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JUSTICE ABANDONED?

An Assessment of the Serious Crimes
Process in East Timor

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I. INTRODUCTION

This paper considers the regime established to respond to the crimes committed in East Timor during the last stage of the Indonesian occupation between 1975 and 1999. Following the outbreak of violence and the commission of human rights atrocities on a massive scale during 1999, the United Nations (UN) sponsored a justice program to investigate and prosecute those behind the most serious crimes. Within East Timor, serious crimes were to be prosecuted by the Serious Crimes Unit (SCU) under the Deputy General Prosecutor for Serious Crimes (DGPSC) and to be tried by the Special Panels for Serious Crimes (SPSC; collectively referred to as the serious crimes regime or process). A separate initiative, called the *ad hoc* Human Rights Court, was launched in Indonesia to try international crimes committed by Indonesian functionaries in East Timor. The paper outlines the historical background to the serious crimes process; explains the criminal justice regime for serious crimes; describes how the investigations, indictments, and trials unfolded; analyzes the relationship between the serious crimes process and other transitional justice mechanisms; and offers an assessment of the performance of the SCU and the SPSC. The paper ends with a discussion of the prospects for future prosecutions of serious crimes in East Timor.¹

The story of the quest for justice in East Timor perhaps can be summed up as one involving good intentions that were not backed up by the strategic planning and effective support necessary to counter the damaging effects of Indonesian lack of cooperation. The lack of planning and support seriously undermined the effectiveness of the serious crimes process. These shortcomings signaled the level of commitment to the justice process shown by the UN, the international community, and the Timor-Leste government. In its hour of need, these bodies effectively abandoned the serious crime regime. The justice process was trumped by other interests. Despite the resource and political constraints imposed upon the serious crimes regime, a small group of determined practitioners managed to achieve a small measure of justice for the victims of the East Timor conflict.

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¹ After independence in 2002, the country name East Timor was changed to Timor-Leste. Since much of what is discussed in this paper relates to events that took place prior to independence, reference is made to both country names.

A. Historical Background

The territory of East Timor became a colony of Portugal in the sixteenth century. In 1960, the UN General Assembly declared Portuguese Timor to be a non-self-governing territory under the administration of Portugal to which Chapter XI of the UN Charter applied.² Following the Carnation Revolution of April 1974, the Portuguese government initiated a process of self-determination.

During 1975, tension between the newly formed Timorese political parties grew, eventually erupting into armed violence in August 1975. As a result of the fighting, the Portuguese administration withdrew from the mainland of East Timor to the island of Atauro. The Soeharto regime in Indonesia presented the situation in East Timor as a security risk and Indonesian forces began incursions into Timorese territory in late 1975. Indonesia launched a full invasion of East Timor on December 7, 1975. In July 1976, Indonesia purported formally to annex the territory of East Timor as its 27th province. The UN never recognized that act of integration.

East Timor was occupied by Indonesia from 1975 until 1999. During this period, the East Timorese resistance, Fretilin, and its armed wing, Falintil, continued to oppose the occupation. Indonesian security forces were responsible for the perpetration of gross and widespread human rights abuses, including murder, torture, rape, arbitrary detentions and internments, and forced displacements.

1. The Events of 1999

The 1998 regime change in Indonesia led to an upsurge in pro-independence activity in East Timor and later to an agreement among the UN, Portugal, and Indonesia in May 1999 that a popular consultation would be held to allow the people of East Timor to decide between integration into Indonesia and independence. Pursuant to the “May 5 agreements,” a UN presence was to facilitate the logistics of the ballot,³ while the maintenance of peace and security and “a secure environment devoid of violence or other forms of intimidation” was the responsibility of the Indonesian security forces.⁴ The May 5 agreements provided that, in the event of a vote in favor of independence, the governments of Indonesia and Portugal and the United Nations Secretary-General would agree on arrangements for the peaceful and orderly transfer of authority in East Timor to the UN.⁵

The Indonesian authorities did not comply with their obligations under the agreements to maintain a peaceful and secure environment for the popular consultation. In the months preceding the vote, much violence was directed against those perceived to be supporters of independence. Local militias carried out the bulk of this violence, with the active support of the Indonesian

² General Assembly Resolution 1542 (XV), Dec. 15, 1960, para. 1(i).

³ Agreement Regarding the Modalities for the Popular Consultation of the East Timorese through a Direct Ballot (between Indonesia, Portugal, and the Secretary-General of the United Nations), May 5, 1999.

⁴ Article 3, Agreement between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor, May 5, 1999; and Article 1, East Timorese Popular Consultation Agreement Regarding Security (between Indonesia, Portugal, and the Secretary-General of the United Nations), May 5, 1999.

⁵ Article 6, Agreement between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor.

military forces (TNI).⁶ Nevertheless, on August 30, 1999, the ballot took place and 78% of the votes cast were in favor of independence. In the weeks following the consultation, violence again escalated, and militia groups, organized and supported by the Indonesian military and police,⁷ carried out a retaliatory scorched-earth campaign against the Timorese people. Estimates made soon after the violence indicated that some 400,000 people were displaced, with many forcibly deported to West Timor.⁸ More than 1000 people were killed⁹ and 60%-80% of all property was destroyed.¹⁰ The violence ended only with the intervention of the UN International Force in East Timor (INTERFET), which arrived in the region on October 20, 1999.¹¹

2. The Intervention of the United Nations

By Resolution 1272 (1999), the Security Council established the United Nations Transitional Administration in East Timor (UNTAET).¹² UNTAET's role was to maintain law and order, provide an administration, and help to develop capacity for self-government. Although it was established to operate only until January 31, 2001,¹³ UNTAET's mandate was extended to May 20, 2002,¹⁴ at which date the independent state of Timor-Leste officially came into existence.

