a spirited display, yelling "Viva Independence", "Viva Timur Timor", rushing to the accused to shake his hand in a courageous display of solidarity with the accused. This conduct

of the accused was seen in some quarters as being aimed at earning Xanana leniency in sentencing. The Prosecution sought a life sentence against Xanana, citing his good conduct and cooperation as one of the reasons why the death sentence was not pressed for. In his defence statement, however, Xanana expressly referred to Saturnino as “a clear example of the heroism of the people” and to the “farce of the hastily-drafted medical certificate certifying that Saturnino was ill (which should) make you all blush with shame”.

On 5 February 1993, around lunch time, the accused shouted out to a group of Portuguese journalists present in court not to leave the trial but to wait till the end. On 25 February 1993, the accused waved out to members of his family attending the trial and was admonished by the Chief Judge who demanded an apology for what was termed “not polite” conduct. In May 1993, Xanana was prevented by the court from reading out his defence statement in Portuguese. This led to some disagreement with his lawyer, Sudjono, who withdrew or was discharged from the case. On hearing his sentence of life imprisonment, he shouted: “Viva Timor l’este” and shook hands with all the judges.¹¹

Before witnesses were examined on each day (as was also observed on 4 March 1993, when the Observer was in court), the accused was first made to sit in the witness chair facing the Judges and was asked by the Chief Judge whether his health was good. The accused invariably responded in the affirmative. He was told to follow the proceedings with attention. The Chief Judge spoke to the accused in Bahasa Indonesia. An interpreter assisted the accused, whose replies, were in Portuguese and were translated into Bahasa Indonesia.

11 *The Independent of London*, 22 May 1993.

Xanana speaks Portuguese fluently and is stated to be passably familiar with Bahasa Indonesia. Mr Sudjono, SH, the defence Counsel, stated to the ICJ Observer that he had no difficulty communicating with his client, using a mixture of both Bahasa Indonesia and English.

In court, the testimony of witnesses was generally rendered in Bahasa Indonesia, with occasional assistance from the official interpreter who was always at hand to translate into Portuguese for the benefit of the witnesses, and from Portuguese into Bahasa Indonesia for the benefit of the Judges and others. At the trial on 4 March 1993, although an official interpreter had been provided to the accused, the proceedings in Bahasa Indonesia were not being translated for him into Portuguese. In the concluding stages of the trial, the court refused to permit the accused to read out the defence statement in Portuguese, the only language in which he is fluent. The court's insistence on the defence statement being first translated in writing into Bahasa Indonesia (despite the presence of interpreters in court) gave rise to grave doubts about the possibility of the translated defence statement being edited in the process of translation. This also amounted to a serious breach of internationally accepted standards of fair trial procedure and of the Indonesian Criminal Procedure Code itself (KUHAP Article 177(1)).

The Tribunal

The trial was held in the Dili District Court, Dili (Pengadilan Negari, Dili), before a Bench of three Judges. The Chairman or Chief Judge 'Hakim Ketua' was Mr Heronymus Godong, SH. The two other Judges 'Hakim Anggota' were Mr Pandapotan Sinega and Mr Agustinus Bire Radjah.

The ICJ Observer met the Chairman, Judge Godong on 1 March 1993 in his Chambers at the Dili District Court, when he apprised the Judge of the international interest in the trial of Xanana. The ICJ Observer was readily granted permission to attend the trial on 4 March 1993 and the Judge even invited the ICJ Observer to attend the trial in April 1993 for which an extension of his stay would be arranged, if required.

The trial had commenced on 1 February 1993 and after the ninth court session on 25 February 1993, was due to resume only on 4 March 1993. The Judge indicated that the long recesses were necessary in view of his poor health. The trial "calendar", drawn up on 29 January 1993, had even then provided for long interruptions in the trial proceedings after 25 February 1993.

The ICJ Observer's request to be allowed to peruse the court papers (with the assistance of the interpreter) including the prosecution charge/indictment, the defense's exceptions, the prosecution reply, the court's judgment rejecting the defence exceptions, the depositions of witnesses, the medical reports, if any, of the accused and other related documents, was declined, for the reason that these were "State papers". Contradictorily, the ICJ Observer was informed that some of these documents had been made available to the press, which had reproduced verbatim the contents of the documents.

The ICJ Observer's request to meet and interview the accused was also declined, the Judge stating that such a request was being made for the first time and that the Observer's questions to the accused, at that stage, in the midst of the trial, may cause him mental disturbance.

The Prosecution and the Defence Advocates

The prosecution team consists of I. Ketut Suwara, SH, Endang Supardi, SH and Endro Sipat, SH. Very little information could be obtained by the ICJ Observer about the prosecutors. They are Public Prosecutors. I. Ketut Suwara is an assistant Prosecutor. Supardi was also the Prosecutor who handled the trial against at least one of the November 1991 Dili demonstrators - Gregorio Da Cunha Saldanha.

On 1 March 1993, the ICJ Observer visited the Prosecutor's office in Dili (Kejaksaan Negeri, Dili) to meet the members of the Prosecution team. The ICJ Observer was first directed to the office of Mr Zainuddin Rasyid, SH from the Prosecutor's office, whose precise designation the Observer was unable to ascertain. The ICJ Observer explained that the purpose of his visit was to obtain a general background of the case, learn the Prosecutor's views on various aspects of the trial and peruse relevant documents, including the accused's medical reports, if available with the prosecutor. He was informed that Suwara and the others were then too busy and could not meet the ICJ Observer. The ICJ Observer's attempts to meet the Military Intelligence Assistant Mr Yohan Supit in Dili were also in vain, as the promised call to fix a convenient time never materialised.

The defence team was led by Mr Sudjono, SH who has a law office in Jakarta, 'Sudjono Partners'. He was assisted by two junior advocates from his Jakarta office, Mr Bhismoko Wa and Mr F. M. Paradana, and also by University Professors. Sudjono is very personable, with a flair for good press and public relations. He specialises in criminal and labour laws, and has been in active practice for over 20 years.

Sudjono SH graduated from the Faculty of Law, University of Unair, Surabaya and is a member of the Indonesian Bar

Association IKADIN. Sudjono SH represented Agapito Cardoso (25), who was prosecuted for his role in the demonstration in Jakarta on 19 November 1991 and against whom the prosecution had sought a sentence of 12 months imprisonment. Cardoso was sentenced by the court to an imprisonment term of 10 months.¹²

According to Sudjono, his appointment as defence advocate was in these circumstances: sometime in mid-December 1992, he was informed through a friend in the Military that Xanana was looking for a lawyer to represent him at his trial. Through his personal contacts in the Military, Sudjono arranged a ten minute meeting with Xanana in Jakarta. They got on so well that the ten minutes stretched to forty. Sudjono found Xanana to be "exceptionally intelligent" and "a true leader of men." He met Xanana a second time and finally, Sudjono was appointed defence advocate by Xanana's letter dated 26 January 1993. (Not available for the Observer's perusal).

