

**PROSECUTIONS  
CASE STUDIES  
SERIES**

## **The Serious Crimes Process in Timor-Leste: In Retrospect**

Written by Caitlin Reiger  
and Marieke Wierda  
for the *International Center  
for Transitional Justice*

March 2006



## **About the ICTJ**

The International Center for Transitional Justice (ICTJ) assists countries pursuing accountability for past mass atrocity or human rights abuse. The Center works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unresolved.

In order to promote justice, peace, and reconciliation, government officials and nongovernmental advocates are likely to consider a variety of transitional justice approaches including both judicial and nonjudicial responses to human rights crimes. The ICTJ assists in the development of integrated, comprehensive, and localized approaches to transitional justice comprising five key elements: prosecuting perpetrators, documenting and acknowledging violations through non-judicial means such as truth commissions, reforming abusive institutions, providing reparations to victims, and facilitating reconciliation processes.

The Center is committed to building local capacity and generally strengthening the emerging field of transitional justice, and works closely with organizations and experts around the world to do so. By working in the field through local languages, the ICTJ provides comparative information, legal and policy analysis, documentation, and strategic research to justice and truth-seeking institutions, nongovernmental organizations, governments and others.



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## HYBRID COURTS CASE STUDY

### THE SERIOUS CRIMES PROCESS IN TIMOR-LESTE: IN RETROSPECT<sup>1</sup>

5 March 2006

This paper seeks to analyze the serious crimes process (the Special Panels and the Serious Crimes Unit) the UN established in Timor-Leste to try serious violations of human rights perpetrated in 1999. This mechanism finished its work in May 2005, and this paper provides an overall analysis in its aftermath. It is part of a series that aims to provide information and analysis on policy and practical issues facing hybrid tribunals, including:

- A brief history of the conflict and the nature of the atrocities in Timor-Leste
- Background to the establishment of the Special Panels and Serious Crimes Unit
- Analysis of the Special Panels
- Analysis of the Serious Crimes Unit
- Jurisdiction and legal framework
- Capacity of the Defence and issues of fairness
- Efficiency and funding
- Outreach and public perceptions
- Domestic ownership and political support
- Relationship with the Commission for Reception, Truth and Reconciliation
- Legacy
- Completion strategy and future of the serious crimes process

The purpose of this case study is to provide basic information, some of which is still not widely available, on these areas to guide policymakers and stake-holders in establishing and implementing similar mechanisms. Similar case studies have been developed on Kosovo and Sierra Leone.

#### *Summary of Conclusions*

The principal difficulty facing the serious crimes process was that the vast majority of major suspects in regard to the 1999 violence are in Indonesia, and the Timorese government has not been able to secure their surrender. This issue has called into question the success of the entire operation and whether it was appropriate to pursue a hybrid court in Timor-Leste. There was never any significant prospect of the SCU obtaining custody of such people considering the international reluctance to put any concerted pressure on Indonesia. This scenario was obvious at the outset to most observers, and was among the principal reasons that led to sustained calls for the creation of an international tribunal, including by the International Commission of Inquiry appointed by the UN High Commissioner for Human

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<sup>1</sup> This case study was written mainly by Caitlin Reiger, currently a Senior Associate at the International Center for Transitional Justice (ICTJ), who worked in Timor-Leste from 2001-2002 for the Judicial System Monitoring Programme (JSMP). It was edited and updated on issues since 2003 by Marieke Wierda, Senior Associate, and also relies on analysis in an unpublished paper by Paul Seils. Ayumi Kusafuka and Annie Bird also assisted. This paper uses the name Timor-Leste throughout, as the official change in the name of the territory to Timor-Leste occurred on May 20, 2002, and East Timor was used until that time. This paper represents the views of the author(s) and not ICTJ.

Rights. In the least, the Special Panels would have required a grant of Chapter VII powers from the UN Security Council, but there was insufficient international political support.<sup>2</sup>

These are some of the other conclusions pertaining to the serious crimes process:

- *Legitimacy.* The credibility crisis suffered from the beginning by the serious crimes regime in turn led to serious problems of legitimacy. Complaints were frequently heard that the Special Panels convict only persons from Timor-Leste, while the Indonesians remain unpunished.<sup>3</sup> This situation was further exacerbated by the flawed trials carried out in Jakarta in 2002 and 2003 in relation to the 1999 violence. The intimidation suffered by Timor-Leste witnesses allied to the generally offensive outcomes of the trials, only raised expectations among the people of Timor-Leste toward the serious crimes regime in their own country. It also led to ambivalence among the political leadership, which preferred to concentrate on improving relations with Indonesia. But neither did the serious crimes process have the backing from the UN that it needed to fully succeed, in terms of political support or resources. While resource allocation improved toward the end of the serious crimes process, some problems were never completely corrected.
- *Fairness.* One of the most serious concerns in terms of performance lies in the quality of defense counsel available to the accused. The notable lack of adequate quality in the representation of the accused in many cases in Timor-Leste casts doubt on the credibility of the whole process.<sup>4</sup> Given that there was already something of a crisis of legitimacy in relation to the process, the perception that a conviction was more or less a *fait accompli* in most cases as a result of the lack of adequate representation was a further serious setback. While the creation of the Defense Lawyers Unit provided some improvement in the provision of defense services, but this too was not without its problems. There remained a lack of sufficiently experienced lawyers given the gravity of the crimes involved.
- *Planning.* Adequate recruitment and staffing was an enormous challenge for the serious crimes process throughout its life. At various stages in the life of the Special Panels and SCU, there were significant points of crisis where it appeared that, principally due to the life cycle of the UN mission, the scale of operations, particularly of the SCU, were likely to be significantly downsized. As a result, significant effort was spent over the final years by senior SCU staff as well as sympathetic international organizations, lobbying for at least a continuation of existing staffing levels if not increases. Also, doubts about the commitment of the UN and the government created an atmosphere that did not always allow for the best in terms of staff morale. Nor can it be said that such a circumstance was likely to inspire the best-qualified applicants to seek work for either the SCU or the Special Panels. Finally, the decision to close down the serious crimes process was driven by a

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<sup>2</sup> Chapter VII powers refer to the part of the UN Charter that allows the Security Council to take measures to maintain or restore international peace and security.

<sup>3</sup> See the letter from Timor-Leste victims' representatives and NGOs to Kofi Annan asking that a Commission of Experts be appointed to examine the issue of criminal accountability on July 19, 2004 (on file with the ICTJ).

<sup>4</sup> "What I am afraid of is that afterwards, some years ahead people will say that it's not justice because they didn't have good enough defense or they didn't have proper interpreters. That I'm afraid might happen." Siri Frigaard, Deputy General Prosecutor for Serious Crimes (DGPSC) quoted at [www.etan.org/et2002b/june/23-30/28specal.htm](http://www.etan.org/et2002b/june/23-30/28specal.htm).



- winding down of the mission rather than by the needs of the criminal process, thereby leaving many issues unresolved or unclear.
- *Impact.* One proposed benefit of the Timorese model was its proximity to the victims, which would in principle make the pursuit of justice a more meaningful exercise, not only to the few witnesses in specific cases but to the country as a whole. It is widely recognized that wherever possible, the interests of justice and especially the interests of victims will be best served if trials occur in the country where the crimes were committed. However, the risks associated with failure, especially in the context of elevated expectations, may be more significant in the case of in-country trials than extraterritorial ones. The overall failure of the process to establish accountability in respect of those bearing the greatest degree of responsibility has meant that rather than making the pursuit of justice a meaningful national experience, it has simply served to make failures more obvious and the bitter pill of impunity harder to swallow.
  - *Overall efficiency.* The serious crimes process can be regarded as a success in at least one regard—the speed with which it was able to investigate and prosecute cases. After four years it indicted almost 400 people. It held 35 trials and 48 people were convicted and two acquitted. On the face of it this compares favorably to the rate of progress in the ICTY, where in more than 10 years just over 130 people have been indicted in approximately 70 indictments. However, any such comparisons fail to take account of the respective challenges. The scale of the issues facing the investigations and prosecutions at ICTY was clearly much greater than those facing the SCU. Also, while the ICTY has for much of the last five years focused on prosecuting people with high levels of responsibility, the SCU was unable to do so.<sup>5</sup> Those bearing most responsibility remain beyond their reach in Indonesia. This is relevant not only in judging the overall effectiveness of the venture, but is also important to bear in mind in assessing the complexities and time involved in particular investigations.
  - *Legacy.* The international presence within the judicial system in Timor-Leste has left only a limited legacy, and many additional steps will be needed to rebuild Timor-Leste's judicial system.

The case of Timor-Leste is instructive in what is required, both in terms of resources and in terms of political will, to deliver an adequate measure of justice in a situation with cross-border culpability. In many cases, the serious crimes process fell short. At the same time, the fact that it was able to deliver a measure of justice for particular victims should not be disregarded.

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<sup>5</sup> Notably, a conviction has been achieved against former Vice President of the Republika Srpska, Biljana Plavsic, and, more important, former president Slobodan Milosevic is currently on trial in relation to events in Kosovo, Bosnia, and Croatia.

## THE SERIOUS CRIMES PROCESS IN TIMOR-LESTE: IN RETROSPECT

### I. INTRODUCTION

#### A. Brief History of the Conflict

Timor-Leste was a Portuguese colony for almost 500 years, albeit a relatively neglected one in terms of development and colonial presence. In the 1960s the United Nations rejected Portugal's claim on Timor-Leste and placed it on the list of non-self-governing territories under Chapter XI of the UN Charter. The Portuguese Government, following political shifts in its own territory in 1974, accepted this situation and preparations began for a process of self-determination. Newly formed political parties split over preferences for full independence, continued relations with Portugal, or integration with neighboring Indonesia. The two major parties took opposing views, with UDT (Democratic Union of Timor) favoring progressive autonomy within Portugal, and FRETILIN (Revolutionary Front of Independent Timor-Leste) favoring immediate independence. The much smaller APODETI (Timorese Popular Democratic Association) supported integration with Indonesia.

Fighting soon erupted between the political parties, and the Portuguese administration withdrew. This was followed by the Indonesian invasion of the territory on December 7, 1975. The UN never recognized Indonesia's purported annexation of Timor-Leste as its "27th Province" in July 1976, and continued to regard Timor-Leste as a non-self-governing territory of Portugal.<sup>6</sup> Indonesia's occupation was the beginning of almost a quarter-century of immense atrocities and human rights abuses, during which almost one-third of the population of Timor-Leste, some 200,000 people, lost their lives.

In the five years immediately following the invasion, the Indonesian armed forces (TNI) conducted a series of intensive military offensives against FALINTIL (Armed Liberation Forces of Timor-Leste), the military wing of FRETILIN. It is estimated that 100,000 people died in the resulting violence.<sup>7</sup> A significant proportion of these deaths is attributed not only to the massive military assaults against unarmed civilians, but also to forced starvation and disease. Much of the population fled to the harsh mountainous interior to escape the invading forces and the widespread use of napalm and other defoliants.<sup>8</sup> FALINTIL continued a small but irrepressible guerilla resistance for more than two decades. In addition, in the face of the extreme military repression inflicted by the Indonesians, a clandestine popular resistance movement developed and was increasingly supported by an international solidarity network, despite the severe restrictions imposed on external communications and freedom of movement.<sup>9</sup>

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<sup>6</sup> This period of Timor-Leste's history is detailed extensively in Carmel Budiardjo and Liem Soei Liong, *The War against East Timor*, London: Zed Books, 1984; James Dunn, *Timor: A People Betrayed*, Sydney: ABC Books, 1983; Jill Jolliffe, *East Timor: Nationalism and Colonialism*, St. Lucia, Queensland, 1978.

<sup>7</sup> FALINTIL (Armed Liberation Forces of Timor-Leste) was created by FRETILIN in mid-1975 out of the remains of the Portuguese army. For details of the encirclement and annihilation campaigns, see John G. Taylor, *Indonesia's Forgotten War: The Hidden History of East Timor*, London: Pluto Press, 1991, at 79-91.

<sup>8</sup> Report of the CAVR National Public Hearing on Famine and Forced Displacement, July 28-29, 2003 (copy on file with the ICTJ).

<sup>9</sup> For an example of one of the longest-running international solidarity groups, see Timor-Leste Action Network at [www.etan.org](http://www.etan.org).

The continuous human rights violations perpetrated in Timor-Leste ranged from torture of suspected resistance members and suspected FRETILIN supporters, disappearances, confiscation of land for migrant settlers from other parts of Indonesia, rapes, forced marriages and forced sterilizations, and general intimidation of the population.<sup>10</sup> Periodic massacres continued, such as the killing of hundreds of unarmed protesters during a funeral procession to Santa Cruz Cemetery in the capital city of Dili in November 1991, which increased both state oppression and further clandestine resistance to it. The cruelty of Indonesian policies such as “encirclement and annihilation” spared none. Particularly illustrative was the “fence of legs” operation in 1981, in which 80,000 men and boys were forced to form human chains, scouring the country for pockets of resistance. Those caught in their path were slaughtered.

During these years the international community largely turned a blind eye to the plight of Timor-Leste. Many nations voted with Indonesia against General Assembly Resolutions on Timorese self-determination. Others sold arms or gave military equipment to Indonesia.<sup>11</sup>

However, dramatic changes occurred in late 1998, during the economic crisis in Southeast Asia and when increased support for democratization saw the fall of Indonesia’s long-standing President Soeharto. The resulting political instability in Indonesia created a brief window of opportunity for Timorese self-determination. The new President, BJ Habibie, agreed in late January 1999 to hold a popular consultation on an autonomy package for the territory, to be supervised by the UN in August of that year.<sup>12</sup>

However, the Indonesian military did not support this policy, and during the months leading up to the popular consultation, the Indonesian military (a.k.a. the TNI) and civilian administrations in Timor-Leste stepped up their attempts to control the civilian population through increased persecution of pro-independence organizations and intimidation of the general populace. Central to this strategy was the creation of Timorese militias, largely composed of young men who were trained, armed, paid, and supervised by the regional commands and often incorporated as village or district-level civil administrators. These local paramilitaries were not a new invention, as they were used at varying stages during the preceding years.<sup>13</sup>

## **B. Nature of the Atrocities**

The campaign of intimidation included a range of human rights abuses, many of which were an intensification of violations that occurred throughout the occupation. These crimes were perpetrated despite the presence of (unarmed) UN civilian police accompanying the UN mission to organize the vote. Many of the worst mass killings occurred before the UN’s

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<sup>10</sup> For more background on the nature of the occupation and details of long-term violations, see e.g., “A People Betrayed,” supra note 6; Budiardjo, supra note 6; Miranda Sissons, “From One Day to Another: Violation of Women’s Reproductive and Sexual Rights in East Timor,” East Timor Human Rights Centre, 1997.

<sup>11</sup> See Open Society Initiative and Coalition for International Justice, “Unfulfilled Promises: Achieving Justice for Crimes Against Humanity in East Timor,” Nov. 2004, at 15–16.

<sup>12</sup> See Don Greenless and Robert Garran, *Deliverance: The Inside Story of East Timor’s Fight for Freedom*, Sydney: Allen and Unwin, 2002.