During September 1999, the UN Human Rights Commission held a special session to consider the situation in East Timor. A resolution was passed that called upon the Secretary-General to establish an independent commission of inquiry to investigate violations of human rights and humanitarian law that had occurred in the region since January 1999.¹⁵ In accordance with that resolution, the UN International Commission of Inquiry on East Timor was established. The Commission reported its findings in January 2000. It recommended the establishment of an international body to investigate and prosecute those responsible for violations of international law, as well as the establishment of an international tribunal to try such persons.¹⁶ Earlier, three special rapporteurs of the UN Commission on Human Rights had reported back from their mission to East Timor. They cited gross human rights violations and also called for the establishment of an international tribunal, "unless, in a matter of months, the steps taken by the government of Indonesia to investigate TNI involvement in the past year's violence bear fruit, both in the way of credible clarification of the facts and the bringing to justice of the perpetrators."¹⁷

⁶ UN OHCHR "Report of the International Commission of Inquiry on East Timor to the Secretary-General," A/54/726, S/2000/59, January 2000, para. 136.

⁷ "Report of the Security Council Mission to Jakarta and Dili," S/1999/976, Sept. 8-12 and 19, 1999. See also UN OHCHR, *supra* note 6, paras. 136-140, which says that the Indonesian army was responsible for the violence in 1999 and that the Indonesian authorities used militias in order to create an impression that the East Timorese were fighting among themselves.

⁸ "Report on the Joint Mission to East Timor 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," A/54/660, Dec. 10, 1999, paras. 20, 38, and 71.

⁹ *Ibid.*, para. 37.

¹⁰ UN OHCHR, *supra* note 6, para. 130.

¹¹ INTERFET was authorized by the Security Council under Chapter VII. See Security Council Resolution 1264 (1999), Sept. 15, 1999.

¹² Security Council Resolution 1272 (1999), Oct. 25, 1999.

¹³ *Ibid.*, para. 17.

¹⁴ Security Council Resolution 1338 (2001), Jan. 31, 2001, para. 2; and Security Council Resolution 1392 (2002), Jan. 31, 2002, para. 2.

¹⁵ Commission on Human Rights Resolution 1999/S-4/1, Sept. 27, 1999, para. 6.

¹⁶ UN OHCHR, *supra* note 6, paras. 152-153.

¹⁷ See "Special Rapporteur," *supra* note 8, para. 74(6).

There was some reluctance about establishing such a tribunal, however, not least because of the costs incurred in the international criminal tribunals in the former Yugoslavia and in Rwanda.¹⁸ On the basis of assurances from Indonesia that it intended to pursue justice fully,¹⁹ it was decided that these steps were unnecessary and that prosecutions and trials could proceed on a national level in Indonesia and East Timor.²⁰

Much speculation has followed as to why the UN rejected the recommendations of its own experts and relied instead on assurances from Indonesia. Some may have thought that the Indonesian democracy was still too fragile to withstand the pressure that might have been exerted on the military by an international tribunal and that the matter could be handled more sensitively on an internal basis.²¹ In addition, it appears that a certain level of optimism and goodwill was generated by the election in October 1999 of President Abdurrahman Wahid, who appeared to support the pursuit of justice.²² In letters that transmitted the report of the International Commission of Inquiry to the Security Council, the General Assembly, and the Human Rights Commission, the UN Secretary-General referred to assurances from Indonesia that there would be no impunity, and indicated that he was “encouraged by the commitment shown by President Abdurrahman Wahid to uphold the law and to fully support the investigation and prosecution of the perpetrators through the national investigation process underway in Indonesia.”²³

This sense of optimism may have been buoyed by the decision of the government of Indonesia in September 1999 to appoint an independent commission of inquiry (KPP HAM) to investigate that year’s human rights abuses in East Timor. While the KPP HAM investigation was credible, the optimism felt by the international community was misplaced. No serious assessment of the ability of the Indonesian criminal justice system to deliver justice on such politically sensitive cases was carried out. Such an assessment might have revealed that there was no prospect of justice being pursued boldly and fearlessly in Indonesia in the prevailing context.

Ultimately, it was decided that parallel domestic prosecutions should take place in Indonesia and East Timor. In Indonesia, this was attempted through the establishment of an *ad hoc* human rights court. In East Timor, the SPSC and the SCU were established for this purpose. Originally, it was

¹⁸ For example, in 2004-2005, the ICTY’s gross funding was \$298,226,300. “Eleventh Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991,” Aug. 13, 2004, para. 382, and General Assembly Resolution 58/255, Dec. 23, 2003.

¹⁹ See letter dated January 26, 2000, from the Minister for Foreign Affairs of Indonesia to the Secretary-General, A/54/727 and S/2000/65, Jan. 31, 2000.

²⁰ The UN Secretary-General stated that “there will be no need for the Council or the UN to set up another tribunal to compete with one set up by the Indonesian government that is going to do exactly the same thing.” Kofi Annan, cited in David Cohen, “Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?” *Asia Pacific Issues* 61:1, 2002, p. 3. He also said that “the main thing is to put people on trial and make them accountable...If the government has the capacity and the willingness to do it and is doing it, you don’t want to create another tribunal.” Kofi Annan, cited in Suzannah Linton, “Cambodia, East Timor, and Sierra Leone: Experiments in International Justice,” *Criminal Law Forum* 12:185, 2001, p. 213.

²¹ Sidney Jones, “Human Rights and Peacekeeping in East Timor,” unpublished paper, p. 2.

²² *Ibid.*

²³ Identical letters dated January 31, 2000, from the Secretary-General, addressed to the president of the General Assembly, the president of the Security Council, and the chairperson of the Commission on Human Rights, A/54/726 and S/2000/59, Jan. 31, 2000.

thought that the prosecutions in Timor would focus on local perpetrators while the trials in Jakarta would target Indonesian suspects.