Sudjono's appointment was not welcomed in many quarters. At least one newspaper¹³ reported that there was a feeling in some quarters that the defence advocate would merely fulfill legal formalities and that he would be of no use to the accused.

There was some justification for the widespread feeling that Xanana's rejection of the offer from LBH to act for the defence, was not voluntary or free. Sometime around the third week of December 1992, LBH was sounded out by Xanana's relatives about their taking up his defence. Around 22 December 1992, LBH was given a Power of Attorney/Authority letter from Xanana's family authorising them to be present during his interrogation and to represent him at the trial. LBH addressed a letter to Xanana, offering to conduct his defence. In response,

12 "Tragedy in East Timor", ICJ, 1992, pp. 49 - 52.

13 *Suara Timur Timor*, 2 February 1993.

the LBH received a letter stated to be addressed by Xanana declining their offer. LBH's representations to the authorities went unheeded. Xanana's family sources confirmed to the ICJ Observer that the family had addressed letters to the Indonesian authorities to permit the "legal aid cell" (presumably, LBH) to act for the defence, but nothing came of these requests.

The Indonesian authorities have made consistent past attempts to dissuade defendants/accused from engaging LBH's services as defence advocates. The scepticism relating to Xanana's rejection of the LBH offer thus appears to be justified. LBH advocates had conducted the defence free of cost in the trials relating to the November 1991 demonstrators in Jakarta and Dili; their efforts had been lauded then. In "Indonesia and the Rule of Law", ICJ, 1987, at page 176, it is noted that:

"In addition, lawyers, including members of LBH, have been harassed by government officials for carrying out professional responsibilities, especially in cases with a political impact. To be a good lawyer in criminal cases, one needs idealism, time, and courage. Most harassment is directed at the client. Officials attempt to convince suspects to renounce legal assistance and sometimes force them to withdraw their mandate to LBH lawyers or other human rights activists...".

In "Tragedy in East Timor - Report on the Trials in Dili and Jakarta" ICJ, 1992, at page 61, it is noted that:

"Gregorio was advised by the public prosecutor, Supardi, that in order to avoid conflict between the Jakarta and Dili lawyers, it would be better to choose Ponco Atmono, a local Dili lawyer. If he chose the LBH lawyers, he would suffer the consequences. This was repeated by Police Lieutenant Bambang. Gregorio remained silent, but in his address to the

Court, said: "A heavy weight which I bring to this court which is that a life sentence may result." At the opening stages of the trials, both Francisco and Gregorio stated that they wished the lawyers from the LBH to appear for them. The Judges initially took the view that a local lawyer from Dili should handle the cases and rejected the LBH team on a technical ground. The matter was, however, resolved and the LBH lawyers were allowed to appear before the Court".

Footnote No. 61 (on page 61) of the same publication also notes that:

"It appears Gregorio was threatened that if he insisted on being represented by the LBH lawyers from Jakarta he would risk a life sentence - which is what he actually received from the Court".

In his defence statement, Xanana for the first time categorically stated that Sudjono was appointed by military intelligence BAIS (the Strategic Military Intelligence Agency), that Xanana himself wished to be represented by LBH, that his letter appointing LBH was intercepted by the military authorities, that he was forced to withdraw it and to give a letter appointing Sudjono as defence advocate. Xanana's statement confirmed LBH's worst fears and shows that there has been a serious violation of the accused's right to counsel of his own choice. LBH has, in June 1993, called upon IKADIN, the Bar Association of which Sudjono is a member, to investigate into the complaint that by such conduct, Sudjono has violated universal principles regarding legal aid, professional independence and the lawyers' code of ethics.

Sudjono SH, the defence advocate, appeared for the defence free of cost. Sudjono SH claimed to the ICJ Observer that he was appointed by Xanana's letter dated 26 January 1993. The defence

advocate was not a court appointed advocate under KUHAP. KUHAP provides (Articles 54 and 60) that the accused has a right to be assisted by a Counsel of his own choosing. It is this right which Xanana exercised in appointing Sudjono. KUHAP also provides that if the suspect or accused has not chosen a counsel, a lawyer must be assigned by the court automatically where the charge carries the death sentence or a prison term of 15 years or more. In such a case, ability or otherwise to pay is irrelevant. A counsel must also be assigned automatically for indigent accused who are unable to pay and who are liable to a jail term of five years or more. Every assigned lawyer has to give his assistance free of charge (Articles 56(1) and (2))¹⁴.

Mr Sudjono SH was not an assigned lawyer, and thus not obliged to give his assistance free of charge. Sudjono SH, however, repeatedly highlighted his free services. To the ICJ Observer, Sudjono also stated that the trial had cut into his other legal work and affected his legal practice. However, he candidly acknowledged that the wide media publicity of and focus on the trial, had helped to bring him to general public notice, which he was sanguine, would have a beneficial long term impact on his future legal practice. This seemed to be his main motive in accepting the defence brief.

In March 1993, Xanana's father Manuel and his younger sister confirmed to the ICJ Observer, in response to a query, that they were satisfied with the manner in which Sudjono SH was conducting the defence and that their perception of the situation was that he was doing his best for his client.

Sudjono SH did not have any grievance about the conduct of the trial. He claimed to have unlimited access to the accused at any time "even at 11.30 p.m.". He met the accused alone, no police

14 "Indonesia and the Rule of Law", ICJ, 1987, p. 175.

personnel were present or even within ear-shot. Sudjono SH informed the ICJ Observer that the accused was in good health and was comfortably accommodated in a jail cell that consisted of a bedroom with an attached bathroom.

Controversy surrounded the appointment of Sudjono, who claimed to be appointed by Xanana's letter dated 26 January 1993. The Jakarta Post dated 1 February 1993 reported a court spokesman, Hizbullah, as stating that four local lawyers, Pontio Atmono, Ms Sri Bagianingsih and two others were willing to represent Xanana. Intriguingly, the report also mentioned that Sudjono told the court that he was also willing to defend Xanana but had not obtained any Power of Attorney from Xanana or his family. Even assuming Sudjono's version to be the correct one, his appointment was barely five days before the trial commenced on 1 February 1993 and a day after the charge/indictment was filed by the Prosecution. This was not a deterrent to the defence advocate – normally, he stated, it would have taken him about seven days to prepare the defense's "Exceptions" but in the present case, he was able to complete them in three days, with the assistance of a University Professor of Law, an expert in criminal law. In keeping with his high-profile press build-up, the Defence advocate added, that he could have finalized the "Exceptions" even in a day, "since I am a professional."¹⁵

The Defence advocate's total satisfaction with the conduct of the trial was quite remarkable, given the fact that problems for the Defence, particularly in politically sensitive trials, are almost a universal experience. A possible explanation could be that it was the Defence advocate's perception that voicing grievances in the present set up, would be self-defeating for Xanana.