<sup>13</sup> The CNRT (National Council of Timorese Resistance) included FRETILIN, other political groupings, and student resistance organizations. For further detail of the background on the use of paramilitaries, both during and before 1999, see Peter Bartu, “The Militia, the Military and the People of Bobonaro District,” in *Guns and Ballot Boxes: East Timor’s Vote for Independence*, Monash Papers on Southeast Asia; No. 54, Kingsbury, ed., Clayton: Monash Asia Institute, 2000.

arrival, while the negotiations between Indonesia, Portugal, and the UN were still under way. Mass abuses included the massacres of dozens of civilians taking shelter in churches in Liquiça and the attack after a large militia rally on the house of independence leader Manuel Carrascalao in Dili, where many people fleeing the militias had sought refuge. Local militias carried out these acts under the clear direction and with overt support of the Indonesian military and police.<sup>14</sup>

Despite the widespread violence, by virtue of an agreement with the UN concluded on May 5, 1999, responsibility for security during the process remained with the Indonesian police and military authorities, many of whom were vehemently opposed to the radical change in policy toward Timor-Leste.<sup>15</sup>

On August 30, 1999, an estimated 98 percent of the Timorese voting population turned out to cast their ballots in the popular consultation. Their experience of two decades of Indonesian occupation had taught many to foresee what was to come, and large numbers fled straight to the mountains after voting. When it became clear on September 4 with the results of the ballot that most Timorese were overwhelmingly opposed to an ongoing autonomy arrangement within the Indonesian republic, the Indonesian military began a campaign of vengeance against those who supported independence. As almost 80 percent of the population had rejected autonomy within Indonesia, few were exempted.<sup>16</sup>

In the days following the referendum, the TNI and Timorese militias embarked on a scorched-earth policy, burning down Dili and other towns and killing hundreds, in addition to committing many other types of atrocities. This was a well-planned attack, involving all levels of civil and military administration, that resulted in the displacement of more than 50 percent of the population (at least 400,000 people), many of whom were expelled to Indonesian West Timor. The violence left at least 1,300 people dead and many more raped or seriously injured, and resulted in a near total devastation of the territory's property and infrastructure.<sup>17</sup> FRETILIN forces under the leadership of Xanana Gusmão remained cantoned so that it would be clear that the TNI was the sole source of the violence.

Particularly notorious massacres included the killing of a group of nuns near Los Palos and the mass murders of large groups of civilians sheltering in the Suai Church compound, the

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<sup>14</sup> For a full description of the violations and the extensive involvement of the Indonesian military during 1999, see Indonesian Commission of Investigation into Human Rights Violations in East Timor ("KPP-HAM Report)," Jan. 31, 2000, available at [www.jsmp.minihub.org](http://www.jsmp.minihub.org); James Dunn, "Crimes Against Humanity in East Timor, January to October 1999: Their Nature and Causes," Feb. 2001, available at [www.etan.org](http://www.etan.org); Report of the International Commission of Inquiry on East Timor to the Secretary General, UN Doc. A/54/726-S/2000/59, Jan. 31, 2000 ("ICI Report"); Report of the Security Council Mission to Jakarta and Dili 8 to 12 September 1999, UN Doc. S/1999/976, Sept. 14, 1999.

<sup>15</sup> TNI and POLRI (police) were both known by the acronym ABRI and remained closely linked.

<sup>16</sup> For further detail of the events leading up to the popular consultation and the involvement of the UN Assistance Mission to East Timor (UNMET), see Ian Martin, "Self-Determination in East Timor: The United Nations, the Ballot, and International Intervention," Boulder, CO: Lynne Rienner Publishers, 2001.

<sup>17</sup> A Security Council Mission was shocked by the level of destruction in their visit to the territory soon afterwards. UN Doc. S/1999/976, *supra* note 14. For the number of people forcibly displaced, see "Report on the Joint Mission to East Timor Undertaken by the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions, the Special Rapporteur of the Commission on the Question of Torture and the Special Rapporteur of the Commission on Violence against Women, Its Causes and Consequences, in Accordance with Commission Resolution 1999/S-4/1 of 27 September 1999," UN Doc. A/54/660, Dec. 1999 ("Special Rapporteurs' Report"), para. 20.

Maliana police station, and the attack on the house of Nobel Peace Laureate Bishop Carlos Ximenes Belo. At least 70 percent of all buildings were burned or destroyed and property completely looted. The intimidation extended to foreign media covering the ballot, who— together with almost all UN staff—were evacuated when the violence reached its crescendo, allowing the rampage to continue unchecked and out of sight of the international community, while the departing forces deliberately destroyed crucial evidence. Among those killed were UN national staff members.

However, some international media witnessed the extreme violence, which provoked an outcry and calls for an intervention. In response, the UN sent an Australian-led military force (INTERFET) to Timor-Leste on September 21 to restore order. Under increasing international pressure, including the threat of economic sanctions, Indonesia ceded control of Timor-Leste to the UN on September 27, 1999.

After the Indonesian withdrawal, the UN Security Council placed Timor-Leste under the control of the UN Transitional Administration for East Timor (UNTAET), with the objective of preparing the territory for independence.<sup>18</sup> UNTAET was endowed with a mandate of almost unprecedented breadth, the only comparable mission being the UN Mission in Kosovo (UNMIK), from which many UNTAET staff had come. The Special Representative of the Secretary General (SRSG) and Transitional Administrator, Sergio Vieira de Mello, was given full legislative and executive control. As such, UNTAET's task included managing the initial post-conflict humanitarian emergency of a largely homeless population; establishing the groundwork for developing basic state infrastructure, including governance institutions and a public administration; disarming FALINTIL and managing relations with Indonesia; and facilitating the return of the large numbers of displaced people still in camps in West Timor under the control of militias.<sup>19</sup> The UN was therefore acting as the government of Timor-Leste until elections.

Prior to full independence, the next two years saw the political transition progressed from early informal consultation with CNRT (National Council of Timor-Leste Resistance), to a council of national representatives appointed by the Transitional Administrator to advise on major policy decisions, to a Transitional Government in which some portfolios (including justice) were handed over to appointed Timorese “ministers.”

A constitution was drafted by a popularly-elected Constituent Assembly, and on May 20, 2002, the first President of the Republic of Timor-Leste, former FALINTIL leader Xanana Gusmão, declared the new nation's independence. FRETILIN has an overwhelming majority in the new parliament. Portuguese has been adopted as the new national language and there is a strong political preference for links with other Lusophone (Portuguese-speaking) nations, a position that is much criticized by the younger, Bahasa Indonesia-speaking population. The nation remains heavily dependent on international donors, both financially and in terms of technical expertise, and there is frustration with the slow pace of reconstruction and development since independence. While a proportion of former FALINTIL fighters were

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<sup>18</sup> UNTAET was created by Security Council Resolution 1272, UN Doc. S/RES/1272, Oct. 25, 1999.

<sup>19</sup> For further discussion of the breadth of UNTAET's mandate, see Joel Beauvais, “Benevolent Despotism: A Critique of UN State-Building in East Timor,” *New York Uni. J. of Int'l L. & Pol.* 33: 1101, 2001; Simon Chesterman, “East Timor in Transition: Self-Determination, State-Building and the United Nations,” *International Peacekeeping* 9: 45–76, 2002; Boris Kondoch, “The United Nations Administration of East Timor,” *J. of Conflict & Sec. L.* 6: 245, 2001.

recruited into the newly established armed forces of Timor-Leste, many former veterans of the conflict have become vocal critics of the new administration.

The transfer of sovereignty to Timor-Leste on May 20, 2002, initially had few practical implications for the operation of the serious crimes process. The personnel essentially remained unchanged, as did the balance between nationals and internationals. Formally, however, the relationship with the UN altered significantly. The UN mission established after independence was formally responsible only for assisting the Timorese government and continually downsized. As a matter of law, judicial matters were under the authority of Timor-Leste. UNTAET was transformed into the smaller (but still sizeable) UN Mission of Support for East Timor (UNMISSET) which had a mandate until May 2005, and which in turn has been succeeded by the much smaller UN Office in Timor-Leste (UNOTIL).<sup>20</sup> Another factor that has had more serious implications for the serious crimes process is that since independence, the political emphasis of the Timor-Leste government has increasingly shifted to restoring relationships with Indonesia. As a result, a bilateral Commission on Truth and Friendship was formed, which is discussed below.

## **II. THE ESTABLISHMENT OF THE SERIOUS CRIMES PROCESS**

### **A. Recommendations From Commissions of Experts**

Immediately after Indonesia's withdrawal from the territory, Timorese demands for justice focused on the establishment of an ad hoc international criminal tribunal, such as those created for the former Yugoslavia and Rwanda.<sup>21</sup> A UN fact-finding mission conducted by three Special Rapporteurs appointed by the UN Human Rights Commission in November 1999 echoed these calls.<sup>22</sup> Although the matter had been discussed informally in the Security Council after it sent an emergency delegation to visit the destroyed territory in mid-September 1999, the question of an international tribunal was not pursued further. This was partly the result of donor fatigue and sustained criticism of the ICTY and ICTR over the lengthy duration of trials and the tribunals' perceived lack of results.<sup>23</sup>

With the creation of UNTAET, the implication was that a preferable approach would be a "twin-track" of national action in Indonesia and under UNTAET, given the still-fragile state of post-Soeharto Indonesian democracy. This position was reflected in the resolution adopted by the Commission on Human Rights on September 27, 1999, in a Special Session convened to address the situation. The Commission requested that the Secretary General establish an International Commission of Inquiry, which he did shortly thereafter.<sup>24</sup> The establishment of a parallel commission of inquiry (KPP HAM) by the Indonesian Human Rights Commission (Komnas HAM) was seen as a particularly encouraging sign.

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<sup>20</sup> UNMISSET was established by Security Council Resolution 1410, UN Doc. S/RES/1410/2002. UNOTIL was established by Security Council Resolution 1599, UN Doc. S/RES/1599/2005, April 28, 2005. As of October 2005, UNOTIL's mandate is to support the development of state institutions and is to last until May 20, 2006.

<sup>21</sup> The International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR, respectively).

<sup>22</sup> "Special Rapporteurs' Report," supra note 17, para. 73; "ICI Report," supra note 14.

<sup>23</sup> For a detailed analysis of this issue, see "Report of the Group of Experts on the Effective Operation and Functioning of the International Criminal Tribunal for the Former Yugoslavia and of the International Criminal Tribunal for Rwanda," UN Doc. A/54/634, Nov. 22, 1999.

<sup>24</sup> Commission on Human Rights Resolution 1999/S-4/1, Sept. 1999.

The release on January 31, 2000, of the reports of both the UN and Indonesian commissions of inquiry into the violence of 1999 confirmed the need for specific prosecutions of those responsible. Both reports found that the TNI was responsible for serious human rights violations. The Indonesian report named 33 individual perpetrators, including several high-ranking military officials. But whereas the Indonesian report called for national prosecutions within Indonesia, the report of the International Commission of Inquiry proposed an international mechanism.

The suggestion that the perpetrators identified in the reports should be the subject of further investigation and prosecution in Indonesia evoked considerable skepticism among human rights observers, both internationally and within Timor-Leste. Many did not believe that relying on Indonesia to provide accountability was a feasible solution, particularly due to the power that the Indonesian military still exercised.<sup>25</sup> As the three UN Special Rapporteurs noted in December 1999:

The record of impunity for human rights crimes committed by Indonesia's armed forces in East Timor over almost a quarter of a century cannot instill confidence in their ability to ensure a proper accounting. Nor, given the formal and informal influence wielded by the armed forces in Indonesia's political structure, can there, at this stage, be confidence that the new Government, acting in the best of faith, will be able to render that accounting.<sup>26</sup>

Neither did the Special Rapporteurs believe that a national process within Timor-Leste offered a viable alternative:

The questions of the full documentation of the crimes and human rights violations and the definitive establishment of the scope and level of TNI responsibility will need to be answered by a sustained investigative process. The East Timorese judicial system, which still needs to be created and tested, could not hope to cope with a project of this scale.<sup>27</sup>

The UN Rapporteurs therefore recommended that unless the Government of Indonesia's seeds of action quickly bore fruit, "the Security Council should consider the establishment of an international criminal tribunal for the purpose."<sup>28</sup> The UN International Commission of Inquiry likewise concluded that accountability was a matter of international collective responsibility because the violations during 1999 constituted crimes against humanity directed against the Security Council's decision. In its report, the Commission stated that:

The United Nations, as an organization, has a vested interest in participating in the entire process of investigation, establishing responsibility and punishing those responsible and in promoting reconciliation. Effectively dealing with this issue will be important for ensuring that future Security Council decisions are respected.<sup>29</sup>

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<sup>25</sup> Various interviews with Timorese human rights organizations and international observers, 2000–2003.

<sup>26</sup> "Special Rapporteurs' Report", supra note 17, para. 73.

<sup>27</sup> Id.

<sup>28</sup> Id. at para. 74.6.

<sup>29</sup> "ICI Report," supra note 14, para. 47.

Nevertheless, Indonesia indicated that it would not cooperate with an international tribunal and that it was willing to institute domestic prosecutions. According to anecdotal reports, the political environment in the Security Council gave considerable weight to Indonesia's undertaking to deal with the question of accountability at a national level, and other Asian nations also supported this stance.<sup>30</sup> The UN agreed to this course of action, but the Secretary General stated that the Security Council would reserve the right to pursue the matter further in the event that Indonesian trials did not satisfy international standards.<sup>31</sup>

The trials that were eventually held before Indonesia's Ad Hoc Human Rights Court for crimes committed in Timor-Leste have been widely denounced by international commentators, including the recent further UN Commission of Experts in early 2005. In general, the trials were perceived to shield perpetrators, rather than seek genuine accountability. Although the details are beyond the scope of this report,<sup>32</sup> 18 defendants were tried, some of whom were high ranking within the TNI. The Court's jurisdiction was delimited to cover only three of Timor-Leste's 13 districts, and followed up on only three of the 13 cases mentioned in the KPP HAM report.<sup>33</sup> The prosecution did not pursue a coherent strategy and failed to present relevant and available evidence, and the judges were consistently intimidated by a large presence of TNI in the courtroom. Judgments misapplied legal principles and standards. Eventually, only six accused were convicted in the first instance and five had their convictions overturned on appeal.<sup>34</sup>

## **B. Early UNTAET Investigations**

UNTAET was deployed to Timor-Leste with a number of urgent tasks. Among these was the task of preserving evidence of the serious crimes, detaining those suspected of participating, and setting up a justice system from scratch that would also handle current crime and general law and order.<sup>35</sup> To fulfill these disparate and ambitious aims, UNTAET had a civilian staff of more than 1,000, backed up by a large peacekeeping force. The Mission's structure included a Judicial Affairs Office and a Human Rights Unit (HRU).

Despite the breadth of the UNTAET mandate to govern the territory and prepare it for independence, the resolution covering its mandate did not contain any specific reference to creating an accountability mechanism for those responsible for the serious human rights violations that occurred.<sup>36</sup> Nevertheless, the key decision-makers within UNTAET saw a

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<sup>30</sup> Indonesia's position is reflected in its Letter dated 26 January 2000 from the Minister for Foreign Affairs to the Secretary General, UN Doc. A/54/727, S/2000/65, January 31, 2000.

<sup>31</sup> Letter of Secretary General to General Assembly, Jan. 31, 2000, A/54/726.

<sup>32</sup> See David Cohen, "Intended to Fail: The Trials Before the Ad Hoc Human Rights Court in Jakarta," Paul Seils, ed., Aug. 2003, available at [www.ictj.org](http://www.ictj.org).

<sup>33</sup> See Megan Hirst and Howard Varney, "Justice Abandoned? An Assessment of the Serious Crimes Process in Timor-Leste," June 2005, available at [www.ictj.org](http://www.ictj.org).

<sup>34</sup> The Indonesian Human Rights Court received some assistance from the Serious Crimes Unit (SCU), visiting Timor-Leste on two occasions to gather evidence with assistance of the SCU.

<sup>35</sup> See Hansjörg Strohmeyer, "Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor," *American J. of Int'l L.* 95: 46-63, 2001; Bruce Oswald, "Interfet Detainee Management Unit in East Timor," *Yearbook of Int'l Humanitarian L.* 3: 347, 2000, and the East Timor section of the International Policy Institute, "A Review of Peace Operations: A Case for Change," King's College: London, March 2003, available at [ipi.sspp.kcl.ac.uk/index.html](http://ipi.sspp.kcl.ac.uk/index.html).