B. Creation and Structure of the Serious Crimes Regime

In March 2000, UNTAET created district courts and a Court of Appeal.²⁴ The Dili District Court was given exclusive jurisdiction to deal with serious criminal offences, namely, genocide, war crimes, and crimes against humanity committed at any time, as well as murder, sexual offences, and torture committed between January 1 and October 25, 1999 (hereafter referred to as serious crimes).²⁵ The Regulation also provided that special panels for trying serious crimes could be established within the Dili District Court, but that the creation of such panels would “not preclude the jurisdiction of an international tribunal for East Timor...once such a tribunal is established.”²⁶ In a subsequent initiative, it was decided that lesser crimes or those not considered serious crimes would be dealt with by a specialized community reconciliation procedure under the auspices of the Commission for Reception, Truth, and Reconciliation (in Portuguese, the *Comissão de Acolhimento, Verdade, e Reconciliação*, or CAVR).²⁷

In June 2000, special panels were created within the Dili District Court and the Court of Appeal to deal with serious crimes.²⁸ In both the district and the appeal courts, the panels consisted of two international judges and one national judge²⁹ who were appointed in accordance with existing UNTAET regulations.³⁰ The panels were to apply the law of East Timor as well as international law.³¹

At the same time, UNTAET created the Public Prosecution Service for East Timor.³² The service was composed of an Office of the General Prosecutor (OGP) and Offices of District Prosecutors. The OGP, based in Dili, comprised two departments, each headed by a Deputy General Prosecutor—one dealt with ordinary crimes and the other dealt with serious crimes.³³ The Deputy General Prosecutor for Serious Crimes was given exclusive authority in respect of the investigation and prosecution of serious crimes.³⁴ Provision was made for the DGPSC to be supported by staff, including a prosecution support unit consisting of East Timorese and international experts.³⁵ In practice, this support was provided by a unit of UN staff, the Serious Crimes Unit. Originally located within the Human Rights Unit of UNTAET, the SCU was made part of the DGPSC once it was created in June 2000.

²⁴ UNTAET Regulation 2000/11, March 6, 2000, especially sections 7 and 14.

²⁵ Sections 10.1 and 10.2, UNTAET Regulation 2000/11, March 6, 2000.

²⁶ Sections 10.3 and 10.4, UNTAET Regulation 2000/11, March 6, 2000.

²⁷ See the discussion below on p. 10 under “Relationship of the Serious Crimes Regime with Other Mechanisms for Justice.”

²⁸ Sections 1.1 and 1.2, UNTAET Regulation 2000/15, June 6, 2000.

²⁹ Sections 22.1 and 22.2, UNTAET Regulation 2000/15, June 6, 2000. It also was provided that, in cases of special importance or gravity, a panel of the Court of Appeal composed of five judges (three international and two national) could be established; see Section 22.2.

³⁰ Section 23.1, UNTAET Regulation 2000/15, June 6, 2000.

³¹ Section 3.1, UNTAET Regulation 2000/15, June 6, 2000.

³² UNTAET Regulation 2000/16, June 6, 2000, especially Section 1.

³³ Section 5.1, UNTAET Regulation 2000/16, June 6, 2000.

³⁴ Section 14.1, UNTAET Regulation 2000/16, June 6, 2000. These serious crimes were defined as those referred to in the instruments establishing the jurisdiction of the special panels.

³⁵ Section 14.6, UNTAET Regulation 2000/16, June 6, 2000.

On May 20, 2002, UNTAET ceased to operate and Timor-Leste became an independent state. From the same date, the United Nations Mission of Support in East Timor (UNMISSET) began operations.³⁶ The SCU continued to operate within the OGP with the logistical and financial support of UNMISSET.³⁷ Under the new constitution of Timor-Leste, it was provided that the SPSC would continue its work for as long as was deemed strictly necessary to conclude the cases under investigation.³⁸

In April 2000, UNTAET and Indonesia signed a Memorandum of Understanding (MOU) regarding cooperation in legal, judicial, and human rights-related matters. The MOU provided for mutual assistance in relation to the taking of evidence and statements; the service of documents; the execution of arrests, searches, and seizures; the facilitating of the transfer of persons; the facilitating of access to information; and the providing of information and evidence.³⁹ It required each party to enforce arrest warrants and to transfer all persons requested for the purposes of prosecution.⁴⁰

II. THE WORK OF THE SERIOUS CRIMES REGIME

A. Investigations and Indictments

Attempts at investigating serious crimes began almost immediately after the International Force in East Timor (INTERFET) intervention in September 1999. Initially, a small group of Australian military police began investigations before authority for investigations was given to the UN civilian police (CIVPOL) in December 1999.⁴¹ In March 2000, responsibility was transferred to the Human Rights Unit of UNTAET, within which the SCU was established, although work continued to be carried out by CIVPOL personnel seconded for this purpose.⁴² In mid-2000, when the OGP was created, the SCU began operating under the DGPSC.

1. Staffing and Appointments

Staffing levels at the SCU have varied over time. In April 2003, the unit had 124 staff members, including 44 UN prosecutors, investigators, forensic specialists, and support staff, 32 UN police investigators, and 40 national staff, including translators and mortuary staff.⁴³ The unit also had five East Timorese police investigators and 14 local trainees in various areas. The unit was downsized in 2003, and by February 4, 2005, it had only 74 staff members. Of these, 34 were UN international staff working as prosecutors, investigators, forensic experts, and translators, six were UN police technical assistants, and 34 were UN national staff. In 2005, the unit hired an additional 37 translators to assist in the handover process. The unit also employed 13 trainees who were seconded to prosecutions and information technology sections.