15 *Suara Timur Timor*, 2 February 1993.

The Defence advocate's problems stemmed essentially from Xanana's lack of instructions on factual matters and his confirmation of all the testimony against him. Xanana assumed all responsibility for the acts of his supporters. Defence advocate rationalised such conduct by explaining that it showed Xanana to be a great leader of men. The more widespread view in March 1993 was that this tantamounted to Xanana virtually signing his own death warrant. In response to the ICJ Observer's query as to whether Xanana had been advised in clear and unequivocal terms as to the consequent likely adverse repercussion on the outcome of the trial, defence counsel stated that the accused was too intelligent a person to require any detailed explanation as he knew and understood the likely consequences of his conduct.

The Defence counsel felt that Xanana's conduct showed him to be a great leader. The more cynical view in Dili was that Xanana's sudden change of heart was the obvious outcome of pressure and worse being brought to bear on him. The possibility of an arrangement having been worked out between Xanana and the government, in regard to the ultimate sentence which the Prosecution will press for, was also voiced. Did Xanana admit all facts against him because they were in fact true? Or is it that he regarded himself as a great leader, and great leaders do not disown their supporters even when they turn against the leader? Were the admissions part of a 'deal' which ensured for Xanana comfortable jail custody during trial and a 'light' sentence on conviction (any sentence short of the death penalty being regarded as 'light' in this context)? Was Xanana using the trial as a small piece on a larger political chess-board? Did Xanana's image as a tough guerrilla leader in the forests not match the reality of a weak, sick person cracking under the pressures of sustained interrogation and continued detention? The theory of a 'deal' having been worked out appears to be the most plausible - fuelled by the prosecution seeking 'only' a life-term and the court imposing 'only' a life sentence on Xanana. Xanana's defence

statement alludes to the fact that “necessary arrangements” were made by BAIS to spare him the death sentence, with the promise that if he praised integration, he would be acquitted.

The Charge or Indictment

On 25 January 1993, the Prosecution filed in court a 62 page charge or indictment against the accused. A summary of the charges against the accused is:

- a) **Firstly and Primarily:** that the accused had between 17 July 1976 and 20 November 1992, schemed or taken part in scheming for the overthrow of the government with the intention of separating a part of the State territory from the rest thereof and had committed a series of acts in order to separate the East Timor territory which constitutes the 27th Province of the Republic of Indonesia and make it a State independent of the Republic of Indonesia; punishable under Article 106 read with Articles 55 (1) and 64 (1) of KUHP (the Indonesian Penal Code);
- b) **Alternatively,** that the accused from December 1979 till November 1992, committed a series of acts of leading and controlling the persons who fought the government with weapons given by the accused in order to separate the East Timor Territory, which constitutes the 27th Province of the Republic of Indonesia and make it a State independent of the Republic of Indonesia; punishable under Article 108 (2) read with Article 64 (1) of KUHP (the Indonesian Penal Code);
- c) **More alternatively,** that the accused had conspired to scheme for the overthrow of government with the intention of separating a part of the State territory from the rest thereof viz. the accused had committed a series of acts to separate the East Timor territory which constitutes the 27th Province of the

Republic of Indonesia and make it a State independent of the Republic of Indonesia; punishable under Article 110 (1) read with Articles 106 and 64 (1) of KUHP (the Indonesian Penal Code);

- d) Further in the Alternative**, that the accused had conspired to lead and control the persons who fought the legal government or authority in Indonesia with weapons which had been given by the accused with the intention of separating a part of the State territory from the rest thereof viz., that the accused had committed a series of acts in order to separate the East Timor territory which constitutes the 27th Province of the Republic of Indonesia and make it a State independent of the State Territory of the Republic of Indonesia; punishable under Article 110 (1) read with Articles 108 (2) and 64 (1) of KUHP (the Indonesian Penal Code);
- e) And Secondly**, that the accused, from 29 August 1992 to 20 November 1992, whilst in the house of Augusto Pereira at West Lahane Village, Rt 2, Rk 1, Subdistrict of West Dili, Regency of Dili illegally controlled, possessed, owned, stored or hid firearms and ammunition as specified in the charge (viz. one firearm, Minimi No. 003348 with + 50 bullets) – punishable under Article (1)(1) of Act No.12/Drt/1951.

Each charge against the accused was supported by a series of acts alleged to have been committed by the accused and which were chronologically set out in the Indictment. Most of these acts were common to the first and the three alternative charges listed in (b) to (d) above. The Jurisdiction of the Dili District Court was invoked under Article 84 (2) of the Criminal Procedure Code (KUHAP) on the ground that the acts committed by the accused were in various villages and areas over which the Dili District Court has authority and jurisdiction.

Briefly, the accused was charged with (i) supplying arms and seeking to separate a part of Indonesian territory to form a

separate State; (ii) attempted armed overthrow of a government established by law; (iii) conspiring to do each of the above with others named in the Indictment, some of whom were stated to be under detention and others were stated to be still at large and (iv) illegally possessing, keeping, carrying firearms without licence.

Each of the primary and alternate charges as listed in (a) to (d) above were against the accused in his capacity as a member and leader of FRETILIN, of CNRM and of 'Forças Armadas de Liberação Nacional de Timor Leste' (FALINTIL) the armed wing of FRETILIN.

The charges under (a) to (d) above were clearly political in nature. The Indictment is a lengthy, rambling document, and is unclear when listing the acts which Xanana is alleged to have committed - it is not specified as to whether he participated in the various attacks and ambushes or whether he masterminded them without actual participation. In none of these - bar one - is it alleged that the accused himself led the attacks. The only attack which the accused is alleged to have personally led relates to a December 1988 ambush upon ARBI members at Laçlo River (situated between Alas and Fatuberliu) Regency of Manufahi. All the other attacks and ambushes are alleged to have been led by others.

The charges against the accused rendered him liable for the following maximum penalties:

- a) under Article 106 of KUHP: life imprisonment or a term of imprisonment not exceeding 20 years;
- b) under Article 108 of KUHP: term of imprisonment not exceeding 20 years;
- c) under Article 110 of KUHP: life imprisonment or a term not exceeding twenty years;
- d) under Act No.12/Drt/1951: the death sentence.

The Nature of the Prosecution Case and a Summary of the Prosecution Evidence

In the Prosecution Indictment, in support of each charge, the Prosecution set out “the methods” by which the accused committed the offences with which he is charged. These acts are enumerated year-wise. The following are typical illustrations:

“On June 10, 1980, making an attack upon the security post of TVRI Station situated at Maurabia Village, Sub-district of East Dili, Regency of Dili, led by Maukalo, in order to capture the Dili TVRI Station which caused:

- two members of the Mobile Brigade to die from shooting,
- three members of the Mobile Brigade to be seriously injured.”