<sup>36</sup> See SC Res. 1246, Oct. 25, 1999.



clear “moral imperative” for the UN to make some arrangements to this end.<sup>37</sup> In October 1999, INTERFET forces began gathering evidence, such as securing mass graves and detaining those accused of participating in the violence. Furthermore, the Secretary General told the General Assembly in late 1999 that “accounting for the violations of human rights which occurred in the aftermath of the consultation process is vital to ensure a lasting resolution of the conflict and the establishment of the rule of law in East Timor.”<sup>38</sup> Investigations into recent atrocities were commenced by the HRU during late 1999.

### C. Locating Timorese Judicial Personnel

Simultaneously, UNTAET began to turn its attention to re-establishing the justice system in general, particularly given the pressing number of people held in detention on suspicion of committing atrocities and ongoing crimes. This required building a new judiciary and legal system almost entirely from scratch. All physical infrastructure, such as court and prison buildings, books, and records, was completely destroyed during the “scorched-earth” campaign during the withdrawal of the TNI and militias.

A far greater problem was the lack of human resources. Judges, prosecutors, and the majority of lawyers and court staff mainly comprised Indonesians who had fled the territory. During the Indonesian occupation a small number of Timorese gained legal qualifications, generally from Indonesian universities, but they had been systematically discriminated against for judicial appointments or were reluctant to participate in a judicial system that was an instrumental arm of state oppression, particularly in relation to arbitrary detentions and show trials for political offences.<sup>39</sup>

Despite creative efforts, such as dropping leaflets by air to seek legal personnel, UNTAET was able to identify only a limited number of qualified Timorese lawyers, few of whom had any relevant practical experience.<sup>40</sup> Several had trained as lawyers but had never practiced. Others were recent law graduates without any work experience or minimal paralegal experience in human rights organizations or legal aid in Indonesia. Although there were a small number of the returning Timorese diaspora who did have legal or judicial experience, from countries such as Portugal or Mozambique, these people were mostly assuming the developing political leadership of the country.<sup>41</sup>

UNTAET appointed a small group of Timorese judges and prosecutors on a provisional basis in early 2000, although it was several more months before a regulation was promulgated to

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<sup>37</sup> See Hansjörg Strohmeyer, “Making Multi-Lateral Interventions Work: The UN and the Creation of Transitional Justice Systems in Kosovo and East Timor,” *Fletcher Forum of World Affairs* 25: 107, 2001; also SC Res. 1264, UN Doc. S/RES/1264, Sept. 1999. Strohmeyer was the Acting Principal Legal Advisor to UNTAET from its establishment in October 1999 until mid-2000, having come directly from UNMIK.

<sup>38</sup> Progress Report of the Secretary General on the Question of East Timor, UN Doc. A/54/654, Dec. 13, 1999, para. 42.

<sup>39</sup> Interviews with Timorese judges and lawyers confirmed that they had not used their legal skills because of a combination of active marginalization by the Indonesian state and personal ambivalence about collaborating with the occupying forces.

<sup>40</sup> Hansjörg Strohmeyer, “Policing the Peace: Post-Conflict Judicial System Reconstruction in East Timor,” *University of New South Wales L.J.* 24: 171–182, 2001, at 175.

<sup>41</sup> Notable examples included senior members of FRETILIN, such as Ana Pessoa and Mari Alkatiri.

create a transitional court system within which these judges could operate.<sup>42</sup> Initially the appointment of international judges was rejected on the basis that it would undermine local ownership of the justice system, whereas using Timorese professionals would minimize the need for translation, facilitate the transition process, and—most importantly—encourage the participation of local jurists, which would have political and symbolic significance.<sup>43</sup>

While this decision was subsequently criticized, at the time there was no difference in process between appointing judicial personnel to deal with current or past crimes, nor was there consideration for whether different political issues might apply.<sup>44</sup> The newly appointed Timorese judges felt it was their responsibility to deal with past crimes.<sup>45</sup> However, the key UNTAET judicial policymaker at the time has since noted that the lawyers were “so inexperienced as to be unequal to the task of serving in a new Timorese justice system,”<sup>46</sup> and that the “prosecution and trial of legally and factually complex criminal offences such as crimes against humanity...should not be left solely to largely inexperienced lawyers, however committed they may be.”<sup>47</sup>

#### **D. Establishment of the Special Panels**

While the national judges were left to deal with ongoing ordinary crimes on their own, in mid-2000 UNTAET took steps to establish Special Panels of the Dili District Court to try cases of “serious criminal offences” that had occurred in 1999. The panels were composed of one national and two international judges.<sup>48</sup> International judges were also appointed to the Court of Appeal, which as the superior court in the transitional system heard appeals from both the ordinary and serious crimes jurisdictions.

The creation of the hybrid Special Panels was entirely the initiative of the international staff within the UN administration, and Timorese judges, who were expecting to handle such cases themselves, reacted with some hostility. Local NGOs and judicial personnel reported that there was no real consultation prior to the establishment of the Special Panels.<sup>49</sup> Members of

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<sup>42</sup> UNTAET Reg. 2000/11, March 6, 2000, initially established eight district courts, although this was soon revised by Reg. 2000/14, May 10, 2000, to just four, with a single Court of Appeal. For further detail, see Suzannah Linton, “Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor,” *Melbourne U. L.R.* 25: 122–180, 2001; Sarah Pritchard, “United Nations Involvement in Post-Conflict Reconstruction Efforts: New and Continuing Challenges in the Case of East Timor,” *University of New South Wales L.J.* 24: 183–190, 2001; “Collapse and Reconstruction,” *supra* note 35; “Review of Peace Operations,” *supra* note 35.

<sup>43</sup> See the Strohmeier articles, *supra* notes 37 and 40.

<sup>44</sup> For detailed criticism of the decision to place inexperienced Timorese jurists into such positions without further prior intensive training, see Frederick Egonde-Ntende, “Building a New Judiciary in East Timor,” *Commonwealth Judicial Journal* 22, 14(1), 2001. Egonde-Ntende is a Ugandan High Court Judge who was initially appointed as a judicial mentor and became one of the first international judges to serve on the Court of Appeal.

<sup>45</sup> Sidney Jones, “Human Rights and Peacekeeping in East Timor,” April 2001, draft paper prepared for the Aspen Institute (copy on file with the ICTJ).

<sup>46</sup> See “Collapse and Reconstruction,” *supra* note 35, at 50.

<sup>47</sup> See “Making Multi-Lateral Interventions Work,” *supra* note 37.

<sup>48</sup> Regulation on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, June 6, 2000, UNTAET/REG/2000/15 .

<sup>49</sup> Interviews with Judge Maria Natercia Gusmao Pereira, Dili, Sept. 2003, and Joaquim Fonseca of Yayasan HAK, London, Sept. 2003. See the discussion in “Rising from the Ashes,” *supra* note 42, at 150. Linton was one of the Judicial Affairs officers working with the Timorese judges when Regulation 2000/15 was introduced. See also Jones, *supra* note 45.

the legal and human rights organization, Yayasan HAK, which was instrumental in documenting human rights abuses during 1999, noted that UNTAET informed them after the decision was made and tried to sell it as a “back-door” international tribunal.<sup>50</sup>

The inspiration for the Special Panels was drawn from UNMIK, which at the time was planning to establish a specialized mixed War and Ethnic Crimes Court, although the proposal did not proceed.<sup>51</sup> As was the case in Kosovo and unlike Sierra Leone, the possibility of creating a hybrid court by treaty did not arise, as there was no independent national government with whom to contract. Therefore, the creation of the Panels was simply accomplished by “national legislative action,” i.e., by means of a Regulation issued by UNTAET.

While the lack of consultation seems inexcusable, given the well-organized civil society that developed out of the clandestine independence movement, many local NGO leaders were dealing with the ongoing humanitarian crisis that enveloped Timor-Leste or had not yet returned to the territory. The absence of any meaningful consultation between UNTAET and the Timorese authorities—namely CNRT—at the time probably contributed to the Transitional Government’s lukewarm support for the Special Panels.

#### **E. Establishment of the Serious Crimes Unit**

When the Special Panels were established in mid-2000, UNTAET also created a Public Prosecution Service that included a specialized unit to prosecute serious crimes. At this point, the Serious Crimes Unit (SCU) was transferred from the HRU to the Prosecutor-General of Timor-Leste and became a subunit of the general prosecution service.

The creation of the Special Panels and what became the SCU was not an integrated process based on any prior planning; it was a series of ad hoc responses to a crisis situation. The two developed separately and never functioned as a single institution. UNTAET approached funding and staffing of each in very different ways, and they were eventually accorded differing levels of resources. To this extent, the SCU was not simply an organ of the court, such as the Office of the Prosecutor at the Special Court for Sierra Leone, as it basically operated as a quasi-separate institution.

In contrast to the HRU, the initial personnel brought in to staff the SCU have been widely criticized for their failure to involve Timorese individuals and groups in their work, in particular some of the national human rights organizations that had extensive documentation and information about the violations. Unlike the new SCU staff, which was largely composed of police investigators, many HRU officers had both local language skills and longstanding connections with local NGOs, advantages which were lost once the responsibility for the investigations was transferred. The new investigators were either unaware of the level of expertise available within the community or were suspicious of offers of assistance. Yet this lack of early consultation and respect led to these organizations refusing to cooperate when approached later, a situation that severely hampered community relations and the progress of investigations.<sup>52</sup>

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<sup>50</sup> Interview with Joaquim Fonseca, id.

<sup>51</sup> Suzannah Linton, “New Approaches to International Justice in Cambodia and East Timor,” *International Review of the Red Cross* 84: 93, 2002; “Making Multi-Lateral Interventions Work,” *supra* note 37, at 118–120.

<sup>52</sup> Interviews with HRU staff and Joaquim Fonseca, *supra* note 49.

Although this caused many difficulties, it also brought certain benefits, such as closer cooperation with peacekeepers in securing evidence and assistance from the UN civilian police in investigation and arrests. These may not have been forthcoming if the SCU had been part of the fledgling national institutions.<sup>53</sup> The Special Panels, on the other hand, formed a part of the national structure of the Dili District Court. As discussed in more detail below, this disjuncture and lack of cohesion had significant implications for the varying perceptions accorded the two institutions, as well as their mixed levels of success.

### **III. ANALYSIS OF THE SPECIAL PANELS**

#### **A. Recruitment of International Judges**

The Special Panels for Serious Crimes and the Court of Appeal were each composed of one Timorese judge and two international judges. Prior to independence, the means of appointment for the Timorese judges was by the UN Transitional Administrator on the recommendation of the Transitional Judicial Services Commission.<sup>54</sup> Appointments were problematic, and for a significant amount of time only one Panel was functioning. The Court of Appeal, staffed by two UNMISSET-funded international judges and one national judge, became operational in July 2000 and handed down its first appeal decision in October 2000.<sup>55</sup> The Court of Appeal dealt with a number of cases in the early life of the serious crimes regime. However, as a result of departures of international judges from the Court of Appeal and a subsequent shortage of international judges, there was a substantial period during which appeals could not be heard.<sup>56</sup>

The international judges were appointed through the standard UN recruitment process for peacekeeping missions, which does not involve targeted advertising of vacancy notices. As a result, there was a lack of qualified candidates. Furthermore, the political relationship between UNTAET and the Timorese authorities prioritized approval of international candidates by the Timor-Leste Minister of Justice, who reduced the available pool even further by insisting on considering only candidates who spoke Portuguese and were from civil law jurisdictions. The Special Panel Judges' posts were rated between P3 and P5 level on the UN salary scale, which is substantially less pay and prestige than the Under-Secretary General level posts in the ICTY, ICTR, and the Special Court for Sierra Leone. UNTAET had already hired the first international judges to serve as judicial affairs officers, and then appointed them to the new courts.

Throughout the years, the international judges who sat on the Special Panels came from a variety of national jurisdictions, including Burundi, Uganda, Italy, Portugal, Brazil, Cape Verde, Germany, and the United States. Only two came from superior courts in their home countries. The remainder of judges were from courts of lower jurisdiction or even non-criminal jurisdiction. None had specific prior experience in the application of international criminal or humanitarian law, despite the requirement set out in UNTAET Regulation

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<sup>53</sup> Interview with Senior SCU Prosecutor, Dili, Sept. 2003.

<sup>54</sup> This Commission was established by UNTAET to provide some independence in the appointment of the judiciary from the exercise of executive power. UNTAET/Reg/1999/3, Dec. 3, 1999.

<sup>55</sup> See Hirst, *supra* note 33, at 9.

<sup>56</sup> The difficulties in the appointment of international judges prevented the Court from sitting for more than 18 months, from October 2001 to June 2003. See Hirst, *supra* note 33, at 21. See also JSMP on the Court of Appeal, available at [www.jsmp.minihub.org](http://www.jsmp.minihub.org).

2000/15.<sup>57</sup> UNTAET initially recruited the President of the Court of Appeal, a Timorese judge who has spent most of his life in Portugal, as an international judge.

Except for a brief period in late 2001, until mid-2003 there were only enough judges to constitute one panel at a time, although a second and a third started functioning subsequently. Delays in recruitment of international judges, combined with high turnover of staff, poor management of recreational leave, and an average contract length of 6 to 12 months, caused repeated delays in the Special Panels' operation. As mentioned above, the Court of Appeal was unable to function for more than a year. In 2003, several partly heard trials had to be restarted because of the departure of a judge on the Panel.<sup>58</sup> Gender balance has not been ideal. While two of the three Timorese judges have been women, only one of the 11 international judges has been female.

As mentioned, the difficulties in appointing judges hampered the Panels' work, but it is not clear who is responsible for the inexplicable delays. UN officials have pointed to government obstruction, including requirements on language issues that did not seem strictly necessary. Government sources, on the other hand, have accused the UN processes of being unwieldy and slow. Lack of flexibility within the UN peacekeeping recruitment procedures, as well as a lack of awareness of what skills are required, also hindered the process. Better targeting of candidates could have helped, but would also require an improvement in conditions of service in order to successfully attract candidates from other tribunals. Alternatively, longer-term seconding from other institutions or governments could have alleviated some of the problems.

None of the Timorese judges had any prior judicial experience, except the President of the Court of Appeal, who was a judge in Portugal. Generally, the interaction between the international judges and their three Timorese colleagues reportedly functioned relatively well and the Timorese judges report that they have learned a great deal from the experience. Nevertheless, language barriers were a significant problem, with no interpreters available for judicial discussions.<sup>59</sup> There was also some frustration among the Timorese judges, who felt they were not treated as equals, highlighted by the vast differential in salaries, as well as the fact that the international judges are UN employees with administrative support and leave entitlements.<sup>60</sup>

Independent observers noted early occasions where international judges demonstrated patronizing attitudes to their national colleagues, citing instances where a national judge's questions of an accused were cut short by the Presiding Judge, despite the fact that they related to specific details of the context that may not have been apparent to internationals,

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<sup>57</sup> Section 23.3 refers to experience in criminal law and international law, including international humanitarian and human rights law.

<sup>58</sup> Amnesty International and JSMP, "Justice for Timor-Leste: The Way Forward," April 14, 2004, at 11.

<sup>59</sup> None of the international judges have spoken Bahasa Indonesia, the professional language of the Timorese judges, or Tetum, the daily language of communication in Timor-Leste. Timorese judges have been expected to communicate with their international colleagues in either English or Portuguese, languages in which they had only limited proficiency and received little support.