³⁶ Established by Security Council Resolution 1410 (2002), May 17, 2002, para. 1.

³⁷ *Ibid.*, para. 3(a).

³⁸ Constitution of Timor-Leste, s. 163.

³⁹ Memorandum of Understanding between the Republic of Indonesia and the United Nations Transitional Administration in East Timor Regarding Cooperation in Legal, Judicial, and Human Rights Related Matters, April 5-6, 2000, s. 1.2.

⁴⁰ *Ibid.*, s. 2(c) and 9.

⁴¹ See Jones, *supra* note 22, p. 18.

⁴² *Ibid.*, p. 20.

⁴³ Serious Crimes Unit Update, April 21, 2003.

The position of DGPSC was filled by several international prosecutors. The first DGPSC, Jean-Luis Gillisen, was appointed in July 2001. Siri Frigaard took up the post in January 2002 and left in April 2003, when Essa Faal was appointed acting DGPSC. The position was assumed by Nicholas Koumjian in October 2003. The last DGPSC, Carl de Faria, began work at the SCU in February 2005 and remained at the unit until its closing in May 2005.⁴⁴

2. The Indictments

The SCU's first indictments were issued in December 2000. Concern was expressed by the Security Council in November 2000 that "UNTAET [was] facing significant difficulties in bringing to justice those responsible for the serious violations of human rights that occurred in East Timor in 1999."⁴⁵ The unit's initial indictments dealt largely with East Timorese militia members who were being detained in East Timor. Most of the indictments involved simple murder charges rather than charges of crimes against humanity. Apparently, this was due to the failure of the SCU in its early period to focus sufficiently in its investigations and prosecutions on the contextual elements required to prove crimes against humanity. It has been suggested that charges of murder were brought instead of charges of crimes against humanity, even when the latter could have been prosecuted, in order to allow for a cheaper or faster trial.⁴⁶ The result was that some perpetrators who might have been charged with crimes against humanity were instead convicted of lesser offences, such as murder.

Similarly, the SCU has not indicted individuals for war crimes. It is unclear whether this occurred because it was regarded as unnecessary in cases where crimes against humanity or the "ordinary" crimes of murder or rape could be charged, or whether prosecutors were reluctant to gather and adduce the evidence necessary to demonstrate that an armed conflict took place in East Timor in 1999. It is also possible that the prosecutors at the SCU considered that recognizing the situation in 1999 as an armed conflict might give legitimacy to the actions of Indonesia by suggesting that the violence was something other than a premeditated campaign against the pro-independence movement.⁴⁷

It seems unlikely that any crimes would have gone uncharged as a result of the SCU's failure to utilize the war crimes jurisdiction of the SPSC. However, it is likely that, in cases where crimes were charged under Indonesian law rather than international law, the more serious and potentially more appropriate charge of a war crime might just as easily have been made.

By August 2001, a coherent prosecutions strategy emerged with a move toward the indictment of crimes against humanity. Recognizing that time and resource limitations would prevent it from prosecuting all cases, the SCU decided to focus on 10 "priority" cases.⁴⁸ The cases were selected based on the number and type of victims, the seriousness of the crimes and their political significance, and the availability of evidence.⁴⁹ A decision was made that the focus of the

⁴⁴ A skeletal staff of the SCU was maintained until June 20, 2005.

⁴⁵ "Report of the Security Council Mission to East Timor and Indonesia," S/2000/1105, Nov. 21, 2000, p. 2.

⁴⁶ See Linton, *supra* note 21, p. 215; and JSMP, "The Paulino De Jesus Decision," April 2005, p. 6.

⁴⁷ See letter by DPGSC Nicholas Koumjian to the Wall Street Journal, May 3, 2004.

⁴⁸ Suzanne Katzenstein, "Hybrid Tribunals: Searching for Justice in East Timor," *Harvard Human Rights Journal* 245:16, 2003, pp. 258-259.

⁴⁹ The 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 (September 2-8, 1999); the Lospalos case (April 21 to September 25, 1999); the Lolotoe case (May 2 to September 16, 1999); the Suai Church massacre (September 6, 1999); the attack on Bishop Belo's compound (September 6, 1999); the Passabe

investigations and prosecutions should be those cases involving murder (there were approximately 1400 such cases). Some cases of rape and torture were investigated, particularly when associated with murders, but cases that, for example, only concerned forcible transfer, even when this potentially constituted a crime against humanity, were not pursued.

Later, the unit's policy concentrated more closely on the organizers and instigators of the crimes, particularly the commanders of the TNI, police, and militia.⁵⁰ On February 24, 2003, the SCU's most significant indictment was issued against General Wiranto (former minister of defense and commander of the armed forces), as well as six senior TNI members and the former governor of East Timor.⁵¹

The focus of the work of the SCU was the violence of 1999. The unit began an investigation of the Santa Cruz massacre of 1991, but abandoned it at an early stage. Otherwise, the only investigations into pre-1999 violence concerned events late in 1998 that were closely associated with the violence of 1999. As a result, the large number of crimes that occurred between 1975 and 1998, and even the more recent and high-profile crimes among these, have not been investigated or prosecuted. It appears that this was partly a policy decision and partly a particular interpretation of the applicable law relevant to the serious crimes regime.