“9. In 1983, the following acts were committed:

- attack upon the Security post of Yon Zipur (Engineering Battalion of Combat) at Klaras Village, Regency of Viqueque, led by Ologari, Maukalo, David Alex, Taur Matan Ruak, Vera Lafaek, Mauhudu, Kilik, causing:
 - one squad of the Engineering Battalion of combat members to be killed,
 - one full platoon of Hansip (Civil Defence Corps) members together with their weapons to be captured,
 - twenty civilians to be shot dead,
 - seventeen pieces of firearms called SP-1 to be held up,
 - one Racal Radio to be held up...”

The accused was charged with crimes of violence - killing of army and civilian personnel, looting, theft, extortion, arson, armed attacks, ambushes, etc. Barring one attack, alleged to have been led by the accused himself (when no deaths, casualties or injuries are listed), in the case of the other attacks and ambushes, only vague allegations are made without specifying the accused's precise alleged role in them. Several of the witnesses, particularly the three witnesses who were expected to depose to the 1991 demonstration - Gregorio, Francisco and Saturnino - were all serving sentences for their role in that demonstration. Prosecution witnesses were also under arrest and awaiting trial (Oscar Lima, Augusto Pereira). The ICJ Observer was informed that the "key witnesses", Maukalo and Mauhudu, were not under arrest; they were both "captured" before Xanana's arrest, were kept in detention for a long period, were subsequently released on promise of good conduct and have since been working as farmers in their respective villages in East Timor. The ICJ Observer was unable to confirm the veracity of this information.

The Prosecution witnesses deposed mainly to the hierarchical military command of the outlawed organisations, the attacks and ambushes and the motives for the same, the part played by Xanana in such attacks and his role in the organisations which he led. Several of the witnesses deposed to their own roles - in the process incriminating themselves. This was particularly harmful to those still awaiting trial, as their evidence in the present trial can be used against them in their own trials. As noted in "Indonesia and the Rule of Law" ICJ, 1987:

"The public prosecutor is not obliged to combine the cases and to charge them in one indictment. In this way, the other defendants in the separate cases can be summoned and heard, on oath or pledge, as witnesses. Although they are all charged with the

same criminal acts or with connected criminal acts, they have no right to keep silent or to withdraw as a witness. Furthermore, Judges in practice use evidence – especially witness statements – in the other cases, which are materially connected but formally separated, as evidence in such case.”

The victims of the attacks were unable to identify the accused positively as a participant in the attack, although one of them, Islamet Widodo (47), after stating that he could identify the persons who attacked his school only by their physique, added that may be Xanana was also there, though he could not identify him exactly. The two key witnesses, Maukalo and Mauhudu, both deposed that they had not received instructions directly from the accused, though they stated that they acted under the accused’s instructions. In fact, Maukalo specifically stated, in response to a question from Judge Radjah, that the accused did not take part in the shooting and burning. Mauhudu deposed that the accused had instructed him to plan and organise the 12 November 1991 demonstration at Dili. Many witnesses deposed to having seen the accused in possession of arms. Maukalo clarified that he had never seen the accused actually use the arms. Augusto Pereira deposed that the accused carried a pistol, but it was in his bag, not in a holster. Rui de Oliveira (37) was the only witness who deposed to actually seeing the accused killing ABRI soldiers during an encounter at Kali Lacro, Manatuto. He also deposed that the Klaras attack was led by the accused. Xanana confirmed this testimony.¹⁶

16 The ICJ Observer was unable to obtain detailed transcripts or notes of the evidence of Rui de Oliveira. The above comment on the evidence is on the basis of the short summary of Rui’s evidence which appeared in *The Jakarta Post*, 26 February 1993.

The questioning of witnesses by the Judges appeared to be an exercise in getting the witnesses to confirm on oath their statements as recorded in the 'Berkas Perkera' (BAP) - compilation of the evidence relied upon by the Prosecution against the accused, and obtaining clarifications of such statements. Indonesian criminal law procedure is not based on an adversarial system. The main questioning of witnesses is done by the Judges, some supplementary questions are asked by the Prosecutors, there is a brief 'cross-examination' by the Defence advocate, and then a further round of questioning by the judges and the Prosecutor, if they consider it necessary. The Defence advocate objected to prosecutors questions on the ground of relevance, but in the absence of permission to peruse the official record of the court, the Observer could not ascertain whether these objections were recorded and formally ruled upon. The Defence advocate also objected to one of the puisne judges being rude to Xanana.

Summary of Evidence on 4 March 1993

On 4 March 1993, the day the ICJ Observer attended the trial, two witnesses were examined: Luis Cardozo and Saturnino da Costa Belo. Luis Cardozo acknowledged his Indonesian citizenship, and deposed that he knew the accused well since 1991 through his younger brother, Acacio Jose Tilman. He had met the accused in Tilman's house in Fatuk Metau, W. Dili. He stated:

"I knew about the activities of the accused through my younger brother, who is a commandant of FALINTIL. I do not know what FALINTIL means. I do not know if it is an organisation. I know that Nicolas Lobato was one of the other commandants of

FALINTIL. I knew this even in 1978 because in 1976, I lived in the forest with Nicolas Lobato, as a member of FRETILIN. In 1979, I surrendered and returned from the forest, since I was then weak and I thought that the fight for independence was hopeless. I used to keep arms at that time. Between 1985 to 1991, I lived in Same, Manufahi, as head of the village. I did not meet the accused in 1985. I had only heard about him. I knew that he was the commander of FRETILIN but I had never met him. I repeat that I do not know if FALINTIL is an organisation. I think FALINTIL has military activities, not Indonesian military, but the military of FRETILIN, with the idea of gaining independence. In February 1985, I knew that GPK was a movement of FRETILIN. I do not know that its aim was to disturb other's activities. In 1991, a girl named Reginia Constantia asked me to meet Xanana Gusmao, on the following day. She was sent by Acacio to tell me to come to Dili to meet him. Two days later, I met Xanana, in Fatuk Metan, in Acacio's house. At that time, Acacio said that Xanana was the Commander of FRETILIN. He told me to contact other members of FRETILIN. I was asked to meet other members. I was also asked to join an organisation called "Suri Tahan", whose aim was to help by providing food, medicine, etc., to FRETILIN. There were about 30 members of this organisation, but only three were active. My job was to procure foodstuffs, medicines, clothes, etc. for being sent to the forest. Xanana told me that if I met Aquilong, I should tell Aquilong that he (Xanana) would like to meet him. Xanana asked me to keep his whereabouts in Dili secret. I was also successful in contacting other members of FRETILIN in the

forest, as asked. This was in October 1991. I met three members - Bennoi, Fatori and Berleka. I gave them food - rice, curds, potatoes. I did not buy these foodstuffs, I got it from friends who sympathised with the struggle. I don't recall how much foodstuff I got. Besides food, I also collected medicines and clothes.