<sup>60</sup> Interviews with Timorese judges. They are aware that this is not the case in, for example, the Special Court for Sierra Leone, with one judge querying why all such hybrid courts were not the same.

such as Indonesian military structures.<sup>61</sup> On another occasion, the dissenting opinion of the national judge was not published.<sup>62</sup>

There were also occasions in which a Timorese judge dissented on the basis of particular national experiences, although this did not rise to the level of suggesting any political bias. For example, in the only case to date against a member of the pro-independence guerrilla force, FALINTIL, the Timorese judge argued for both a lesser conviction and sentence.<sup>63</sup> In 2003, the Timorese judge on the Court of Appeal published a strong dissent on a controversial decision on whether Portuguese or Indonesian law was still applicable, in which she confirmed the general understanding that Indonesian law could be applied.

Integration of international judges into the national context was allegedly less than satisfactory. International judges sometimes demonstrated a lack of awareness of Timorese cultural behaviors and historical background, particularly in the questioning of witnesses.<sup>64</sup> With the exception of a general induction provided by the UN mission, no specific cultural awareness training was ever provided. One public defender described the international judges as operating in a professional, social, and cultural vacuum.<sup>65</sup> A UN report published in 2003 noted that international advisors' reluctance to learn local languages contributed to the poor rate of skill transfer from internationals to nationals.<sup>66</sup>

In addition, beyond the three Timorese judges who were involved in hearing serious crimes cases at either trial or appellate hearings, there was virtually no social or professional interaction between the international and national judges in the courts of ordinary jurisdiction.<sup>67</sup>

## **B. Training for the Judges**

Training provided to Special Panel judges, although well-intentioned, was haphazard and poorly coordinated.<sup>68</sup> Judicial training sessions were generally conducted only for national judges, despite a demonstrated lack of consistency between the decisions of international judges, further exacerbated by the absence of a functioning superior court to standardize jurisprudence. Lack of adequate translation was also an ongoing issue, with early training conducted in English and later in Portuguese, despite the fact that most of the judges' legal education was in Bahasa Indonesia. Many of the training programs, including the major ones

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<sup>61</sup> Various interviews with JSMP legal researchers and trial monitors, Dili, 2000–2003.

<sup>62</sup> See the discussion in Suzannah Linton, "Prosecuting Atrocities at the District Court of Dili" *Melbourne J. of Int'l L.* 2: 414, 2001, at 422.

<sup>63</sup> See the Judgment in the case of Julio Fernandes Case Number 2/2000, March 1, 2000. It should be noted that this was also one of the first cases to be heard by the Special Panel. Furthermore, there was no such national/international split when both the sentence and conviction were lowered subsequently by the Court of Appeal. On that occasion, though, one of the international judges was Portuguese of Timorese ethnicity.

<sup>64</sup> Interviews with international public defender and Timorese judge, Dili, Sept. 2003.

<sup>65</sup> Interview with international public defender, Dili, Sept. 2003.

<sup>66</sup> UNMISSET, "Strategic Plan for East Timor Justice Sector: Post UNMISSET Continuing Requirements and Suggested Mechanisms," Dili, Sept. 24, 2003.

<sup>67</sup> Interviews with Timorese judges, Dili, Sept. 2003.

<sup>68</sup> The International Development Law Institute provided some courses, which were supplemented by occasional seminars from Australian Legal Resources International and the International Commission of Jurists. From 2001 there was a policy decision by the UNTAET Minister for Justice to accept training programs only from Portuguese-speaking nations.

run by the UN Development Program and the International Development Law Institute, reflected a lack of proper needs assessment from the outset. These programs often presumed a level of basic legal knowledge that did not necessarily exist. Although training occurred while the judges assumed new professional responsibilities, it was not designed to ensure smooth functioning of the new court system, and many judges resented the interference with their work. For example, a training program instituted during 2001 involved taking all Timorese judges to Portugal for two months, and most described the exercise as poorly organized and administered.

It would have been more effective to precede seminars on highly specialized areas of law with skill-development programs on more basic legal fundamentals. Areas that could have benefited from such an approach include legal reasoning and decision-writing, as well as more detailed and practically focused education on the applicable law that the judges were expected to use in the cases before them, rather than the courses on comparative education on family law in Portugal or contract law in Macau. Although those judges working in the Special Panels were expected to apply international criminal law, they received minimal training in this area, especially at the outset. During 2003, Washington University's War Crimes Research Office conducted seminars with both international and national judges. A few Timorese judges have also been increasingly exposed to international programs, such as the Justice in Times of Transition Project at Harvard University, and a project held in September 2004 and organized by the UN High Commissioner for Human Rights on developing tools for transitional justice.

Much of the training funded and conducted by the UN was not effective, due to poor communication between trainers and trainees, as well as inadequate funding resources.<sup>69</sup> Moreover, the official training programs did not reach many recipients, as they were mainly conducted in Portuguese at the insistence of the Timorese government. Some will undoubtedly point to the failure of all 22 judges, both from the Special Panels and the ordinary courts, in recent legal examinations, as an indication that capacity-building efforts among the local judges have failed.<sup>70</sup> Training provided to local SCU staff by other organizations was also criticized for poor coordination, which resulted in overlap.

#### **IV. ANALYSIS OF THE SERIOUS CRIMES UNIT**

Throughout its existence, the SCU was dominated by internationals. Recruitment took place through UNTAET and the post of Deputy General Prosecutor was not permanently filled until early 2002. Before that, a series of short-term acting appointments affected the early strategic direction of the office.<sup>71</sup> From 2002 until the closing of the SCU in May 2005, the unit was headed by a Deputy General Prosecutor for Serious Crimes, who reported to the Timorese General Prosecutor and Attorney-General.

While initially there was little coordination between investigations and prosecutions, the SCU was subsequently divided into four integrated teams, each of which focused on cases from

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<sup>69</sup> Report to the Secretary General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (the then East Timor) in 1999, 26 May 2005 (hereafter COE Report), at 26, para. 116.

<sup>70</sup> However, the examinations were primarily conducted in Portuguese, which is not the language with which many are most familiar. Although Tetum translations were provided, serious concerns have been raised about the accuracy of the translations that many of the judges relied upon.

<sup>71</sup> See the discussion below.

two districts of Timor-Leste, with an additional team dedicated to “national” and “historical” crimes. Throughout, the unit lacked criminal analysis capacity, and the CIVPOL investigators seconded to the unit were insufficient in number and lacked experience in investigating complex crimes such as crimes against humanity.<sup>72</sup> The unit was also lacking in forensic capacity.

Although initially the unit was under-resourced, support from UNTAET and UNMISSET, grants, bilateral assistance, and assistance from the UN police, UN volunteers, and others assisted the Unit in building its capacity.<sup>73</sup> At its peak, the SCU had more than 130 staff, including prosecutors, case managers, investigators and forensic staff. The Unit was downsized in 2003,<sup>74</sup> and before the final closure in May 2005, it had 88 staff members, comprising UN international staff working as prosecutors, investigators, forensic experts, and translators.<sup>75</sup> In early 2005, the SCU hired an additional 37 translators to assist in the handover process. The unit also employed 13 Timorese trainee staff, who were seconded to prosecutions and information technology sections under an initiative organized by then Deputy General Prosecutor, Siri Frigaard of Norway.<sup>76</sup>

Only a small number of the international prosecutors had experience from other international tribunals, particularly from the ICTR. However, as staff were generally recruited on contracts for just six months (albeit renewable), turnover was a significant issue. While the prosecutors themselves were recruited as professional posts, case managers (legal officers) and many of the other staff were drawn from the UN Volunteer Program. Only some had backgrounds in international criminal law.

At the time of its closure in May 2005, the SCU had indicted 391 people in 95 separate indictments. These included 37 Indonesian military officers from the TNI, 4 Indonesian police chiefs, 60 Timorese TNI officers and soldiers, the former civilian Governor of Timor-Leste, and 5 former District Administrators. Out of those indicted, 339 remained at large outside the jurisdiction. There were very few acquittals (only 3 out of the first 84 tried, one of which was subsequently overturned by the Court of Appeals).

#### **A. Prosecutorial Strategy**

Many view the initial period of the SCU operations as inefficient and badly organized.<sup>77</sup> The Commission of Experts notes that at the early stages of its operation the SCU decided to focus on the events of 1999 (although it did conduct some investigations into pre-1999 incidents).<sup>78</sup> Early SCU investigations were criticized for failing to focus on the systematic nature of the violations that had occurred during 1999 and the role played by the Indonesian military apparatus, focusing instead on treating them as individual criminal cases, which was

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<sup>72</sup> See Hirst, *supra* note 33, at 19.

<sup>73</sup> COE Report, *supra* note 70, at 19, para. 44.

<sup>74</sup> See Hirst, *supra* note 33, at 6.

<sup>75</sup> COE Report, *supra* note 70, at 13, para. 48.

<sup>76</sup> See Hirst, *supra* note 33, at 6.

<sup>77</sup> Conversations with UN officials and other observers on several occasions in Timor-Leste on various occasions during five missions to that country in 2001–2003.

<sup>78</sup> It is also interesting to note that the truth commission in Timor-Leste has subsequently recommended that the SCU should be reconstituted to look at cases from the pre-1999 era (see below).



reflected in the fact that initial indictments included only ordinary domestic charges of murder, rather than crimes against humanity.<sup>79</sup>

When the SCU was established in mid-2000, the international General Prosecutor identified 10 “priority cases” involving 202 accused, at least 183 of whom remained at large.<sup>80</sup> The decision was made to focus the investigations and prosecutions on those cases involving murder (there were approximately 1400 such cases), selected based on the following criteria: the number and type of victims, the seriousness of the crimes and their political significance, and the availability of evidence.<sup>81</sup> Five further cases were identified that involved widespread national patterns of atrocities.

However, due to resource and management constraints, as well as the limited progress of the major investigations,<sup>82</sup> the first cases selected for indictment and trial related to individuals already held in custody. Most of the early inditees—including some Timorese TNI members—were indicted alone and often only on ordinary murder charges. One or two of these cases even related to murders from 1999 that were most likely unrelated to the broader violence.

Several early Prosecutors resigned in frustration, claiming that outside influences were determining where prosecutorial efforts were directed. One claimed direct political interference in his work by the UNTAET Judicial Affairs Department.<sup>83</sup> Another has since indicated that domestic charges were used in the early indictments, as they were easier (and cheaper) to investigate and prove, indicating that “funding, or rather the lack of it, has therefore determined prosecutorial strategy.”<sup>84</sup>

The determination of what should have been prioritized was not as difficult a challenge as it might appear. The Indonesian Human Rights Commission (Komnas HAM) had already presented its report outlining the main incidents of violence throughout 1999 as a result of a mandate from the Indonesian Government. The UN International Commission of Inquiry had likewise reported on the major crimes that took place. Furthermore, local human rights groups carried out a number of less comprehensive but reliable studies. Furthermore, the

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<sup>79</sup> See Suzannah Linton, “Cambodia, East Timor and Sierra Leone: Experiments in International Justice,” (2001) *Criminal Law Forum* 12: 185-246 at 206, quoting the East Timor Action Network.

<sup>80</sup> COE Report, supra note 70, at 13, para. 49. For more detail, see “Fact Sheet on Serious Crimes and Justice for Victims of 1999 Violence,” Feb. 15, 2001, Dili: UNTAET Office of Communication and Public Information (copy on file with the ICTJ).

<sup>81</sup> See Hirst, supra note 33, at 6. These 10 priority cases were: the Liquiça Church massacre (April 6, 1999); the murders at the house of Manuel Carrascalão (April 17, 1999); the Maliana Police Station (Sept. 2–8, 1999); the Los Palos case (April 21–Sept. 25, 1999); the Lolotoe case (May 2–Sept. 16, 1999); the Suai Church massacre (Sept. 6, 1999); the attack on Bishop Belo’s compound (Sept. 6, 1999); the Passabe and Makaleb massacres (Sept.–Oct. 1999); a second case in Los Palos (April–Sept. 1999); and other sexual violence cases carried out in various districts (March–Sept. 1999).

<sup>82</sup> It was not until January 2002 that investigative staff members were deployed in the areas designated as key investigation sites. The failure to develop a significant presence in the field in the relevant areas, allied to a lack of significant outreach program, made an already difficult task even harder for the SCU in terms of establishing a credible relationship with victims and witnesses.

<sup>83</sup> Carlos Vasconcelos, “Briefing on East Timor’s Serious Crimes Unit,” Annual Conference of the International Association of Prosecutors, 2001 (copy on file with the ICTJ).

<sup>84</sup> See Linton, “Experiments in International Justice,” supra note 80, at 215. More recently, one prosecutor suggested that the fact that the General Prosecutor is Timor-Leste and formally part of the government as Attorney-General has made it more difficult to proceed with investigations against a FALINTIL leader. Even the General Prosecutor has acknowledged the difficult political pressures.

HRU also developed a significant investigation into the violence that followed the same conclusions of the other principal investigations. The general universe of cases, therefore, was established with a fair degree of precision by the time the SCU began its work.

The situation improved considerably with the arrival of Norwegian Siri Frigaard as Deputy General Prosecutor for Serious Crimes.<sup>85</sup> While it is true that she continued with the previous plan of investigating 10 key cases, the shape of the investigation changed under her leadership. Much greater emphasis was placed on investigating those in positions of greater responsibility, especially among the TNI. As a result, several high-profile indictments were issued in the first half of 2003. The most high-profile indictment was issued on February 24, 2003, against the former Indonesian Minister of Defense, six high-ranking TNI commanders, and the former Governor of Timor-Leste in relation to crimes against humanity involving murder, deportation, and persecution. The accused included the former Indonesian Minister of Defense and Commander of the Armed Forces, General Wiranto.

However, the relatively small number of deaths and assaults brought its own difficulties. In 2003, Frigaard noted that although the UN estimated just over 1,300 people had been killed in the 1999 violence, only 40 percent of those deaths were investigated. In such circumstances, there is intense pressure on prosecutors to carry out investigations into all the deaths and to present plausible explanations to victims and relatives as to why there has been no progress in (or launch of) the investigation. The SCU faced considerable pressure from families to carry out investigations. The failure to deploy investigators in the relevant areas at an earlier stage, and the absence of a well-developed outreach program explaining the unit's strategy, made matters more complicated for the SCU.

However, considerable efforts were made to improve on the earlier situation. Special mention should be made of the decision in 2003 to publicly announce indictments in the areas where the crimes were committed, rather than simply from headquarters in Dili. These announcements were combined with public meetings helped restore a sense of trust and credibility among the Timorese regarding the SCU.

Some may suggest that the SCU should have focused exclusively on the Indonesian officers and reported to the Security Council that they could not be arrested, or simply followed a domestic prosecutor's mandate and prosecuted anyone within its jurisdiction.<sup>86</sup> But such a stark choice fails to take into account the complexity of the situation facing the Deputy General Prosecutor for Serious Crimes (DGPSC). At the outset, the SCU was under pressure to proceed against a significant number of low-level suspects who were already in custody. Furthermore, the Unit was faced with relatives who could point clearly to the person responsible for the murder of a loved one, albeit militia members rather than TNI officers. It was often not politically or morally possible to simply say to victims that such cases would not be pursued. At the same time, it was impossible to deny the internationalized nature of the system that brought about the crimes and the demand that all that TNI forces be held responsible.

Those involved also claimed that lack of resources hindered any effective planning. After establishing a reputation for going after low-level offenders, least able to defend themselves, instead of those with the greatest degree of responsibility, local perceptions were already

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<sup>85</sup> See, e.g., [www.etan.org/et2003/may/01/29concern.htm](http://www.etan.org/et2003/may/01/29concern.htm).

<sup>86</sup> See the comments of No Peace Without Justice, available at [www.npwj.org](http://www.npwj.org).

damaged. In addition, the SCU was put in an impossible position. Internationally, it was seen as a lame duck incapable of getting to the TNI.