3. Winding Up of Operations

Beginning in early 2003, the number of investigators was significantly reduced⁵² and the Oecusse office of the SCU was closed.⁵³ In May 2004, while extending the UNMISSET mandate for another year, the Security Council resolved that the SCU should complete all investigations by November 2004 and that it should conclude all other activities no later than May 20, 2005.⁵⁴ Accordingly, the SCU began to wind up its operations toward the end of 2004 and issued its final four indictments in December 2004.⁵⁵ This brought the total number of indictments to 95, with 391 accused persons the subject of at least one indictment. A significant number of the indictments relate to members of the Indonesian army, including high-ranking officers.⁵⁶ The SCU also sought the issue of Interpol red notices in relation to 120 indictees, but only 77 red notices have been issued.⁵⁷ Because policy was unclear, the red notices were not restricted to high-level perpetrators but also were issued to low-ranking militia members thought to be in West Timor, where such procedures have little or no effect.

and Makaleb massacres (September to October 1999); a second case in Lospalos (April to September 1999); and other sexual violence cases carried out in various districts (March to September 1999). See the Serious Crimes Unit Update, Feb. 4, 2005, p. 2.

⁵⁰ Information received from members of the Transition Working Group on the Future of the Serious Crimes Process. The Transition Working Group was formed by UNMISSET to make recommendations on the future of the serious crimes process.

⁵¹ See Serious Crimes Unit Update, supra note 50, p. 2.

⁵² The JSMP reported a reduction in number from 23 to eight UNPOL investigators and from 13 to nine UN investigators.

⁵³ Judicial System Monitoring Program, "The Future of the Serious Crimes Unit," January 2004, pp. 5-7.

⁵⁴ Security Council Resolution 1543 (2004), May 14, 2004, para. 8.

⁵⁵ See Serious Crimes Unit Update, supra note 50, p. 3.

⁵⁶ A full list of indictees is available at <http://www.scu-dili.org/suspects/SuspectsByName.html>.

⁵⁷ Carl de Faria, "ET's Quest for Justice: The Serious Crimes File," paper presented at the UNMISSET International Symposium on UN Peacekeeping Operations in Post-conflict Timor-Leste: Accomplishments and Lessons Learned, April 28, 2005, p. 2.

Between February and May 2005, the SCU worked on a “handover” process, attempting to leave all its files and evidence in a state that might be useful to any future justice process. This involved the scanning of some 60,000 pages of documents, the creation of a searchable database, and the translation of all key documents (including witness statements and handover documents) into Tetum.⁵⁸ For this last task, 37 translators were hired to work under the supervision of eight senior translators.⁵⁹ The SCU attempted to bring all unfinished cases as close as possible to indictment and to draft instructions for future investigators who might resume the process.⁶⁰ The SCU also held community meetings in each district to explain to local communities what work the unit had done, why it was closing, and what would happen to their cases.⁶¹

B. The Work of the Special Panels and Court of Appeal

The first trials before the special panels began in January 2001. At this stage, only one panel of three judges operated.⁶² By the end of 2001, the panel had held 12 trials that covered 21 defendants. Later, a second and a third panel were created.⁶³ At the conclusion of the process in May 2005, 55 cases had been heard and 87 defendants had been tried. Of these, 84 were convicted⁶⁴ and three acquitted. A further 13 defendants had their cases withdrawn by the SCU or dismissed by the SPSC, and one defendant was ruled mentally unfit to stand trial. As a result of the lack of cooperation by Indonesian authorities, the Court’s convictions all related to relatively low-level perpetrators. Most of those convicted received sentences in the range of seven to 15 years.

The Court of Appeal was staffed by two UNMISSET-funded international judges and one national judge. The Court began functioning in June 2000 and handed down its first appeal decision in October 2000.⁶⁵ As a result of a shortage of international judges, the Court did not function at all from the end of October 2001 until June 2003.⁶⁶

The special panels were responsible for the issue of indictments and arrest warrants on application from the DPGSC. A total of 289 arrest warrants were requested and only four warrant applications were refused.⁶⁷ The usual procedure for the issue of an arrest warrant by the SPSC was for a written request to be made by the DPGSC to the Court, accompanied by supporting documentation. The application would be considered by a judge in chambers, who would determine whether “there [were] reasonable grounds to believe that a person has committed a crime.”⁶⁸

⁵⁸ Interview with Carl de Faria (Deputy Prosecutor General), David Savage (Chief of Investigations), and Paul Nifah (IT/Networks Expert) of the SCU on March 16, 2005.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ The first meeting was held in Oecussi on March 15, 2005, and the last in Dili on May 9, 2005.

⁶² Information received from members of the Transition Working Group on the Future of the Serious Crimes Process.

⁶³ Progress report of the Secretary-General on the United Nations Mission of Support in East Timor, S/2005/9, 18 February 2005, para. 25.

⁶⁴ Including one defendant who had his acquittal overturned on appeal.

⁶⁵ JSMP, “The Right to Appeal in East Timor,” October 2002, p. 8.

⁶⁶ JSMP, “Overview of the Justice Sector,” March 2005, p. 20.

⁶⁷ See De Faria, *supra* note 58, p. 6.

⁶⁸ Transitional Rules of Criminal Procedure, UNTAET Regulation 2000/30, as amended by UNTAET Regulation 2001/25, s. 19A.1.

On February 24, 2003, the DPGSC presented an application for the issue of an arrest warrant for General Wiranto and some of his closest associates.⁶⁹ General Wiranto was charged with crimes against humanity under the doctrine of command responsibility.⁷⁰ The SPSC informed the DPGSC in June that the application for the petitions would be considered one at a time to ensure that there would be sufficient examination of the grounds for an arrest warrant for each individual.

The length of time taken to issue the arrest warrant for the main indictee, General Wiranto, created significant tensions in the political arena. The general, now retired, was a front-runner for the presidency of Indonesia in elections that were to be held in July 2004. In January 2004, Timorese Prosecutor General Longuinhos Monteiro demanded a faster process for the issuance of the warrant and went as far as to publicly accuse the UN of blocking it.⁷¹

In January 2004, the then-DPGSC presented a motion to the Court requesting that the prosecution's application for the issue of an arrest warrant in the case of General Wiranto be heard publicly.⁷² The motion requested that instead of the warrant application being considered on the papers in chambers, a full public hearing be held, with the indictee permitted to attend with representation. The proposal also included the calling and cross-examination of witnesses. Among the perceived benefits of the proposal were that it would contribute to the historical record and provide victims with some sense of vindication through the public presentation of evidence.