(In answer to questions by Judge Senega the witness stated):

In 1991, I was told by Jose Tilman to meet Xanana. I met him at Tilman's house. I saw him in the bunker in Tilman's house. The bunker was made by Tilman, but I don't know how. After 1991, Xanana continued to stay in Dili. I met him twice or thrice. Xanana came from Same to Dili in an autobus, in a box. He was accompanied by his friend, Akuilong. The box was put in the autobus. He could not be seen, as the box was covered with many other goods like potatoes, etc. I don't know where he went after that. I sat on the box. I did not see him bring out any firearms. I sat on the box so that no one could see. I helped him because I was scared that FRETILIN would attack our village and kill us if I refused. Xanana carried firearms and ammunition from Same to Dili (witness identifies the 'Minimi' gun shown to him by the Prosecutor as the one carried by the accused). Witness continues: He also had a pistol. (Witness identifies the pistol shown to him by the Prosecutor as the one carried by the accused). Witness continues: Xanana always had firearms when he came to my house. It was his own idea to travel in the autobus in a box. FRETILIN activities, when I was in the forest, were to attack people and burn their homes. We burnt homes in Baturaga and stole buffaloes and also attacked Indonesian soldiers in Mutalau village. I got food and

medicine from friends and from the staff in the hospital, a lady called Olga. Xanana directed us to do all this. I do not know if he paid for it. I know that Xanana organised and mobilised people for the organisation. We were told that we had to be united to be independent. We had to keep our organisation secret. Xanana gave interviews to journalists and prepared video recordings. **In August 1992 I was present when the video recording was done** by Mauhadu and about 10 other people. These interviews and documents were sent abroad. I do not know what the documents contained. (emphasis added).

(In answer to questions from Judge Radjah the witness stated):

On 26 July 1992, six of us, including Akuilong, Fernando and others travelled from Dili to Same. We all stopped over at my house including Xanana. He had lunch at my house and left. **The video shooting was in August 1992 I was not present during the shooting.** I did not attend the Commemoration Day for FALINTIL. Later on, I took food and medicine. I met Xanana after that when he stayed in my house. We went to Dili early morning and arrived at 12 o'clock. He stopped at a Chinese cemetery. I did not stay there, since I had my family house. Even after I became the head of the village, I met FALINTIL members from the forest. I did not know that the FALINTIL military attacked Indonesian soldiers. I learnt this only in 1992, recently. I also learnt recently that FRETILIN robbed houses and goats from the village and burnt houses in the village. I do not know what else they did.

(emphasis added)

(In answer to questions from the Prosecutor the witness stated): I kept firearms. The commander of our organisation was Pero Cotria. Our aim was independence. Between 1976 to 1979 when I was a member of FRETILIN, I had no role, as it was very difficult to contact people in the forest. My connection with the accused was only to help by bringing food and medicine. The Chairman of the organisation was Xanana. (Witness identifies the Video camera shown to him by the Prosecutor as being the one used in the video shooting). The video was sent to Portugal and Australia. I surrendered in 1979 because I lost all hopes and strength. There were no benefits to me by co-operating with FRETILIN. It was of no use. I was appointed head of the village by the Indonesian Government.

Q: As a government employee why did you help Xanana, who is an enemy of the Indonesian Government?

A: I did not understand. I thought that he was clever so I followed him. I did not know that the Indonesian law applied. I know it now.

The cross-examination of witness Luis Cardozo by defence advocate Sudjono SH was as follows:

Q: Did you take part in the demonstration on 12 November 1991?

A: Yes.

Q: What were the aims of the organisation 'Suri Tahan'?

A: To get independence (for East Timor).

Q: What were its other activities?

A: To help with supplies of food, medicines, etc.

Q: You said that you were directed by Xanana to contact Akuilong. What was the relationship between Xanana and Akuilong?

A: I don't know that well. I don't know whether I was asked to meet Akuilong because he was more clever than the others.

Q: (Did your) organisation take part in the demonstration on 12 November 1991?

A: No.

Q: Regarding the video shooting were you present?

A: No. I was not there.

Q: How do you know that the video shooting was sent to Portugal?

A: I was so informed by friends.

(emphasis added)

Further questions were then put by the Chairman. In answer, the witness Luis Cardozo stated that the organisation Suri Tahan was not a "permitted" one. It was prohibited. He stated:

"I don't know if it was a "clandestine" organisation. I don't know any other organisation prohibited (outlawed) by the government."

In answer to further questions from the Prosecutor, the witness stated that he knew that the video camera shown to him in Court was Xanana's, as he had himself seen the camera when it was brought to his house.

Q: Did you actually see the burning of house?

A: I knew about it **but I did not actually see it**

Q: Who did it?

A: FRETILIN (GPK)

(emphasis added)

At the end of the witness' testimony, the Chairman asked the accused if what was stated by the witness was true. The question was asked in Bahasa Indonesia. It was not interpreted to the accused, but the accused appeared to understand it. The accused replied in Portuguese that he accepted all that was stated by the witness.

The next witness, Saturnino da Costa Belo, created a stir in court. Dressed in black trousers and a white shirt, the witness Saturnino was escorted into the courtroom by two policemen. On entering the courtroom, he yelled out loud: "Viva Independence", "Viva Timur Timor" and gesticulated wildly, punching the air with his clenched fist. Instead of going to the witness table, he rushed towards the defence table, where Xanana was seated, and sought to shake hands with the accused, in an apparent gesture of defiance against authority and of solidarity with the accused. Xanana politely and calmly declined to extend his hand, and directed the witness towards the witness table. He was taken there by the policemen (or court marshalls). The Chairman, Judge Godang began asking the witness the usual introductory questions like his name, etc. The witness answered, giving his name, and then broke off into a speech, speaking excitedly and in a defiant tone. He spoke in Portuguese. At this juncture, the Prosecutor requested the court to recess for a short while, so that the witness could be medically examined. The Chairman then announced a 15 minute recess, stating that the witness, who was under obvious stress, would be examined by a doctor. The judges then retired to their chambers and the courtroom was cleared.

The court reassembled after about 45 minutes. The witness did not return to the courtroom. The Prosecutor stated that the result of the medical examination was not good, and submitted the doctor's report to the Chairman. The Chief Judge then announced that according to the doctor's report, the witness was not in a physical and mental state to give evidence in court. The Chairman then called upon the Prosecutor to present other witnesses. The Prosecutor stated that two other witnesses, Hendrik Belmino Da Costa and Luis Chung (alias Akuilong) would be examined, but on the next occasion. The Chief Judge then asked the accused to go to the witness table and was in the process of explaining to him what had happened when Sudjono SH, the Defence advocate, asked to see the doctor's report and stated that the attitude of the witness was not beneficial to his client. He was shown the doctor's report. He then called upon the judges to admonish the Prosecution, stating that they should be warned that in future, the health of witnesses should be checked beforehand, so that the trial process was not needlessly prolonged. The Chairman then expressed the hope that such an incident would not recur.