However, these factors do not detract from the poor decisions in terms of prosecutorial strategy. For example, on May 17, 2002, “X,” a minor, was indicted on crimes against humanity including extermination. X was 14 years old in September 1999. An amended indictment charged him with the murder of three men. He was convicted and sentenced to one year in jail, having spent almost all of that time in pre-trial custody, with his status as a minor only acknowledged once it was pressed by defense counsel. Never before or since has a minor been charged under an international or internationalized criminal process.

The recent Commission of Experts’ Report concluded that the SCU did not “function with a prosecution strategy designed to maximize limited resources,”<sup>87</sup> and that “the lack of an effective prosecution strategy and policy from the outset supports to some extent the criticism that the SCU and [Special Panels] have only succeeded in prosecuting low-level Timorese perpetrators.”<sup>88</sup> The report also commented that:

[S]ince the focus of the SCU was on murder cases, other serious crimes such as destruction of property, deportation and unlawful transfer cases were not investigated thoroughly. Investigations into cases involving rape and torture remain incomplete. For this reason, the SCU is not able to establish a comprehensive and complete documentation of the diverse nature of the crimes committed during 1999.<sup>89</sup>

However, the majority of the later indictments for crimes against humanity included charges of murder as well as persecution, unlawful population transfer, and torture. In terms of the historical record, more stark is the fact that the crimes between 1975 and 1998 remained uninvestigated. While some within SCU saw this period as outside its temporal mandate, it is probably more accurate to recognize that these cases were not prioritized because of limited resources.

## **B. Lack of Indonesian Cooperation**

The greatest difficulty facing the SCU in its investigations was that the majority of the suspects were beyond its jurisdiction in Indonesia. UNTAET and the Indonesian Government agreed on a Memorandum of Understanding on 5 and 6 April 2000, for cooperation in legal, judicial, and human rights-related matters. This stated, among other things, that the parties would ensure that warrants of arrest would be enforced and that accused persons would be transferred. The MOU never had any practical effect because the Indonesian authorities later claimed that it had to go through national procedures to be ratified, and thus no assistance was forthcoming. The MOU was also temporally limited to the period of the UN administration of Timor-Leste. The net result of the lack of cooperation with Indonesia has been devastating. Out of 391 persons indicted, 309 accused currently remain outside the jurisdiction of Timor-Leste.<sup>90</sup>

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<sup>87</sup> COE Report, *supra* note 70, at 16, para. 63.

<sup>88</sup> *Id.* at 16, para. 64.

<sup>89</sup> *Id.* at 12, para. 51.

<sup>90</sup> *Id.* at 12-13, para. 47. For the section which follows on Rule 61, see Paul Seils, “A Proposal for a Procedure in the Event of a Failure to Execute a Warrant Issued in Respect of an Indictment Alleging the Commission of Serious Crimes”, submitted to a Symposium on Justice for International Crimes Committed in the Territory of East Timor, University of Melbourne, Faculty of Law, Jan. 16-17, 2003.

In early 2004, Nicholas Koumijans, the successor to Siri Frigaard, presented a motion to the Special Panels for Serious Crimes in the case against General Wiranto, asking that warrant hearings be held in public and that the court should hear evidence from witnesses in support of the application. The principal benefits of the proposal would be that victims could get some sense of vindication in hearing the evidence presented publicly and have judges determine that there was a case to be answered. Additionally, the process would allow the SCU and the UN to demonstrate that its impotence was not its own fault, but that of Indonesian intransigence. Third, it might have the effect of restoring a sense of efficacy to the overall justice system in Timor-Leste.

The proposal was rejected under the reasoning that there was no precedent under international law. Judge Phillip Rapoza compared the proposal to the hearings under Rule 61 of the Rules of Procedure and Evidence of the ICTY, noting that those hearings related to cases where warrants had been issued and not acted upon. While the judge was correct in distinguishing the situation from ICTY, the decision remains questionable both on legal and policy grounds, as international law does not operate on a basis of strict precedent in the way common law systems do. The fact that all the circumstances were not the same as those that pertained in former Yugoslavia should not have been determinative. There was a rich basis for analogous reasoning to be applied here that would have justified the decision both on grounds of law and public policy. The Rule 61 hearings were created to put pressure on non-cooperative entities and to allow victims both to see that efforts were being made and to feel a part of those processes.

There could be no serious doubt that Indonesia would not cooperate with warrants by the time the motion was presented. Nevertheless, the judge noted that public policy considerations, such as the interests of victims, were not sufficient to outweigh basic principles of procedural fairness. The decision was unduly cautious and, in the light of subsequent declarations of the General Prosecutor and political leadership, perhaps deprived the local population of the closest they were going to get to a sense of justice.

## **V. JURISDICTION AND LEGAL FRAMEWORK**

### **A. Substantive Law**

The end of Indonesia's occupation of Timor-Leste left a vacuum in terms of a legal framework. The first regulation promulgated by the Transitional Administrator declared that the transitional applicable law in Timor-Leste would be that previously in force (i.e., Indonesian law), subject to any inconsistency with international human rights law and any laws subsequently made by UNTAET.<sup>91</sup> Several Indonesian laws were deemed inapplicable from the outset, such as the notorious anti-subversion laws and the death penalty, yet there was no comprehensive review of which laws were inconsistent with international human rights law.<sup>92</sup> Although this decision was later criticized, at the time it was not seen as especially controversial, as all Timorese lawyers had trained in Indonesia.

UNTAET Regulation No. 2000/15 provided the Special Panels of the Dili District Court with exclusive jurisdiction in relation to "serious crimes"; i.e., war crimes, genocide, and crimes

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<sup>91</sup> Regulation on the Establishment of the United Nations Transitional Administration in East Timor, Nov. 27, 1999, UNTAET/REG/1999/1, Section 3.

<sup>92</sup> See Jones, *supra* note 45, at 9–10.

against humanity, regardless of when or where the crimes were committed or the nationality of the victim (based on universal jurisdiction).<sup>93</sup> Torture was later added. In respect of murder and sexual offenses, the court was provided with exclusive jurisdiction only insofar as the crimes were committed between January 1, 1999 and October 25, 1999.<sup>94</sup> The Special Panels enjoyed primacy over the ordinary national courts for offenses within their exclusive jurisdiction. In practice, genocide and war crimes were not charged before the Special Panels; hence, all the charges involved either crimes against humanity or domestic law. The reasons for this are not entirely known, but may lie in the fact that prosecutors preferred to charge the crimes of 1999 as a widespread campaign against a civilian population than as crimes in the context of an armed conflict.<sup>95</sup>

The applicable law for the Special Panels essentially incorporated the international law provisions in respect of war crimes and genocide and used the definitions for crimes against humanity found in the Rome Statute for the International Criminal Court.<sup>96</sup> While it is doubtful that another approach would have been deemed legitimate in the circumstances, the importation of such laws was extremely ambitious. Even though the quality of the decisions coming from the court improved over time, on some occasions the judges demonstrated a lack of comprehension of these laws. The lack of training and support to the judges and defense lawyers led to inaccurate application of the elements of crimes in cases dealing with crimes against humanity.<sup>97</sup> Although in the early years, there was limited reliance on substantive jurisprudence or procedure from the ICTY or ICTR,<sup>98</sup> the Special Panels came to rely at least to some extent on international human rights standards and on the jurisprudence of the international tribunals over the years.<sup>99</sup>

Nonetheless, the quality of the jurisprudence remained subject to criticism. Detailed analyses can be found elsewhere, but a few examples illustrate some of the difficulties. As mentioned, the exclusive jurisdiction of the Special Panels also included murder and sexual offenses if such crimes were committed between January 1, 1999 and October 25, 1999. The limitation was temporal, but there was no specific territorial restriction on the jurisdiction over murder and sexual offenses. However, unlike the international crimes, these national crimes were not the subject of universal jurisdiction, and if committed before January 1, 1999, would have to

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<sup>93</sup> Section 2.2 of Regulation 2000/15 provides:

For the purposes of the present regulation, “universal jurisdiction” means jurisdiction irrespective of whether:

- (a) the serious criminal offence at issue was committed within the territory of East Timor;
- (b) the serious criminal offence was committed by an East Timorese citizen; or
- (c) the victim of the serious criminal offence was an East Timorese citizen.

<sup>94</sup> Section 10 of UNTAET Regulation 2000/11. There were originally eight district courts, but this was reduced to four, with only the Court in Dili having the powers to deal with these specified cases.

<sup>95</sup> See Hirst, *supra* note 33. The question of whether the situation in Timor-Leste during 1999 satisfied the legal definition of an armed conflict was never tested.

<sup>96</sup> A notable exception is the ICC defence of superior orders. UNTAET Regulation 2000/15, Section 21.

<sup>97</sup> For example, in the first major crimes against humanity judgment, the Special Panel erroneously demanded proof of the existence of an armed conflict, which is not required by the applicable definition of crimes against humanity: see Prosecutor v. Joni Marques and Others (Los Palos) Case No. 9/2000, Special Panel of the Dili District Court, judgment, Dec. 11, 2001.

<sup>98</sup> Prosecutor v. Damaio da Costa Nunes, Case No. 1/2003, dissenting opinion of Judge Blunk, Dec. 10, 2003, in which eight years’ imprisonment was imposed for two counts of murder as a crime against humanity.

<sup>99</sup> COE Report, *supra* note 70, at 14, para. 55.

come before the Indonesian courts. If committed after October 25, 1999, the date of the Indonesian pullout, these cases could be brought before ordinary Timorese courts. Furthermore, by implication the Special Panels held that such crimes fell within their jurisdiction only if committed within the territory of Timor-Leste. Crimes committed by Timorese in West Timor, including rapes and murders in the camps, were held to be outside the jurisdiction of the Special Panels.<sup>100</sup> Neither could these crimes be tried by the ordinary courts, as their jurisdiction was only deemed to have commenced on October 25, 1999, when UNTAET was established. Moreover, the definitions of the national crimes did not comply with international standards, as a number originate from the Indonesian Penal Code, which includes problematic concepts in relation to sexual offenses, such as the criminalization of adultery, limiting the definition of rape to female victims, and making rape inapplicable in the context of marriage.<sup>101</sup>

The national dimension of the Special Panels' legal framework caused the greatest confusion in application. For example, in the decision in July 2003 of the Court of Appeal in the case against *Armando dos Santos*, rendered more than two years after the Special Panels began functioning, a majority of the Court held that Portuguese—and not Indonesian—law is the default subsidiary law to be applied in the absence of applicable UNTAET regulations or new national legislation.<sup>102</sup> The decision, which caused widespread confusion and protest within the Timorese legal community, most of whom were trained in Indonesia, also held that the application of international crimes under UNTAET Regulation 2000/15 violated the new constitution's prohibition on retroactivity. As a result, the Court of Appeal, in deciding on the prosecution's appeal against an acquittal relating to crimes against humanity charges, instead convicted Dos Santos of genocide under Portuguese law. This called into question a number of verdicts from the Special Panels.

The National Parliament has since clarified that Indonesian law continues to apply as the default subsidiary law, but the *Dos Santos* conviction for a crime under Portuguese law has not been overturned.<sup>103</sup> Throughout this confusion, the Special Panels continued to apply Indonesian law where appropriate, thereby declaring that they were not bound by the decision of the Court of Appeal.<sup>104</sup> Subsequently, the Court of Appeal has reverted to the application of Indonesian law but has not revisited the question of how this impacts serious crimes cases, including the potential implications for those already convicted.<sup>105</sup>

## **B. Procedural Law**

In terms of criminal procedure, in September 2001 Transitional Rules of Criminal Procedure were introduced by UNTAET, which apply to both serious and ordinary criminal proceedings. The Rules constituted a combination of civil and common law practices as well

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<sup>100</sup> See *Prosecutor v. Leonardus Kasa*, Case No. 11/2001, May 9, 2001.

<sup>101</sup> See "Experiments in International Justice," supra note 80, at 210–211.

<sup>102</sup> *Prosecutor v. Armando dos Santos*, Case No. 16/2001, July 15, 2003. A strong dissent was filed by Timorese Judge Jacinta Correia da Costa.

<sup>103</sup> The new law was passed on October 8, 2003. For further discussion of the Court of Appeal decision, see JSMP, "Report on the Court of Appeal Decision in the Case of Armando dos Santos," Dili, Aug. 2003, available at <http://www.jsmp.minihub.org>.

<sup>104</sup> See JSMP, "Special Panel Delivers its own Decision on the Applicable law," July 24, 2003, available at <http://www.jsmp.minihub.org>.

<sup>105</sup> See JSMP Justice Update, Issue 12/2005, Dili, June 30, 2005, available at <http://www.jsmp.minihub.org>.

as elements from the ICC Statute.<sup>106</sup> They were only replaced by a new criminal procedure code in January 2006.

The application of these relatively complex and unfamiliar procedures caused major difficulties in practice. First, they were generally considered incomplete. While amendments to provide greater detail were contemplated, they were never created.<sup>107</sup> In particular, the Rules provided little guidance on the role of the Investigating Judge, an office that did not exist under the Indonesian criminal justice system. As a result, there have been ongoing difficulties of procedure affecting both ordinary and serious crimes suspects. A common problem involved excessive use of pretrial detention ordered by investigating judges, even on occasions where the prosecution indicated that it would not be proceeding with charges. (The Special Panels ruled against such practice in a *habeas corpus* motion.)<sup>108</sup>

Second, there were major problems in the Special Panels' application of the Rules. Section 29 follows the ICC statutory safeguards for the admission of confessions, although this provision experienced problems in its application, particularly in relation to guilty pleas.<sup>109</sup> Similarly, while rights to a public trial and access to interpretation facilities were guaranteed under the Rules, these were regularly violated through a lack of public accessibility to information about the processes and inadequate translation services.<sup>110</sup> In other areas, there has also been a notable lack of consistency in how the Rules were interpreted. Both SCU and defense lawyers have complained of this in relation to such issues as admission of witness statements, issuing of arrest warrants, and illegal detention.<sup>111</sup> The absence of a functioning Court of Appeal for more than a year meant that appeals from interlocutory decisions to resolve many of these inconsistencies did not proceed.<sup>112</sup>

It is also unclear whether the Special Panels have been able to add to the development of law at the national level, particularly given the limited interaction between the Special Panels and judges of the ordinary national courts. It remains to be seen how the ordinary courts will deal with serious crimes cases, but indications are that suspects simply will be processed under domestic criminal law.<sup>113</sup> Although the heavy reliance on international standards and practices had the potential to introduce such concepts at a national level, such standards are predicated on the existence of fully functioning justice systems and assume a certain skill level within the legal profession. The absence of these elements, together with the absence of any staged handover plan, seems to indicate that this potential has not been realized. In retrospect, it may have been preferable to devise a simpler procedural code for both the

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<sup>106</sup> See UNTAET Regulation 2000/30, Sept. 25, 2000, and UNTAET Reg. 2001/22, Aug. 10, 2001. For further detail of the problems in the drafting of the Transitional Rules of Criminal Procedure, see Jones, *supra* note 45, at 10.

<sup>107</sup> Interview with senior SCU prosecutor, Dili, Sept. 2003.

<sup>108</sup> See JSMP, "Special Panels in Dili finally releases illegal detainee," Oct. 22, 2003, available at [www.jsmp.minihub.org/news](http://www.jsmp.minihub.org/news), and "Justice for East Timor," *supra* note 59, at 10–15.

<sup>109</sup> See Suzannah Linton and Caitlin Reiger, "The Evolving Jurisprudence and Practice of East Timor's Special Panels for Serious Crimes on Admissions of Guilt, Duress, and Superior Orders," *Yearbook of International Humanitarian Law* 4, 2001.