The proposal was rejected.⁷³ Judge Phillip Rapoza held that the rules of criminal procedure neither provided for such a hearing nor granted a judge sufficient discretion to conduct one. In any event, he held the view that the public policy grounds put forward by the DPGSC in support of the motion did not justify a public hearing. The judge distinguished the procedure under Rule 61 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (ICTY), which allows for a public hearing in certain circumstances where warrants have been issued but their execution has not been possible. The judge also pointed out that should General Wiranto attend the hearing, as proposed by the prosecution, he in effect would be submitting himself to the jurisdiction of the Court, rendering an arrest warrant unnecessary.⁷⁴ Judge Rapoza later granted the arrest warrant against General Wiranto after considering the application in chambers.

The Wiranto case proved to be the breaking point in the relationship between the Timorese political leadership and the serious crimes regime. To the discredit of the UN and the Timor-Leste government, both bodies disassociated themselves from the Wiranto arrest warrant. In so doing,

⁶⁹ The following senior military and civilian officials also were indicted: Zacky Anwar Makarim, Kiki Syahnakari, Adam Rachmat Damiri, Suhartono Suratman, Mohammad Noer Muis, Yayat Sudrajat, and Abilio Jose Osorio Soares.

⁷⁰ Deputy General Prosecutor for Serious Crimes v. Wiranto and Others, Case No. 05/2003, brief in support of the issuance of an arrest warrant for Gen. Wiranto, March 9, 2003.

⁷¹ Jill Jolliffe, "UN blocking arrest of Wiranto," *Sydney Morning Herald*, Jan. 14, 2004; see <http://www.smh.com.au/articles/2004/01/13/1073877833949.html>.

⁷² Deputy General Prosecutor for Serious Crimes v. Wiranto and Others, Case No. 05/2003, Motion to Request a Warrant Application Hearing Pursuant to Sections 27.2 and 19 (a) of UNTAET regulation 2000/30, as amended by regulation 2001/25.

⁷³ Deputy General Prosecutor for Serious Crimes v. Wiranto and Others, Case No. 05/2003, Decision on the Motion of the Deputy General Prosecutor for a Hearing on the Application for an Arrest Warrant in the Case of Wiranto, Feb. 18, 2004.

⁷⁴ *Ibid.*, p. 5, n. 2.

they signaled to senior perpetrators that the serious crimes process did not enjoy the committed support of the international community or the national authorities. The actions of the UN and the government of Timor-Leste emboldened perpetrators, offended victims, and seriously undermined the integrity of the serious crimes process.

III. RELATIONSHIP OF THE SERIOUS CRIMES REGIME WITH OTHER MECHANISMS FOR JUSTICE

A. Indonesian *Ad Hoc* Trials

In September 1999, Komnas HAM, the Indonesian National Human Rights Commission, established an independent commission to investigate human rights violations committed in East Timor during 1999. KPP HAM was mandated with determining the level of involvement of the Indonesian state in human rights abuses and to provide evidence for prosecutions in a human rights court. KPP HAM's final report from January 31, 2001, analyzed 13 incidents and several categories of crimes. It concluded that the Indonesian government was implicated in the funding, arming, and supporting of the militias in East Timor and that the TNI had carried out military operations with the militias.

The KPP HAM report resulted in the establishment of a judicial process to try perpetrators of the crimes in question. Under the Indonesian Law on Human Rights Courts,⁷⁵ passed in 2000, crimes committed before the entry into force of the law could be tried only by an *ad hoc* court. Accordingly, an *ad hoc* Human Rights Court was created that had jurisdiction to try international crimes committed in East Timor. Eighteen defendants were prosecuted before the Court in 12 trials.

Initially, some cooperation occurred pursuant to the MOU, whereby the SCU assisted Indonesian investigators and Indonesian investigators visited East Timor on two occasions to gather evidence with the assistance of the SCU.⁷⁶

The trial process has been widely denounced as a sham, however.⁷⁷ In particular, the following criticisms of the process have been made:

- The Court's jurisdiction was limited to events that occurred in April 1999 and September 1999, and only in three of the 13 districts of East Timor (Liquica, Dili, and Cova Lima);
- Of the 13 cases in the KPP HAM report, only four formed the basis of prosecutions by the Attorney General's office;
- Throughout the trials, the prosecution failed to put its case effectively in almost every respect, using vastly inadequate evidence and failing to adopt a workable trial strategy.⁷⁸

⁷⁵ Law 26/2000.

⁷⁶ See De Faria, *supra* note 58, pp. 8-9.

⁷⁷ See Human Rights Watch, "Justice Denied for East Timor," available at <http://www.hrw.org/backgrounder/asia/timor/etimor1202bg.htm>; and "Amnesty International, Indonesia & Timor-Leste: International Responsibility for Justice," April 14, 2003, available from <http://web.amnesty.org/library/eng-idn/reports>. For a detailed critique of the *ad hoc* trials, see David Cohen, "Intended to Fail: The Trials Before the *Ad Hoc* Human Rights Court in Jakarta," published by the ICTJ, August 2003.

⁷⁸ An example of the lack of commitment shown by prosecutors was when an appeal against one of the Court's acquittals was dismissed as a result of the negligent failure of prosecutors to comply with basic procedural requirements; see "Human Rights Court: The Forgotten Memo," *Tempo Magazine* 28:15, 2005.

This has been explained by a lack of political will on the part of the government, including the Attorney General's office, in respect of the prosecutions; and

- A constant and intimidating presence of TNI soldiers was maintained in the courtroom throughout the trial, and other tactics of intimidation were directed at judges thought to be independent.