During the court recess, the witness was examined by a Police doctor, Dr. Musadec Ishac. The doctor's report did not specify what exactly was wrong with the witness. The witness Saturnino is presently undergoing a 15 year jail sentence on conviction for his role in the 12 November 1991 demonstration. Defence Advocate Sudjono SH, on being asked by the Observer for his views on the witness' conduct, opined that the witness Saturnino had been convicted and sentenced to a 12 year imprisonment term by the trial court for his role in the 12 November 1991 demonstration. Saturnino had appealed. His jail sentence had been enhanced to 15 years by the appellate court. Defence Advocate Sudjono SH felt that the witness could have been under stress in court, if he was under the impression that the present court proceedings were the third stage of his own trial and that he may have

apprehended a further enhancement of his jail-term. This appeared to be an implausible explanation. The Observer's impression is that the witness had decided to make a bold gesture, unmindful of the consequences.

In the Observer's view, it would have been advisable for the witness to have been examined by a private doctor mutually agreed upon between the Prosecutor and the Defence advocate. No such application was made to the court. Further, the doctor's report tersely stated: "physical and psychological unfitness", without specifying or even indicating what exactly was wrong with the witness.

Saturnino was not examined subsequently, having been certified as unfit to give testimony. However, his statement to the police during interrogation was read into the record (permissible under KUHAP), thereby depriving the Defence of their right to cross-examine the witness.

The Nature of the Defence and Summary of the Defence Evidence

The accused declined an opportunity, after the Prosecutor had read out the charges, to make a statement in his defence on the factual aspects of the case against him.

On 1 February 1993, the opening day of the trial, the accused informed the court that he accepted that he was a citizen of Indonesia. He also made a statement calling upon his supporters to surrender.

On 3 February 1993, the Defence filed its "Exceptions" ('Excepsi') to the Prosecutor's charges, limited to the question of

the Jurisdiction of the Dili District Court to try the accused ('Yurusdiksi Pengadilan'). The 'Excepsi' did not raise any protest about breach of KUHAP provisions during Xanana's pre-trial interrogation. In the 'Exceptions', the defence argued that on the basis of the theory of State formation by "social contract" and by reason of the history of the community in East Timor, the accused could not be tried by the Dili District Court. It cited as illustrations in support of this theory, the recent developments in what were formerly the States of the U.S.S.R. and Czechoslovakia.

The 'Excepsi' sets out the historical background of East Timor, culminating in the events of 1975-1977, which resulted in a political vacuum once the Portuguese colonizers left Dili. The 'Excepsi' also traces the stands taken by the different political parties in East Timor, including FRETILIN's stand that East Timor should be an independent State. Reference is made to the Referendum and its legitimacy — or lack of it — since it was not conducted under impartial, neutral supervision. The 'Excepsi' states that the accused did not accept the result of the Referendum as claimed by the Indonesian Government as according to him, it did not correctly reflect the people's will. The 'Excepsi' also argues that FRETILIN and the accused never recognized the Indonesian Government as the lawfully established government in East Timor and they had valid grounds for such non-acceptance. Even the international community had not accepted the Indonesian Government's claim as the lawful government in East Timor.

The 'Excepsi' compares the situation in East Timor with that of Irian Jaya and states that in Irian Jaya, the international community had recognised and acknowledged the Indonesian Government as the lawfully established government, and had recognised Irian Jaya as an integral part of Indonesia. Thus, both on the basis of the history of East Timor and on the basis of

international law, the Dili District Court, established by and functioning under the Indonesian Government, had no jurisdiction to try the accused.

The 'Excepsi' also sets out in chronological sequence, the history of the struggle to gain independence for East Timor, and states that the independence movement was not a post-1975 event. Independence for East Timor was sought, and an Independence movement started, shortly after the end of World War II in 1945. At that time, independence was sought from Portuguese rule. In any case, argues the 'Excepsi', FRETILIN had declared East Timor to be an independent State (free from Portuguese Rule) in 1975. Once that happened, FRETILIN became the Government of East Timor and the territory of East Timor belonged to FRETILIN and the accused. Indonesia, was the aggressor, having taken military action and the accused was justified in resisting this aggression. The accused was only enforcing the 1975 Declaration of Independence by FRETILIN. In any event, according to the accused, East Timor was an independent country or at least the accused had fought to make it an independent country. The accused had never recognised the Indonesian legal system. Hence, he could not be tried by a Court set up under the Indonesian legal system. The accused's non-recognition of the Indonesian Government in East Timor also extended to non-recognition or non-acceptance of its institutions, including courts. The accused had fought for independence even prior to 1975 and the Prosecution's attempt to frame charges only on the basis of acts post-1975, without reference to the accused's struggles in the pre-1975 period, was not fair or legal. For all these considerations, the Defence invited the court to hold that it had no jurisdiction to try the accused. In his defence statement of May 1993 Xanana gives the impression that he was not consulted about and did not approve of the 'Excepsi' filed by Sudjono. He complains there that Sudjono tried to adopt a "more liberal position" and did not deal with the

“fundamental problem – the illegality of the annexation of East Timor by means of force.”

On 5 February 1993, the Prosecution filed its reply to the Defence “Exceptions” on jurisdiction. The reply alleged that the “Exceptions” were not valid and could not be entertained in view of Article 156 of KUHAP (Criminal Procedure Code). It states that having regard to the charges framed and the acts relied upon, the court had jurisdiction to try the accused. On the question of the legitimacy of the Indonesian Government in East Timor and East Timor’s “integration” with Indonesia, the Prosecutor’s reply quotes extensively from a book published by “Almanack Republic Indonesia” and entitled: “Lahirnya Propinsi Timur Timor” (1977 Edition). It quotes the book as stating inter alia that after the Portuguese governor left Dili for Aturo (and then to Portugal via Australia), there was a vacuum in East Timor. All the political parties were opposed to FRETILIN, since FRETILIN’s policy (scheme) was not in the people’s interest. The Declaration of Independence by FRETILIN on 28 November 1975 was opposed by a majority of the people in East Timor. On 30 November 1975, the people of East Timor adopted a Resolution, in a meeting at Balibo, proclaiming their support to the integration of East Timor with Indonesia. The Balibo Proclamation was signed by all the political parties, except FRETILIN (End of Quote). Based on this historical background, the Prosecutor’s reply submits that the integration of East Timor with Indonesia was in accordance with the theory of social contract and such a decision reflected the views of the majority of the people, as exemplified by the Balibo Declaration. Thus, in fact and in law, East Timor became an integral part of Indonesia from 17 July 1976 (when the Indonesian Legislature passed the Act legalising the integration and making East Timor the 27th Province of the Indonesian Republic).