<sup>110</sup> This has been an ongoing problem throughout the life of the Special Panels. See JSMP, "Justice in Practice: Human Rights in Court Administration," Thematic Report No. 1, Nov. 2001, available at [www.jsmp.minihub.org/Reports/JSMP1.pdf](http://www.jsmp.minihub.org/Reports/JSMP1.pdf), and JSMP, "Special Panels for East Timor ignores importance of public participation in court proceedings," Nov. 19, 2003.

<sup>111</sup> Interviews with Defence Unit and SCU staff, Dili, Sept. 2003.

<sup>112</sup> Interviews with SCU Staff, Dili and London, 2002–2003.

<sup>113</sup> Information received from JSMP, Dili, Sept. 2005.

Special Panels and the ordinary courts, coupled with dedicated practical training for Timorese judges and lawyers in how to apply the code.

### **C. Legal Implications of Independence**

The Constitution of Timor-Leste, which became applicable at independence on May 20, 2002, contains transitional provisions that allowed for the continued application of these UNTAET regulations, including the Transitional Rules of Criminal Procedure, until replaced by new legislation. The Constitution further provides that:

The collective judicial instance existing in Timor-Leste, composed of national and international judges with competencies to judge serious crimes committed between the 1<sup>st</sup> of January and the 25<sup>th</sup> October 1999, shall remain operational for the time deemed strictly necessary to conclude the cases under investigation.<sup>114</sup>

The provisions also suggested that once the work of the Special Panels is concluded, serious crimes will be dealt with by the ordinary courts, or any international court that may be created with appropriate jurisdiction:

Acts committed between the 25<sup>th</sup> of April 1974 and the 31<sup>st</sup> of December 1999 that can be considered crimes against humanity of genocide or of war shall be liable to criminal proceedings with the national or international courts.<sup>115</sup>

There is also a potential discrepancy between this provision and the unrestricted temporal jurisdiction of the Special Panels in relation to international crimes, although all cases focused on crimes committed during 1999, so the issue did not arise.

### **D. Conclusion**

In short, the Special Panels did not produce jurisprudence of a standard likely to have significant impact on the development of international law. One prosecutor lamented missed opportunities, such as the chance to clarify the law on command responsibility for non-state actors and the ICC definition of rape, neither of which has been explored.<sup>116</sup> On the other hand, another prosecutor has pointed to the following achievements in the jurisprudence: (1) the establishment of an historical record of what happened in Timor-Leste in 1999, with a focus on murder cases; (2) the demonstration of an orchestrated campaign between the militia and Indonesia's civilian administration; (3) the setting of precedent, such as legal precedent in decisions on persecutory intent;<sup>117</sup> and (4) taking judicial notice of the International Commission of Inquiry report.<sup>118</sup>

## **VI. CAPACITY OF THE DEFENCE AND FAIRNESS OF TRIALS**

In a major oversight by UNTAET, when the SCU and the Special Panels were first created, no provision was made for a specialized defense office. A small Public Defenders' Office had

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<sup>114</sup> The Constitution of the Democratic Republic of Timor-Leste, Section 163(1).

<sup>115</sup> Id. at Section 160.

<sup>116</sup> Interview with senior SCU prosecutor, Dili, Sept. 2003, speaking particularly of the Lolotoe case.

<sup>117</sup> Deputy General Prosecutor v. Alarico Masquita, Nov. 25, 2004.

<sup>118</sup> Deputy General Prosecutor v. Joni Marques and 9 others (the Los Palos case), Case No. 9/2000: for a complete JSMP report on the case see

<http://www.jsmp.minihub.org/Reports/Los%20Palos%20trial%20report.pdf>.



been created for the ordinary court system, but it was staffed by young Timorese lawyers with minimal experience (if any) and even fewer resources. As the private legal profession was virtually nonexistent, they were expected to provide legal assistance in all matters before the ordinary courts, including both civil and criminal matters. Nine inexperienced Timorese public defenders were given the sole responsibility for defending individuals accused of serious crimes, while facing international prosecutors across the courtroom. International mentors with little or no criminal or international legal experience began appearing in court themselves to fill the gap. As an indication of the dire state of inequality, in the first 14 trials before the Special Panels, not a single witness was called for the defense.<sup>119</sup> In the *Los Palos* cases, the SCU lodged an appeal in respect of the sentence imposed on one of the defendants because it appeared that the defense lawyers were not going to. However honourable the role of the prosecutors, such a situation demonstrates serious weaknesses.

While some additional defense lawyers were seconded by international NGOs, it was not until September 2002 that UNMISSET established a separate Defense Lawyers Unit (DLU).<sup>120</sup> The DLU employed only international staff, and rather than bolstering local capacity, it seems to have mirrored the approach of the SCU.<sup>121</sup> At the conclusion of the DLU's activities in May 2005, it had seven international defense lawyers working under the head of the unit, three UN defense assistants, two UNV defense interpreters and translators, legal researchers, and five assistants for translation, logistics, and administration.<sup>122</sup> These resources took some time to build up, and at the outset the unit was under-resourced. Although in general the establishment of the DLU led to an improvement in the quality of defense before the Special Panels, the international lawyers had varying levels of criminal defense experience in their home jurisdictions. As with the international prosecutors, they were recruited through the ordinary UN process. A coordinator who was not a practicing lawyer provided nominal leadership and support to the unit. As a result, staff viewed this position as a UN bureaucrat, rather than an active promoter of defense policy.

In the slightly more than two years since it was created, the DLU has provided representation for all defendants in approximately 30 trial and appellate proceedings.<sup>123</sup> Of these 30 cases, three resulted in acquittals, four were withdrawn, and the rest were convicted. The majority of appeals from convictions resulted in rejections. Despite serious challenges, such as limited resources and inability to access witnesses, the DLU has been credited for its commitment to ensuring the rights of accused before the Special Panels.<sup>124</sup> Before it became active, the serious inadequacies of the quality of the defense were enough to call the entire legitimacy of the serious crimes regime into question.

However, the DLU had little or no collaboration or interaction with Timorese defense lawyers.<sup>125</sup> Staff members reported that the Timorese public defenders' office concentrated solely on ordinary crimes, and the lawyers seemed to have lost their initial limited interest in defending those accused of serious crimes.<sup>126</sup> Their gradual but complete withdrawal from the process was partly due to the large caseload in ordinary crimes (due to the lack of any

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<sup>119</sup> See "Human Rights in Court Administration," supra note 111; Hirst, supra note 33, at 20.

<sup>120</sup> COE Report, supra note 70, at 31.

<sup>121</sup> COE Report, supra note 70, at 31, para. 139.

<sup>122</sup> Id.

<sup>123</sup> COE Report, supra note 70, at 31, para. 142.

<sup>124</sup> COE Report, supra note 70, at 31–32.

<sup>125</sup> See Hirst, supra note 33, at 20.

<sup>126</sup> Interview with international public defenders and UNMISSET staff, Dili, Sept. 2003.

enforced guidelines for the provision of legal aid and the fact that there were few private lawyers) as well as their acknowledged inexperience and an understandable preference to concentrate on private (and paying) clients instead. However, international defense mentors have also commented on the persistent attitude of several Timorese public defenders that the former militia members do not deserve a proper defense, that the serious crimes process was an international process, and that they themselves are better placed concentrating on ordinary crimes.<sup>127</sup> This points to a lack of ownership by Timor-Leste's nascent legal profession in the serious crimes process.

## VII. QUESTIONS OF EFFICIENCY AND FUNDING

### A. Workload and Efficiency

The first trials before the Special Panels began in 2001. All convictions related to Timorese militia members, TNI officers, and one former member of FALANTIL. All of those convicted were relatively low-level perpetrators. They received a wide variation of sentencing, with the majority in the range of seven to fifteen years. However, the *Los Palos* case, the first trial for crimes against humanity, attracted significant attention. All 10 accused in that case were convicted and received sentences between 4 years and 33 years. This was later reduced to 25 years on the basis of a presidential pardon.<sup>128</sup> By April 2005, the Special Panels had completed 55 trials, convicting 84 defendants. Twenty-four of the accused pleaded guilty and four were acquitted. The cases against 13 defendants were dismissed by the Special Panels or withdrawn by the Prosecution.<sup>129</sup> While in terms of sheer numbers this was not a bad performance, many problems lurked beneath the surface.

Matters of court administration in Timor-Leste were approached without distinction between the Special Panels regime and the domestic system. Administration for the Special Panels was originally handled through the rudimentary registry office of the Dili District Court, as the UNTAET Regulations made no provision for an internationalized registry team. There was no position for the Special Panels equivalent to that of the Registrar, who in other courts has had a critical role for ensuring sound management and administration.<sup>130</sup> However, in mid-2002 a new post of international administrator for the Special Panels was finally created (albeit at a relatively junior level), which helped to improve management of the caseload and scheduling of cases. No realistic assessment of the level of local resources was undertaken at the outset, nor was there clear management or policy development during the early period. While a few experienced Timorese court clerks were recruited, they were not trained into more senior administrative positions. Instead, they were limited to roles of operating cameras in the courtroom video recording process and filing documents.

For most of the first two years, the judges had no legal advisors, extremely limited research facilities, no transcripts, and no staff to assist with preparation and publication of judgments. This had an enormous impact on the quality of the work they were able to produce. It was only in early 2003 that two international legal researchers were recruited as part of a small judicial support office created for the Special Panels. This included dedicated translators and

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<sup>127</sup> Id.

<sup>128</sup> COE Report, *supra* note 70, at 27, para.121.

<sup>129</sup> COE Report, *supra* note 70, at 27, para. 107.

<sup>130</sup> In contrast, there will be a national chief of administration and an international deputy for the soon-to-be-established Extraordinary Chambers in Cambodia, although they will still remain structurally part of the domestic court system.

a court reporter. As with the Defence Office described below, UNMISSET undertook this initiative after sustained criticism of the functioning of the Special Panels. Furthermore, the judicial support office was located away from the Court itself and inside the UNMISSET compound, and was composed entirely of international staff (with the exception of one interpreter). In short, the responses to problems of court administration were largely reactive and troubleshooting, rather than part of a properly planned approach.

While the SCU suffered resource problems in the early months of its operation, these were eventually addressed. The Special Panels, on the other hand, continued to receive far less attention and resources throughout the serious crimes process.<sup>131</sup> Organizations such as the Dili-based Judicial System Monitoring Programme have repeatedly highlighted the lack of resources and support afforded to all the Special Panel judges throughout its existence.

In the final two years of the Special Panels' operation, many of these constraints were alleviated, although not entirely.<sup>132</sup> Yet while the judges are to be commended for their work in difficult circumstances, the quality of many judicial decisions remained well below what was expected.<sup>133</sup> A belated recognition of the needs of this area within the UN Department of Peacekeeping is evident in the reports of the Secretary General to the Security Council, which urged the follow-up mission to UNMISSET to focus its Serious Crimes resources more on the judiciary.<sup>134</sup>

The Court of Appeal began operating again in July 2003, by which time it had 34 serious crimes cases pending. By July 2004, however, a relatively large proportion of the appeal cases were handled by the Court of Appeal—44 of a total of 73 were commenced in 2003 and 11 of a total of 33 cases for 2004.<sup>135</sup> The lack of any transcripts of the trials in the first instance, and the inability to transcribe the video recordings of trial proceedings which were commenced in mid-2001, caused serious problems in filing appeals and led to an effective denial of the right to appeal in many cases.<sup>136</sup>

Interpretation and translation also presented significant problems because of the complexity of using four official languages and lack of capacity. The panels were supposed to function in Portuguese, Tetum, Bahasa Indonesia, and English, and interpretation and translation was supposed to be provided in all these languages. There were great difficulties in finding adequately skilled interpreters, particularly with any experience in dealing with technical legal terms. This led to errors in interpretation and delays in translation of documents.

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<sup>131</sup> The SCU always enjoyed a relative advantage in access to resources, as it was funded directly out of the UN Peacekeeping Mission budget, whereas the Special Panels fell under the voluntary trust fund to support the national Ministry of Justice.

<sup>132</sup> For the initial period, see "Human Rights in Court Administration," *supra* note 11. For a more recent assessment, see "Justice for East Timor," *supra* note 59.

<sup>133</sup> Interviews with various prosecutors, public defenders, and JSMP, Dili, Sept. 2003. Several Timorese judges expressed particular disappointment on this issue, given the UN-assisted nature of the process.

<sup>134</sup> See Special Report of the Secretary General on the United Nations Mission of Support in East Timor, Feb. 13, 2004, UN Doc. S/2004/117, para. 32. Further discussion on the extent of future international support to the Serious Crimes process as a whole is discussed below.

<sup>135</sup> JSMP, "The Role, Practice and Procedure of the Court of Appeal," June 28, 2005, at 4, available at [www.jsmp.minihub.org](http://www.jsmp.minihub.org).

<sup>136</sup> JSMP, "Overview of the Justice Sector," March 2005, at 17–18, available at <http://www.jsmp.minihub.org>.

## B. Funding

The SCU and Special Panels were funded through UNMISSET, both through assessed and voluntary contributions. For the period 2003–2005, the total operating cost of the SCU and Special Panels was US\$14,358,600, or around 5 percent of the overall assessed contribution to UNMISSET, which amounted to approximately \$296,557,000. The voluntary contributions amounted roughly to US\$120,000.<sup>137</sup> The overall yearly budget grew from around \$6 million in earlier years. In terms of administration, funding and physical location, the SCU operated separately from the rest of the national judicial structure. The SCU received direct bilateral support by way of seconded posts from international NGOs (such as the Coalition for International Justice) and national governments (such as Norway and Australia), but the bulk of its funding continued to be sourced from the general UN peacekeeping budget through UNTAET and then UNMISSET (which were based on assessed contributions).

In contrast, until late 2002 most of the Special Panels' budget (with the exception of the salaries of the international judges) was funded out of the trust fund of voluntary state contributions that applied to most general governmental costs. There was some direct bilateral aid and NGO support provided to the court system in general, but not to the Special Panels, with the exception of some legal research assistance on international criminal law from one U.S. university.<sup>138</sup>

It is particularly difficult to obtain detailed separate budget information, but in 2002 only \$600,000 was spent on the Special Panels, whereas almost \$6 million was spent on the SCU (out of a total budget for UNMISSET of more than \$200 million).<sup>139</sup> The majority of this was taken up by salaries of international staff. Within the Special Panels there was an ongoing problem that these were part of the court system as a whole, and were directly dependent on the Ministry of Justice and hence had no control over their budget, including from whom they could accept support.

Although outsiders generally thought that the funds for the SCU were sufficient (or at least became so over time), many of those who worked in the Unit did not share this view. They pointed to a lack of investigating staff, especially in the early stages, as a major drawback, as well as a lack on necessary facilities. On the other hand, there is broad agreement that the provisions made for the management of the Special Panels, interpreters, and defense were simply never adequate for significant parts of the process.

It would take a detailed audit to determine whether resources could have been deployed more efficiently. For the purposes of this paper, planning and funding seemed to be concerned above all with the SCU, and there was a significant underinvestment in the overall system. In short, once the SCU became more productive, it became clear that the Special Panels system could not cope. A good deal of this might have been resolved by better planning and training, but it was partly due to a lack of necessary funds through an overemphasis on only the investigatory and prosecutorial arm of the process.

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<sup>137</sup> COE Report, *supra* note 70, at 23, para. 99.

<sup>138</sup> For example, *Avocats Sans Frontières* (Attorneys Without Borders), the Asia Foundation, and USAID provided direct assistance to the justice sector in general to supplement trust fund contributions. The War Crimes Research Office of the American University's Washington College of Law provided legal research assistance to Special Panel Judges during 2002–2003.

<sup>139</sup> David Cohen, "Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?" (2002) *Asia Pacific Issues* 61: 1.