The trials resulted in only six convictions. All six individuals appealed and remained free pending their appeals. Five convictions eventually were overturned on appeal, with an appeal in the sixth case still pending.⁷⁹ Further, some of the most high profile suspects identified by the KPP HAM report, such as General Wiranto, were never even indicted.

Eventually, 12 of the individuals tried by the *ad hoc* Court were indicted by the SCU. Given that the trials in Jakarta did not represent a genuine prosecution of the suspects, this should not be seen as a breach of the principle *ne bis in idem* (or double jeopardy), which prohibits the trial of persons for conduct in respect of which they already have been convicted or acquitted by a court. It is unfortunate that no provision was made in the creation of the SPSC and the *ad hoc* Court for how the overlap in the jurisdiction of the two bodies would be handled. This may have been the result of a tacit understanding that suspects would be tried in their countries of nationality. This approach assumed the integrity of the two national approaches. In the light of the failure of the *ad hoc* process in Jakarta, it is unfortunate that such potential conflict was not resolved upfront.

B. CAVR

An important facet of the serious crimes regime was its relationship with the CAVR.⁸⁰ The CAVR's mandate included: establishing the truth regarding the human rights violations that occurred in the context of political conflicts in East Timor between 1974 and October 25, 1999;⁸¹ assisting in restoring the dignity of victims;⁸² promoting reconciliation, and supporting the reintegration of individuals who committed harmful acts through community-based reconciliation mechanisms;⁸³ identifying practices and policies that should be addressed to prevent future human rights violations and to promote human rights;⁸⁴ and referring human rights violations to the Office of the General Prosecutor with recommendations for prosecution.⁸⁵

The work of the CAVR intersected with that of the serious crimes regime in several respects. Most obviously, the CAVR was required to refer cases involving serious criminal offences to the OGP.⁸⁶ The referral of matters for further investigation will occur when the CAVR hands over its final report to the President of Timor-Leste.

Second, the CAVR's reconciliation processes were intended to complement the prosecutions of the SCU. Persons who committed harmful criminal acts other than serious crimes were candidates

⁷⁹ This is the case against Eurico Guterres, the only Timorese among those indicted.

⁸⁰ The CAVR was established by UNTAET Regulation 2000/10.

⁸¹ UNTAET Regulation No. 2001/10, s. 3.1(a), (b), and (c). See also the definition of "human rights violations" in s. 1(c).

⁸² UNTAET Regulation No. 2001/10, s. 3.1(f).

⁸³ UNTAET Regulation No. 2001/10, s. 3.1(g) and (h).

⁸⁴ UNTAET Regulation No. 2001/10, s. 3.1(d) and (i).

⁸⁵ UNTAET Regulation No. 2001/10, s. 3.1(e). By March 2004, the reception and reconciliation aspects of the CAVR's work had largely been carried out. The truth function will be completed by July 7, 2005, by which date the CAVR's report must be handed to the president of Timor-Leste in terms of Law No. 13/2004, art. 1.

⁸⁶ UNTAET Regulation 2001/10, s. 38.1.

for reception and reconciliation, while those suspected of serious crimes were to be investigated through the serious crimes process. The CAVR's Community Reconciliation Procedures (CRP) envisaged a process whereby people accused of "minor" crimes could take part in a local hearing conducted under customary law known as *adat*. Serious crimes could not form the subject of a CRP.⁸⁷ Following a CRP hearing, a Community Reconciliation Agreement (CRA) could be made that required the perpetrator to undertake an act of reconciliation.⁸⁸ A person who complied with his obligations under a CRA would acquire "immunity" from prosecution (as well as from civil suit) in respect of his or her acts.⁸⁹

The CRP program began in August 2002 and ran until March 2004.⁹⁰ In total, 1371 minor offenders completed the CRP process.⁹¹ The SCU considered 1542 statements from deponents wishing to participate in the CRP and decided to exercise its jurisdiction in respect of 90 suspects. Eighteen of these 90 persons eventually were indicted. Five suspects were referred back to the CRP. Sixty-seven suspects were not indicted or were referred back to the CRP.⁹²

1. Difficulties in the Relationship

One difficulty in the relationship between CRPs and prosecutions for serious crimes was presented by the likelihood that many acts that constituted serious crimes would never in reality be prosecuted by the DPGSC. Regulation 10/2000 originally stipulated that no serious crime could form the subject matter of a CRP.⁹³ However, the regulations also indicated that the CRP should be facilitated unless a notification from the OGP was received indicating that it "intend[ed] to exercise its exclusive jurisdiction pursuant to UNTAET Regulation 16."⁹⁴ While the former provision appeared to make exclusion from the CRP dependent on the nature of the acts committed, the latter appeared to permit the CRP to proceed unless there was indication that a prosecution would ensue. Given that only a small proportion of serious crimes were ever likely to be the subject of prosecution, the difference between these two approaches was significant. Ultimately, the SCU took the approach that any acts not likely to be the subject of prosecution, even if they involved serious crimes, theoretically could be the subject of a CRP.⁹⁵ In order to strengthen this position, Regulation 2001/10 was amended by a directive⁹⁶ in May 2002 that sought to increase the DGPSC's discretion to determine what cases were appropriate for a CRP.

⁸⁷ According to s. 24.3 of UNTAET Regulation No. 2001/10, in determining whether criminal acts discussed in a statement are appropriate for a CRP, the criteria contained in Schedule 1 of the Regulations shall provide guidance. Paragraph 4 of Schedule 1 provides that in no circumstances shall a serious criminal offence (as defined in the Regulations establishing the Courts and the SPSC; see s. 1[m]) be dealt with in a CRP. See also s. 22.2, which provides that nothing in the Regulations shall prejudice the exclusive prosecutorial authority of the GP and DGPSC or the exclusive jurisdiction of the SPSC in respect of serious crimes.