As regards the Defence argument based on international law, and international non-recognition, the Prosecution reply states that factually, once the majority of the people had decided in favour of integration, the status of the territory had officially altered and it became an integral part of Indonesia. In these circumstances, the question of recognition or otherwise by other countries was irrelevant and was at best a political question. All the activities of the accused were within the territory of the Indonesian Province of East Timor. By Act No.7 of 1976, East Timor had become a part of Indonesia and the Indonesian legal system had full force and applied. The prosecutors reply thus invited the court to:

- (i) deny all the objections/exceptions of the Defence,
- (ii) accept all the charges of the Prosecution,
- (iii) rule that the Dili District Court had jurisdiction to try the case and pass judgment, and
- (iv) continue with the trial.

On 11 February 1993, the court gave its judgment, rejecting the Defence "Exceptions" on the question of its jurisdiction and upholding the Prosecution pleas. From newspaper reports¹⁷ it appears that the court held East Timor's integration with Indonesia to be legitimate in fact and in law. Further, the accused Xanana Gusmao had acknowledged that he was an Indonesian citizen. Thirdly, after Act No. 7 of 1976, FRETILIN had been outlawed. The judgment traced the events leading to East Timor's integration with Indonesia and rejected the Defence's submissions to the contrary. The trial was then adjourned to 15 February 1993.

17 *Suara Timor Timor*, 12 February 1993.

Sudjono SH, Defence advocate informed the court that he would be appealing against the judgment. He also told the press that he was not surprised by the judgment, since Defence exceptions were rarely upheld. An appeal had in fact been filed and was pending in the higher court at Kampung. Under Indonesian law, these appeals are disposed of on the basis of written briefs and no oral hearing or argument is permitted. There was unanimity amongst those to whom the Observer spoke that the appeal was a mere formality and its dismissal a virtually foregone conclusion.

In response to the Observer's queries regarding the continuance of the trial during the pendency of the appeal (as an incongruous situation would arise if the trial court's judgment on jurisdiction was reversed in an appeal after the trial had concluded), the Observer was informed that under Indonesian legal practice, it was normal for trials to proceed even during the pendency of appeals.

Generally, the Defence's cross-examination has tried to focus on the witness's lack of personal knowledge of the accused's activities. However, Prosecution witnesses were not contradicted on facts. On the contrary, their testimony was repeatedly confirmed and accepted as correct by the accused. The insistence of the accused in admitting the correctness of the facts deposed to against him, is obviously a major constraint on Defence advocate's ability to dispute facts in cross-examination of prosecution witnesses.

Sudjono SH, repeatedly voiced the Defence's difficulties in getting witnesses to testify in favour of Xanana. Governor Abilio declined to appear as a Defence witness.¹⁸

18 *Suara Timur Timor*, 20 and 24 February 1993 and *Kompas*, 2 March 1993.

Just before the commencement of the trial, the BBC Radio quoted Ramos Horta, a former FRETILIN member now in Australia, as stating that he was willing to go to East Timor to give evidence in favour of the Defence, and in fact wanted very much to do so. According to newspaper reports, the Chief Judge had indicated his willingness to extend facilities for Ramos to testify at the trial, but Xanana declined the offer, stating that Ramos' testimony would not help his case.

Former Governor Mario Viegas Carascalao, now in Jakarta, was willing to testify. However, as an employee of the Ministerial Staff in the Iron Department, Government of Indonesia, he required government permission to testify, which was not forthcoming.

The Defence also wanted to examine members of FRETILIN still in the forest. Sudjono SH, made it known in press interviews that they would have his personal guarantee that no arrests would be made, if anyone deposed in favour of Xanana. This "guarantee" was widely reported in the press. Such a "personal" guarantee was rendered virtually worthless in the absence of any commitment from the government to honour it.

The difficulties in getting witnesses to depose for the Defence, must be seen in the context of KUHAP created rights. Under KUHAP, witnesses are obliged to appear and can be brought before the court if they do not appear. But it is left to the Chairman of the court to decide whether or not he will order a witness who remains absent to be brought before the court. The defendant has the right to seek and submit witnesses who are favourable to him (Article 65). As far as the Observer could ascertain the Defence did not apply to the court to compel the attendance of any witness. There have been cases in the past when the court has declined to summon witnesses sought by the Defence.

The accused was refused permission by the court to read out his defence statement in Portuguese, the only language in which he is fluent. The court ordered a written translation of the defence statement to be made in Bahasa Indonesia. This ruling of the court is in violation of the rights of the accused under KUHAP (Article 171) and is contrary to internationally accepted standards for fair trials. Such conduct also gave rise to doubts about the possibility of the defence statement being “edited” in the process of translation, and indicated that the presence of interpreters in court was merely as show-pieces and not in compliance of obligations imposed by KUHAP.

The defence statement is dated 27 March 1993 and is in Portuguese. The defence statement is a well thought-out political statement and indicates full awareness of the current world political scene, and a fierce indictment of Indonesian rule in East Timor. However, it does not address the legal issues involved, the evidence against him and the question of his guilt. The document is a total denunciation of the Indonesian system. It also seeks to retract Xanana’s earlier much-publicised acceptance of Indonesian citizenship, of Sudjono being his appointee as Defence advocate and his alleged acceptance of Indonesian rule in East Timor.

The Decision and Sentence

On 21 May 1993, the court convicted Xanana on the charges of leading a rebellion and of being in possession of unlicensed fire-arms, and sentenced him to life-imprisonment. The judgment is not available to the ICJ Observer. The reasons which weighed with the Judges are not known. The sentence of life is the maximum in respect of the charge of rebellion. On the illegal possession of firearms, the court did not award the death sentence.

The Conduct of the Trial

The court language is Bahasa Indonesia. The accused who speaks and understands only Portuguese, had the assistance of an interpreter, Sebastina Isabella Ribeira, a policewoman. There was an interpreter, Jose Estevo, also to assist witnesses. On 4 March 1993, when the Observer attended the trial, the interpreter did not interpret the proceedings to the accused continually during the questioning of witnesses. As noted above, the accused was not permitted to read out his defence statement in Portuguese, which is inconsistent with fair trial procedures.

On 4 March 1993, when the Observer attended court, after the Judges had assembled and the accused had been brought in, photographs were allowed to be taken inside the courtroom. The Indonesian Ambassador-designate to United Kingdom was present for a few minutes at the commencement of the hearing on that date.

The trial was meant to be "open". This was emphasised by the Chief Judge to the ICJ Observer. However, to gain entry into the courtroom, first, an identity card was required to be produced at the entrance to the court compound; the card was returned; next, the visitor was searched with metal detectors in the open compound; the identification card was then required to be surrendered for an official identification tag, to be displayed prominently; the tag bore a seat number; a second screening with a metal detector followed just inside the main court building, this time by uniformed policemen; the formalities were gone through very politely; court proceedings were amplified for those seated in the corridor; the courtroom and the corridor were watched through closed-circuit cameras which are monitored in a room in the adjoining building.