## VIII. OUTREACH AND PUBLIC PERCEPTIONS

The Special Panels themselves never engaged in any form of public outreach or even basic information dissemination. There was no clear system for the public to access copies of court documents or judgments, many of which were not translated out of their original versions in either English or Portuguese. The only form of public information about the Special Panels' work came from the JSMP.<sup>140</sup> In March 2004, a Special Panel traveled to the remote enclave of Oecussi to conduct an on-site hearing, the first time it exercised its power to do so. According to monitoring reports, hundreds of community members were present and responded extremely positively.<sup>141</sup> However, the lack of accessibility generally for ordinary members of the public in districts far removed from the capital remained a huge problem for the public perception and understanding of the Special Panels, and compounded fundamental difficulties such as the lack of transport and media services outside of Dili.

General public knowledge about the SCU's work remained limited to those communities visited by investigators and the Dili-based legal community. Initial perceptions of the Special Panels and the SCU were mixed. Although widely criticized during its first two years for its lack of transparency, toward the end of its mandate the SCU engaged in its own public outreach work, albeit with a necessarily partial perspective. Through the appointment of a Public Affairs Officer and the publication of regular fact sheets and update reports, public understanding of the SCU's work improved. The SCU also engaged in town-hall meetings to explain the issuance of certain indictments, and in April and May 2005 held a series of community outreach meetings to explain the imminent closure and hear community concerns.<sup>142</sup>

Any public criticism has been felt most keenly by the Timorese judges on the Special Panels. They have expressed frustration that the general public did not appreciate fully the Special Panels' work, and that many of the limitations of the process were beyond their control, particularly in terms of the lack of resources and enforcement powers.<sup>143</sup> This is an obvious area in which education and outreach could have assisted.

While international media provided intermittent coverage of the Special Panels, it was limited to a few high-profile indictments and convictions. On a day-to-day basis, local media provided semi-regular coverage, but not in any consistent manner. Often the only people who attended Special Panel hearings were monitors and the occasional journalist; few members of the public were ever present.

Within Timor-Leste, there was a perception that the serious crimes process was an international initiative, but it was nevertheless welcomed as consistent with community demands for justice. Furthermore, the "externalized" nature of the process was not inconsistent with a widespread belief held in Timor-Leste and beyond that justice for past

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<sup>140</sup> JSMP was established in early 2001 to provide legal analysis and monitoring of the Special Panels. It is composed of both Timorese and international legal staff, and outreach has increasingly become a large part of its work due to the high demand for information within the community. For further information, see [www.jsmp.minihub.org](http://www.jsmp.minihub.org).

<sup>141</sup> JSMP weekly justice update, March 1–7, 2004.

<sup>142</sup> See JSMP, "The Serious Crimes Unit Conducts Community Outreach Sessions," April 29, 2005, available at [www.jsmp.minihub.org](http://www.jsmp.minihub.org).

<sup>143</sup> Interviews with Timorese judges, Dili, Sept. 2003.

crimes is partly—or wholly—a responsibility of the international community.<sup>144</sup> While little qualitative data exists in the form of official studies, research undertaken by the ICTJ supports this finding, as well as demonstrating the ongoing frustration for some regarding the failure of the SCU to address crimes prior to 1999.<sup>145</sup>

However, there was great frustration among victim communities and Timorese NGOs that the serious crimes process was too slow and focused on low-level perpetrators, rather than targeting the leaders behind the human rights violations. Several stakeholders have noted that this perception shifted significantly after the indictment of General Wiranto.<sup>146</sup> However, a great deal of disillusionment prevailed because of the inability of the serious crimes regime to gain cooperation over the Indonesian military who had masterminded the violence. The Commission of Experts Report notes that:

Victim groups have informed the Commission that they remain dissatisfied with the SCU for not responding to their key concerns, such as locating missing persons and completing investigations into all serious crimes, as well as the inability of the SCU to bring those most responsible for serious crimes to justice.<sup>147</sup>

Within the broader international community, the serious crimes process had only minimal impact and was often dismissed as a purely national initiative, in noticeable contrast to the Special Court for Sierra Leone. While international lawyers and observers have criticized the standard of judicial decisions and quality of defense, among local lawyers and judges the primary issue of concern remained the lack of enforcement powers in relation to Indonesia.<sup>148</sup>

## **IX. DOMESTIC OWNERSHIP AND POLITICAL SUPPORT**

Support among Timorese politicians for the SCU's and Special Panels' work was mixed. This was particularly apparent in the aftermath of the publication of indictments, which sought to charge very senior Indonesian officials with crimes against humanity. Several senior Timorese politicians made it clear that they did not support the move and felt that better relations with Indonesia was a higher priority than dealing with the 1999 crimes. The posture of senior politicians should be seen in conjunction with the constant refrain of the same people who at earlier stages argued that the international community should have led the justice-seeking process through the creation of an international court. Such a court would have relieved the new Timorese state of engaging in the difficult political battle of seeking arrests of powerful Indonesians. Nonetheless, in the absence of such an international tribunal, the lack of unqualified support for the pursuit of justice among senior politicians has been a source of disappointment to many, and further weakened the SCU's hand in its endeavors to bring the accused to justice.

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<sup>144</sup> For further discussion of the concept of the Special Panels being both an externalized national process and a localized international process, see Nehal Bhuta, "Great Expectations—East Timor and the Vicissitudes of Externalized Justice," *Finnish Yearbook of International Law* (2002).

<sup>145</sup> The only major survey on these issues is Piers Pigou (for ICTJ), "Crying Without Tears: In Pursuit of Justice and Reconciliation in East Timor—Community Perspectives and Expectations," Aug. 2003, available at [www.ictj.org](http://www.ictj.org).

<sup>146</sup> Interviews with SCU Public Information officer, former Head of UNTAET Human Rights Unit, General Prosecutor, Dili, Sept. 2003.

<sup>147</sup> COE Report, *supra* note 70, at 21, para. 54.

<sup>148</sup> Interviews with Timorese judges, Dili, Sept. 2003.

Over time, the stance of Timor-Leste's leadership has become more explicitly obstructive in relation to the question of justice. Human rights organizations were dismayed by President Gusmão's decision to meet with General Wiranto in June 2004 after his indictment by the SCU. Gusmão made it increasingly clear that he does not support the idea of prosecuting Wiranto or proceeding with the indictments against him or his senior colleagues.

Another indicator was the curious behavior of the Timorese General Prosecutor, Longuinhos Monteiro. When the Wiranto indictment was originally issued, Monteiro made it clear that he supported the SCU's work, and he appeared to support a number of efforts to begin the process of issuing arrest warrants. At the same time, recognizing the limited prospects for success in obtaining custody of such high-ranking officials, he expressed support for the idea of some kind of public hearings on the warrants so that there would be at least some public acknowledgment of the charges and the local Timorese population could see that serious efforts had been made to indict the ringleaders in Indonesia.

Subsequently, the General Prosecutor seemed to perform a complete "about face" and, in a press conference to local press, gave the strong impression that the SCU was essentially working against his instructions. He presented a motion to the court seeking to have the Wiranto indictment withdrawn. The motion was dismissed. It is difficult to reconcile the two positions that the General Prosecutor adopted. Perhaps it was never anticipated that the Special Panels would issue such warrants, which reflected the poor relationship between the international DGPSC and the General Prosecutor.<sup>149</sup> However, his position—along with that of the political leadership, including the President—has made it clear that there is no will to pursue high-ranking Indonesian officials and that the government-appointed General Prosecutor (who also serves the role of Government Attorney-General) cannot be independent from the government's stance. This has contributed to the strong sense that the Special Panels' effectiveness was limited to pursuing a somewhat arbitrary form of justice: those found guilty simply happened to be the low-level people who could not get away.

An UNMISSET report that laid out the strategy for the winding up the serious crimes process summed up the situation as follows:

[The serious crimes program], which has been largely internationally operated is clearly perceived by the Government as the responsibility of the international community. It is also reasonably clear that it is politically and financially convenient to the Government of Timor-Leste for the responsibility for the SCP to rest with the international community, particularly in the context of Timor-Leste's continued reliance upon the international community for financial support, and in the face of the emerging realities of the politics of the Indonesian-Timor-Leste bilateral relationship.<sup>150</sup>

On the other hand, the serious crimes process never received adequate support from the UN. The lack of support in terms of resources and capacity is elaborated above, but there was also little political support. A serious matter emerged in this respect as a result of the UN reaction to the publication of the SCU indictments against senior Indonesian military officials, including General Wiranto. The indictments were reported in some quarters as coming from the UN. However, as soon as the indictments became public, the UN appeared to distance itself from the SCU's work, pointing out that the Unit was entirely in the hands of Timor-

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<sup>149</sup> Interviews with SCU staff, May 2005.

<sup>150</sup> "Strategic Plan for the Justice Sector," supra note 67, para. 8.

Leste and that the UN had no legal authority to issue indictments.<sup>151</sup> While the UN was no doubt technically correct, the posture was politically damaging. The reality of UN involvement and control over the process was not only evident in the senior staffing positions—precisely the people most responsible for the drafting of the indictments—but also the fact that the Security Council subsequently used this control to close down the process in May 2005. Although the UN later tried to clarify its position and emphasize its support for the pursuit of justice, many within Timor-Leste felt let down and isolated.

## X. RELATIONSHIP WITH THE CAVR

The Serious Crimes Regime co-existed with another transitional justice mechanism, the Commission for Reception Truth and Reconciliation (in Portuguese, the *Comissão de Acolhimento, Verdade, e Reconciliação*, or CAVR) established by UNTAET Regulation 2001/10 of 13 July 2001. The CAVR, which completed its report in November 2005, had a broad mandate to establish the truth regarding human rights violations in Timor-Leste between 1974 and October 1999, but it also included a novel provision for the establishment of Community Reconciliation Procedures (CRP). This envisaged a process whereby people accused of relatively less serious crimes, such as theft, minor assault, arson (other than resulting in death or injury), and the killing of livestock or destruction of crops could seek to take part in a local hearing, modeled to some extent on traditional justice lines, known as *adat*. This part of the truth commission's procedure was intended to complement the functioning of the serious crimes regime.

In order to take part in the CRP, a candidate was required to submit a statement disclosing his involvement in crimes. The statement went to the SCU, which reserved the right to prosecute if the crimes disclosed fell within its subject-matter jurisdiction. If the SCU did not deem the crimes to be serious, the individual could be referred to the CRP.

The process was a matter of concern to the SCU since the wording of Regulation 2001/10 originally stipulated that no serious crime could form the subject matter for a CRP. The SCU felt that this wording effectively fettered its discretion, as their determination on receiving the statements was not whether they were likely to prosecute, but simply whether the facts could be viewed to constitute a serious crime; i.e., war crimes, genocide, crimes against humanity, and murder, torture, or sexual offenses committed between January 1, 1999, and October 25, 1999. Many forms of involvement in the widespread violence could technically be classified as persecution as a crime against humanity, which added to the difficulty.

The SCU insisted that, regardless of the likelihood that none or few of those making statements would be prosecuted, they were nonetheless bound to prevent these cases from being referred to the CRP. Consequently, although Regulation 2001/10 originally provided that “in no circumstances shall a serious criminal offence be dealt with in a Community Reconciliation Process” it was since been amended by UNTAET Directive on Serious Crimes No. 2002/9 of May 18, 2002, to read “*in principle*, serious criminal offences, in particular, murder, torture and sexual offences shall not be dealt with” by a CRP. This language was more acceptable to the SCU.

However, in practice the SCU was not able to investigate or prosecute the vast majority of perpetrators, even those who had participated in the 1999 violence. As a result, (1) less

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<sup>151</sup> Wilton Fonseca, Chief, Public Information Office, UNMISSET, Feb. 25, 2003.



persons reported to the CRP than otherwise might have been the case in the absence of a credible threat of prosecutions and (2) those who did submit to the CRP felt resentful because perpetrators of more serious crimes remained outside the scope of either process. In essence, this created an “impunity gap” that should have been foreseen from the outset and avoided by better planning.<sup>152</sup>

On the other hand, a relatively good relationship developed between the CAVR and the SCU in terms of cooperation. There was an open relationship between the DGPSC and CAVR staff, as well as UNTAET officials, to resolve the initial issues concerning the CAVR mandate and to establish operational procedures to make the process work as smoothly as possible. However, it is doubtful that the CRP made a significant contribution to the SCU investigations. The SCU was not always able to process all applications as quickly as would have been ideal.<sup>153</sup> Also, although the relevant regulations allowed for the SCU to request information from the CAVR, no equal access was granted to the defense. The CAVR’s findings on the serious crimes process are dealt with below.

## **XI. LEGACY**

In terms of the positive legacy of the serious crimes regime in Timor-Leste for the domestic justice system more broadly, the ad hoc nature of the intervention and the lack of planning by international policy-makers from the outset necessarily meant that the impact of the regime in this regard was more limited than it might have been. The other factor is that with the state of devastation of the Timorese legal profession, it would have been unrealistic to expect huge advances in less time than it takes to obtain full legal qualifications in most countries.

Despite the very real difficulties the SCU and Special Panels faced from the beginning, at least one limited success story developed over the past few years. This relates to a successful SCU initiative of training a group of 22 Timorese police investigators and prosecutors who it is hoped will be able to continue their work now that the SCU has ceased to exist.<sup>154</sup> Although arguably “too little too late,” one should not underestimate the positive effects such a number of well-trained professionals might have in a country whose population is only 800,000. This must be seen as an achievement, particularly in light of the prevailing challenges imposed by the distortion of the local economy, where an individual could earn more as a driver for the UN than as a Norwegian government-funded trainee in the SCU. Such contextual challenges are an ongoing reality for hybrid courts.

Former SCU staff members have suggested that creating a lasting impact would have required resources dedicated to the task, such as training and outreach, which were not forthcoming.<sup>155</sup> The General Prosecutor had expressed a hope that as part of the SCU completion strategy, the newly trained serious crimes investigators could be used for such areas as targeting organized crime and drug-trafficking.<sup>156</sup> In the event, the rushed completion

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<sup>152</sup> See Hirst, *supra* note 33, at 14.

<sup>153</sup> The UNTAET regulation stipulated that the SCU would process such referrals within 14 days, an unrealistic deadline given its caseload. In reality, it depended on individual prosecutors and often was reduced to simply running a CRP applicant’s name through the SCU investigation database. Interviews with SCU staff, Sept. 2003.

<sup>154</sup> Although this only began in August 2003, it involved 12 Timorese police and included a detailed eight-week course on international humanitarian law and practical investigation skills, funded by USAID.

<sup>155</sup> Interview with senior SCU prosecutor, Dili, Sept. 2003.

<sup>156</sup> Interview with General Prosecutor, Dili, Sept. 2003.

strategy was limited to completing current trials and copying of documents, due to the deadline dictated by the Security Council.

Timorese judges in both serious and ordinary crimes have confirmed that the lack of any ties between the two jurisdictions limited the legacy potential. While a few Timorese judges benefited most directly from the Special Panels process, it is unclear what influence, if any, the Panels had on other national judges. The national judges of the Special Panels also had to overcome considerable initial resentment toward their appointment, which was accurately perceived as excluding the majority of the Timorese judiciary.<sup>157</sup>

The Commission of Experts Report appears somewhat defensive on the point of legacy, pointing to the fact that it “has no doubt that Timorese judges, sitting with other international judges at the Special Panels, have built skills and refined capacities through this experience, and that the District Courts of Timor-Leste will benefit from their experiences in the future.”<sup>158</sup> But in reality, progress on legacy has not been as successful as that statement would indicate.

The question as to whether the contributions of the serious crimes process added to the establishment of the rule of law in Timor-Leste remains hindered by the fact that—in both perception and reality—the powerful military in Indonesia was able to evade justice, whereas lesser Timorese offenders were not able to escape it. Rather than combating the sense of the selective nature of justice that prevailed during the period of Indonesian occupation, the limitations of the serious crimes process may have perpetuated it.

## **XII. COMPLETION STRATEGY AND FUTURE OF THE SERIOUS CRIMES PROCESS**

Similar to the ICTY and ICTR, no completion strategy originally accompanied the work of the serious crimes regime, although the pressure came through the Security Council to wind down operations in Timor-Leste.<sup>159</sup> The downsizing of the SCU began in August 2003, with offices in outlying areas having closed some months earlier. Although UNMISSET’s mandate was originally due to end in May 2004, it was extended for one further year after the Secretary General recommended a “consolidation” follow-up phase. Two of the primary reasons he gave the Security Council were the weak state of the justice sector in general as well as it being “essential to make progress towards completing the serious crimes process.” He added:

More broadly, it would help to address a potential irritant to future relations within the Timorese population, promote confidence in the justice system, and, in accordance with the priorities expressed by the Security Council, reinforce the message that those who perpetrate such crimes will not enjoy impunity.<sup>160</sup>

In anticipation of the May 2004 deadline, both an internal review conducted by UNMISSET in September 2003 and an independent report in January 2004 recommended the extension of

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<sup>157</sup> Interviews with Timorese judges, Dili, Sept. 2003.

<sup>158</sup> COE Report, *supra* note 70, at 22, para. 58.

<sup>159</sup> See SC Res. 1543, 1573 (2004).

<sup>160</sup> See Special Report of the Secretary General on the United Nations Mission of Support in East Timor, *supra* note 135, para. 32.

the SCU mandate and significant ongoing support for the Special Panels.<sup>161</sup> These reports warned that if the SCU was not able to continue, the Serious Crimes Regime as a whole in Timor-Leste would effectively collapse, as the domestic capacity had not yet reached a stage—nor were the domestic financial resources sufficient—to complete even the existing cases, let alone continue investigations.

While the Secretary General's report urged that overall levels of support should be maintained, he noted that there could be a reallocation towards a greater emphasis on defense and the judiciary, rather than investigations, as well as dedicated training of Timorese counterparts. Once the one year of reprieve was granted, the SCU's efforts focused on completing its work rather than designing a comprehensive handover plan. By the time of the visit by the UN Commission of Experts in early 2005, the warnings of a year earlier remained essentially unchanged.

In accordance with the Security Council Resolutions of 2004, the SCU halted investigations by November 2004. In its final months the SCU drew up a strategy that aimed to complete judicial rulings on requests for arrest warrants by May 2005 for all those indicted but whose cases were not yet before the court. Any new indictments filed included arrest warrant applications for all accused along with draft orders, in the hope of accelerating the review process. The UN ceased funding the process and the mandate of the SCU formally terminated at the end of UNMISSET on May 20, 2005, leaving behind 514 cases for which investigations had been conducted but no indictments issued and 50 cases for which investigations had not been completed.<sup>162</sup> These outstanding cases include 828 cases of alleged murder, 60 alleged cases of rape or gender-based crimes, and possibly hundreds of cases of torture and other acts of violence.<sup>163</sup> In particular, very few gender crimes were finally indicted by the SCU.<sup>164</sup>

In terms of a possible future for the Special Panels, it should be noted that the continued hiring of international judges by Timor-Leste is permitted under the current UNTAET Regulations with no further amendments required. The District Courts have already hired seven international judges who have been trying criminal cases in the District Courts except before the Special Panels.<sup>165</sup>

However, there remain significant questions about what happens next. With more than 800 of the 1420 deaths in 1999 not investigated, not to mention a much larger number of uninvestigated rapes and serious persecution, there remains much work to be done.<sup>166</sup> At this point there seems to be little political recognition of the challenge that is now resting entirely on the shoulders of the national justice system. Although investigations were closed and trials completed, several appeals from decisions of the Special Panels were still outstanding in May 2005. As a result, and although not explicitly provided for within the mandate of the UNOTIL office, this necessitated retaining one SCU prosecutor and DLU lawyer to attend these proceedings. Longer-lasting issues persist in relation to residual judicial functions, such

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<sup>161</sup> JSMP, "The Future of the Serious Crimes Unit," Jan. 2004, UNMISSET, "Strategic Plan for East Timor Justice Sector: Post-UNMISSET Continuing Requirements and Suggested Mechanisms," Sept. 24, 2003.

<sup>162</sup> COE Report, *supra* note 70, at 25, para. 107.

<sup>163</sup> *Id.*

<sup>164</sup> See Hirst, *supra* note 33, at 25, for more detail on investigation and indictment with regards to gender crimes.

<sup>165</sup> COE Report, *supra* note 70, at 30, para. 136.

<sup>166</sup> "Justice for East Timor," *supra* note 59, at 21.

as future proceedings against the large number of indictees who may come within the jurisdiction at a later date.

The Commission of Experts took the view that it would be impractical to expect national prosecutors and defense, and the Special Panels, to take the serious crimes process forward after the closure of the SCU. It urged the Secretary General to retain the serious crimes process, including the SCU, until its report could be considered. Alternatively, it urged the establishment of a new mechanism to allow for investigations and prosecutions of serious crimes, with continued sovereignty by Timor-Leste for the justice process, but with particular attention to capacity building and international assistance.<sup>167</sup> The Commission of Experts also made a number of “fallback” recommendations, including the creation of an ad hoc tribunal or referral to the International Criminal Court. These both seem unfeasible from a political perspective. However, as of February 2006, the findings and recommendations contained within the Commission of Experts’ report had still not been considered by the Security Council.

The lack of any strategy on how to deal with outstanding serious crimes issues has thus moved from being a theoretical concern to a practical reality. In August 2005, Manuel Maia, indicted by the Special Panels in 2003, was apprehended after he crossed the border from neighboring West Timor.<sup>168</sup> Further reports have been received of individuals returning who are suspected of committing crimes during 1999 although not already indicted by the Special Panels.<sup>169</sup> Similarly, there is a real chance of indictees being apprehended in third countries pursuant to international arrest warrants. In the absence of a Timorese process to deal with these cases, one of the legacies of this hybrid process may be to entrench rather than combat impunity.

Another pressing concern relates to the security of the records and evidence of the SCU.<sup>170</sup> In response to these concerns, the Security Council on April 28, 2005 adopted resolution 1599 (2005), calling on the UN Secretariat to preserve a copy of all records of the SCU in agreement with the authorities in Timor-Leste. The SCU has also created a database of all investigative files, in addition to a storage facility for physical evidence relevant to pending cases in sealed containers.<sup>171</sup> Although this process was not completed by the end of the UNMISSET mandate, a small team of SCU staff was retained to continue this work. The original files, however, will remain the property of the Timorese government, who will determine access to the records for any future use. They are likely to be stored with those of the CAVR. As of September 2005, the UN had concluded an agreement with the Timor-Leste government regarding access to the copies, but does not challenge the premise that the custody and control of the originals rests with the national government.

Many statements provided to SCU were given by witnesses and suspects on a confidential basis, some of whom remain in precarious security arrangements in West Timor. Future

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<sup>167</sup> COE Report, *supra* note 70, at 7, para. 21.

<sup>168</sup> At the time of writing it was unclear who would prosecute and defend the case, and whether the possibility of convening a mixed national/international panel would satisfy the requirement for a Special Panel. See JSMP, “War Crimes Suspect Returns to Timor Leste,” Aug. 8, 2005.

<sup>169</sup> JSMP, “More Support and Consideration Required for Continuation of Serious Crimes Trials,” Sept. 13, 2005.

<sup>170</sup> COE Report, *supra* note 70, at 25, para. 110.

<sup>171</sup> COE Report, *supra* note 70, at 25, paras. 109–110.

access to the SCU files is therefore extremely sensitive, particularly given the absence of a witness protection system.

Moreover, also relevant is the fact that in March 2005, the governments of Timor-Leste and Indonesia created a joint Commission for Truth and Friendship (CTF). The terms of reference of the Commission state that:

Indonesia and Timor-Leste have opted to seek truth and promote friendship as a new and unique approach rather than the prosecutorial process. True justice can be served with truth and acknowledgement of responsibility. The prosecutorial system of justice can certainly achieve one objective, which is to punish the perpetrators, but it might not necessarily lead to the truth and promote reconciliation.<sup>172</sup>

The Timorese government has indicated that it intends to make the SCU files available to the CTF, which in turn may expose victims' confidential testimony and damning information against still influential figures in the Indonesian military hierarchy. The question of witness protection had not arisen to any great extent in the trials that did proceed before the Special Panels; indeed, the court itself (including the DLU) had no witness protection system in place at all. The SCU had a small witness management unit that handled the logistics of bringing prosecution witnesses to court, and the prosecution had sought and been granted protective measures for a small number of witnesses who testified in the equally small number of rape cases. However, the written statements of many victims and witnesses who had given evidence to investigators in the higher-level cases that ultimately did not proceed remain under seal. Not surprisingly, it is these same cases that are the most sensitive and present the greatest security risk for victims and witnesses that may be examined by the CTF for purposes that may be subject to political interests.

In this context, one of the other recommendations made by the Commission of Experts raises further concerns. The Commission suggested that "relevant evidence and case-files pertaining to the *Wiranto* indictment be handed over to the Attorney-General of Indonesia for investigation and prosecution," albeit "under the strict supervision, guidance and assistance of an appointed delegation of SCU staff members and/or other persons appointed by the United Nations."<sup>173</sup> Although the Commission of Experts was careful to couch this recommendation in a number of preconditions, including the strengthening of judicial and prosecutorial capacity, and with due regard to witness protection, confidentiality, and other security issues, it still seems that the suggestion that an investigation and prosecution could take place in Indonesia in the current political climate is premature and risky.

Finally, the CAVR's final report, issued in February 2006, contained certain findings on the serious crimes process. The CAVR concluded that the international community took some interest in the killings in 1999 (including particularly the killing of UN personnel), but that it has shown little or no interest in justice for the 23 years prior. The Commission goes on to state that:

[O]ur nascent and still fragile State cannot be expected to bear the brunt of pursuing the daunting task of justice on its own....[T]he Commission

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<sup>172</sup> Terms of Reference for the Commission of Truth and Friendship Established by the Republic of Indonesia and the Democratic Republic of Timor-Leste, para. 10.

<sup>173</sup> COE Report, *supra* note 70, at 7, para. 26.

believes that the definitive approach to achieve justice for the crimes committed in Timor-Leste should hinge critically on the commitment of the international community, in particular the United Nations.<sup>174</sup>

The Commission recommended that the SCU and Special Panels should have their mandates renewed for the purpose of looking at pre-1999 cases, “on the conditions on which these institutions were originally established—that is, directly depending on the UN and not on the nascent national judicial system in Timor-Leste which is not prepared to deal with the technical and political challenges of the cases.”<sup>175</sup> The Report also called for measures to preserve evidence, and for new measures to indicate the commitment of the international community to justice and the serious crimes process, including freezing of assets and issuing travel bans for those indicted. Finally, it suggested that renewed consideration be given to forming an international tribunal. These recommendations are an indication of the impunity gap that is still acutely felt in Timor-Leste in regard to the overall justice situation.

### **XIII. CONCLUSIONS**

When the serious crimes process was established on June 6, 2000, at least part of the attraction in establishing this model was that it would not be another ad hoc tribunal. However, despite the outrage expressed internationally as the fires raged in Timor-Leste in September 1999, the appetite for justice was short-lived. The regional significance of Indonesia compared to Timor-Leste made the prospects of international insistence on justice unlikely. Part of the lessons from Timor-Leste may be to do with the inadequacy of hybrid tribunals in terms of dealing with international conflict.

In retrospect it is rather difficult to discern precisely what the UN expected the serious crimes regime to deliver. Effective prosecutions hinged on the cooperation of Indonesia. To have developed a structure based on such a hope was on any view of it optimistic. In the event of the relatively predictable failure of the MOU with Indonesia, a clear opportunity was presented to revisit the whole scheme. This was not taken. Instead it was decided to wait for the results of the so-called “human rights trials” in Jakarta. This too turned out to be a failure. It is clear that stark choices had to be made, but the situation raises the difficult issue of whether it is worth embarking on something that is likely to deliver very poor results in all the circumstances.

Had nothing at all been done, it is true that it would have been viewed as entirely unacceptable by human rights organizations. At the same time, around \$20 million has been spent on a venture that no one in retrospect could seriously have expected to deliver meaningful results, and nor has it had much of a lasting legacy in terms of the domestic justice system.

Whether the UN is willing to fully acknowledge these shortcomings remains in doubt. In the Commission of Experts Report, the final analysis states:

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<sup>174</sup> Final Report of the Commission for Reception Truth and Reconciliation of Timor-Leste, “Enough!”, October 2005, Part 11, Recommendations: 7.1 Justice for past atrocities, pp. 23- 26. Portuguese title: Chega! Relatório Final da Comissão de Acolhimento, Verdade e Reconciliação de Timor-Leste. Timor-Leste, Outubro 2005.

<sup>175</sup> Id.

[T]he serious crimes process in Timor-Leste has ensured a notable degree of accountability for those responsible for the crimes committed in 1999. Investigations and prosecutions by SCU have generally conformed to international standards. The Special Panels have provided an effective forum for victims and witnesses to give evidence. The number and quality of some of the judgments rendered is also testimony to the ability of the Special Panels to establish an accurate historical record of the facts and events of 1999 during the short duration of its work. In general, the decisions of the Special Panels will assist in establishing a clear jurisprudence and practice for other district courts dealing with serious crimes in the future. In addition, the Special Panels have developed their own jurisprudence, departing from the law of other international criminal tribunals whenever appropriate. The serious crimes process has also significantly contributed to strengthening respect for the rule of law in Timor-Leste and has encouraged the community to participate in the process of reconciliation and justice. The existence of an effective and credible judicial process, such as the Special Panels, has also discouraged private retributive and vengeful attacks.<sup>176</sup>

Although the Report goes on to acknowledge that the lack of ability to gain custody over indictees in Indonesia; lack of resources; and lack of independence on behalf of the Office of the General Prosecutor *vis-à-vis* the government have all been problems, this assessment still seems overly positive and fails to recognize problems that the UN itself could have rectified earlier. If the UN is not willing to recognize these failures openly, it will be doubtful if the political momentum can be gathered to initiate another mechanism for Timor-Leste.

The main failures in Timor-Leste relate to the fundamental choices made at the political level (internationally and in Indonesia) rather than to the strategic choices or technical abilities on the ground in Dili. It is true that the recent declarations of the political leadership in Timor-Leste have left many confused, but the damage had long been done as far as the serious crimes process was concerned: whatever the difficulties in leadership, technical capacity or national political opinion, the limited powers in the face of the political realities rendered it inherently unviable.

It would be wrong, however, to trace the difficulties only to the political decisions made at the UN level. Indonesia bears state responsibility for what occurred and Indonesians bear individual criminal responsibility. Its failure to cooperate and the flawed trials held in Jakarta represent nothing more than adding insult to a most grievous injury inflicted not only in 1999, but for the previous 25 years as well.

One should not underestimate the results of the trials that resulted in 70 convictions and their impact on the family members of the victims. Moreover, the indictments increasingly reflected a historical record of the systematic nature of the violence during 1999. This in itself should be considered an achievement. Notwithstanding these achievements, the disaffection caused by the perception that primarily the wrong people were bearing the responsibility of 25 years of brutal occupation, including its final months, must be taken seriously. The serious crime regime, in the final analysis, will not have contributed to a real sense of justice or in building the confidence of the people of Timor-Leste in the institutions of justice. An important opportunity—to substantially correct the lack of public trust in the rule of law that persisted through the Indonesian occupation—may ultimately have been lost.

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<sup>176</sup> COE Report, para. 8.



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20 Exchange Place  
33rd floor  
New York, NY 10005  
TEL 917.438.9300  
FAX 212.509.6036

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