On 4 March 1993, the ICJ Observer and his interpreter were allotted seats within the courtroom. Several seats were empty,

many were occupied by persons who appeared to be plainclothes policemen. There were also persons from the prosecutors office. Other observers were also seated in the courtroom.

A disturbing feature of the trial was the number of prosecution witnesses who were already convicted for their role in the 1991 November demonstrations or were under arrest and awaiting trial. On 4 March 1993, the first witness, Luis Cardozo appeared to be confused at several points in his deposition, and had to seek the interpreter's assistance on a few occasions.

Access to the accused was denied to the Observer. It has also been denied to the accused's family members. However, as reported in the press and noted earlier, ("Suara Timur Timor" - issue dated 13 February 1993), Mr. Nugroho Wisnumurthi, the Indonesian Ambassador to the United Nations, had a meeting with the accused in jail.

Appeal

The accused has a right of appeal under Article 67 of KUHAP. The appeal would lie to the High Court at Lampung. Under Indonesian law, appeals are normally decided 'on the file' i.e. on the basis of written memorandum and without oral hearing.

Controversy surrounded Sudjono's much-publicised 'mercy petition' to President Suharto. The petition for Presidential clemency was not signed by Xanana and was presented by Sudjono after he ceased to be the Defence advocate. In an interview with the Australian Broadcasting Corporation, on 25 May 1993, Sudjono voiced the utter futility of filing a regular court appeal against the verdict and expressed optimism that the President would reduce the life sentence to less than five years.

The outcome of the clemency appeal is awaited.¹⁹ The disturbing feature of the 'mercy petition' is that it is not known if it has Xanana's authority.

Conclusions and Recommendations

Xanana's trial has ended with the conviction of the accused and imposition of a life sentence against him. His conviction appeared to be a foregone conclusion in all quarters in Jakarta and Dili much before the actual Court Judgment. Also, there was near unanimity that Xanana would not be given the death sentence. The final verdict has proved the accuracy of these pre-judgment expectations.

The ICJ Observer found no evidence of physical torture of the accused. However, in several respects, the trial process violated the accused's rights and was not in conformity with international standards of fair trial procedure and even breached the safeguards provided by KUHAP.

The initial infractions of Xanana's rights related to the days immediately after his arrest, when no lawyer was allowed to be present during his interrogation. This was in clear breach of international standards and of KUHAP. The story put out by the Indonesian authorities that Xanana had himself refused to have lawyers present during his interrogation, is incredible and lacks conviction.

¹⁹ On 12 August 1993 State Secretary Murdiono announced the outcome of the clemency petition - the life sentence was reduced to 20 years.

The appointment of the Defence advocate was another area of concern. Although the person finally appointed was a senior, experienced criminal lawyer, his admittedly close links with top military officers was disquieting. Doubts remained throughout that Xanana had not voluntarily appointed him.

Although access to Dili and to the courtroom for many international observers was free, the reluctance to permit them access to court documents, to the accused and to Prosecution counsel was disheartening.

The non-invoking of the Anti-Subversion law against Xanana was an encouraging feature of the trial.

One of the most significant violations of the accused's rights was the court's refusal to permit Xanana to read his defence statement. The ICJ has obtained translated excerpts from the 28 page defence statement that was presented in court on 17 May 1993 by Xanana. After reading the first two pages the court ordered him to stop. This violated his rights under KUHAP and was not in accordance with internationally accepted fair trial procedures.

Many of the witnesses who deposed for the Prosecution at Xanana's trial are themselves under detention, either after conviction or awaiting trial. In either case, doubts remain that their testimony was not entirely voluntary. Those still awaiting their own trial are under a great handicap, as their statements in Xanana's trial can be used against them in their own trials. Oscar Lima, a businessman, faced this dilemma.

Governor Abilio was reported to have stated that Xanana had committed murders and crimes and must consider himself lucky that he was being tried in Indonesia, a State that believed in the Rule of Law.²⁰ The Attorney General was reported to have stated just

²⁰ *Suara Timur Timor*, 1 February 1993.

a few days before the verdict, that the Court was not bound to award only a life sentence to Xanana as sought by the Prosecution and could award the sentence of death also.²¹ Such statements in the midst of a trial can legitimately be viewed as attempts to interfere with the trial process and, ought to have been avoided.

Recommendations:

1. The Indonesian Government should issue administrative instructions to all concerned parties to strictly enforce KUHAP provisions relating to access by lawyers during interrogation of persons in detention.
2. The Indonesian authorities must get over their prejudice against LBH lawyers and must fairly give the accused the option of engaging LBH lawyers without fear of higher sentences being imposed as a result.
3. The Indonesian authorities should permit international observers to have full access to all court documents and to meet and interview the accused.
4. The Anti - Subversion Law should be abolished from the statute-books, which would be in keeping with Indonesia's attempts to build an international image of a nation governed by the Rule of Law.
5. The trial proceedings must be interpreted to the accused when they take place in a language he does not understand.
6. The accused should have been allowed to make his defence statement. This was one of the most serious violations of the accused's rights and contravenes internationally accepted fair trial procedures.

21 *Jakarta Post*, 1 May 1993.

7. International observers should be allowed access to witnesses in detention and judges themselves should actually ascertain the extent to which the testimony of such witnesses is the result of pressure from the authorities. A witness awaiting his own trial cannot be compelled to make self-incriminating statements. The KUHAP provisions in this regard require to be amended.
8. One of the witnesses, Saturnino da Belo Costa, was certified to be unfit for giving evidence by a police doctor. This was because he came into Court shouting, "Viva Independence", and demanded that the human rights situation in East Timor be improved. It is recommended that in cases where a witness has been certified to be unfit for giving evidence, certification of unfitness must be by an independent doctor, acceptable to the Defence as well, and not by a police doctor. A witness must be allowed to speak his mind, even if what he says is politically inconvenient to the Government.
9. During a trial such as the one involving Xanana, highly placed Government officials like Governor Abilio and Attorney General Singgih ought not to have made statements concerning the trial. Such statements can legitimately be viewed as attempts to interfere with the trial process.
10. Appeals against trial court rulings should be disposed of within a fixed time-frame of say, 30 days. The trial should not proceed during the pendency of an appeal from interlocutory rulings. To prevent the possibility of the State delaying the trial on the pretext of pendency of appeals, adequate statutory provision should be made for enlarging the accused on bail, should the appeal not be disposed of within the prescribed time.

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SECRETARY-GENERAL

ADAMA DIENG

International Commission of Jurists
Genève, Switzerland
Tel (41 22) 788 47 47
Fax (41 22) 788 48 80
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