⁸⁸ UNTAET Regulation 2001/10, s. 27.7 and 27.8. CRAs were submitted to the District Court for approval and registration as an order of the Court; see s. 28.

⁸⁹ UNTAET Regulation 2001/10, s. 32.

⁹⁰ Information received from members of the Transition Working Group on the Future of the Serious Crimes Process.

⁹¹ *Ibid.*

⁹² Information supplied by Julia Alinho, External Relations, Serious Crimes Unit, UNOTIL, Timor-Leste, May 28, 2005.

⁹³ UNTAET Regulation 2001/10, s. 1, para. 4.

⁹⁴ UNTAET Regulation 2001/10, s. 24.7 and 24.8.

⁹⁵ Information received from members of the Transition Working Group on the Future of the Serious Crimes Process.

⁹⁶ UNTAET Directive No. 2002/9, s. 1.

As a result, the CAVR reported that some cases went through the CRP process despite involving serious crimes.⁹⁷ Under the relevant regulations, however, immunity from prosecution could not result from the CRP process in respect of serious crimes.⁹⁸

In some cases, with the agreement of the OGP, CRPs took place in respect of persons who had committed both minor and serious crimes. It was emphasized that the CAVR could not provide immunity in respect of the serious crimes.⁹⁹ Many individuals who were denied participation in a CRP on the basis that the OGP intended to prosecute were never indicted.¹⁰⁰

One of the difficulties with the legislative scheme governing the relationship between the serious crimes process and the CAVR was its failure to grapple with the situation of the lowest-level perpetrators of serious crimes. These persons were declared to be ineligible to participate in a CRP under the regulations, but they ultimately were left outside the serious crimes regime as a result of time and resource constraints. While the fundamental difficulty appears to have been the SCU's practical inability to deal with all cases, this could have been foreseen by the time of the CAVR's creation more than a year after the establishment of the SPSC and well into the work of the SCU. The imperfection in the scheme may be attributed in part to a lack of planning. Indeed, it is unfortunate that the serious crimes process and the CAVR were not established at the same time and after more careful consideration of how an "impunity gap" between the two schemes might be avoided.

Defense lawyers complained that the CAVR's regulations put them at a disadvantage in respect to accessing statements and information held by the Commission.¹⁰¹ Under the relevant regulations, the CAVR could only be compelled to produce information on request from the OGP and not from defense teams.¹⁰² This meant that, whereas prosecutors could gain access to CAVR records independently, defense lawyers could not do so without going through the SCU.

2. Assessment of the Relationship

In practice, a good working relationship developed between the Commission and the SCU, which both recognized from the outset that the CRP process offered a significant prospect of some justice and vindication for many victims. While the SCU was not always able to process applications as quickly as would have been ideal, the CRP was an example of good cooperation between a truth commission and the court system. However, the SCU's failure to indict most of the suspects referred to it by the CAVR¹⁰³ meant that it was unable to provide the validation required by the CRPs. The reconciliation process was contingent upon the effective threat of prosecution against the more serious criminals. It may be argued that the CRP referrals were not consistently factored into the SCU's investigative policy.

⁹⁷ Information received from members of the Transition Working Group on the Future of the Serious Crimes Process.

⁹⁸ UNTAET Regulation 2001/10, s. 32.1.

⁹⁹ Information received from members of the Transition Working Group on the Future of the Serious Crimes Process.

¹⁰⁰ Sixty-seven suspects were not indicted or referred back to the CRP. Information supplied by Julia Alinho, External Relations, Serious Crimes Unit, UNOTIL, Timor-Leste, May 28, 2005.

¹⁰¹ Paper presented by Ramavarma R. Thamburan, Chief of the Defense Lawyers Unit for Serious Crimes, at UNMISSET International Symposium on UN Peacekeeping Operations in Post-conflict Timor-Leste: Accomplishments and Lessons Learned, April 28, 2005, p. 3.

¹⁰² UNTAET Regulation 2001/10, s. 44.2.

¹⁰³ See *supra* note 97.

Some problems in communication occurred. For example, when CRP hearings were discontinued, they were required by regulation to be reported to the OGP.¹⁰⁴ This did not always take place,¹⁰⁵ which may have resulted in individuals being overlooked in the prosecution process. This may have been a function of the two bodies operating separately, with different timetables and with little central coordination and planning.

Perhaps the most significant problem in relation to the interaction between the serious crimes regime and the CAVR (and in particular the CRP system) is that the failure of one tended to undermine the other. Because only a small number of those involved in more serious crimes became subject to any justice process, some resentment resulted among those who volunteered to submit to the CRP process.¹⁰⁶ Victims in the districts appeared to be satisfied with the CRP system, but only to the extent that it was matched by a serious crimes process.¹⁰⁷ The rationale for accepting immunity from prosecution in respect of large numbers of low-level offenders was that there would be a serious crimes process for higher-level offenders.¹⁰⁸ It is particularly ironic that of those who chose to submit to a CRP, it was ultimately those who were suspected of having committed serious crimes who, as a result of the SCU's failure to indict them before the closing of the unit, had to make the least penance to the community. The holding of CRPs raised expectations that justice would be done in respect of serious crimes, at least for those people under Timor jurisdiction, given Indonesian non-cooperation.¹⁰⁹ These expectations remain unfulfilled in most cases.

IV. ASSESSMENT OF THE SERIOUS CRIMES REGIME

A. Criteria for Assessment and Comparison

Before turning to an assessment of the serious crimes regime, it is necessary to make some comment on the appropriate criteria for such an assessment. It has become commonplace to compare the work of this and other international justice mechanisms to the records of the ICTY and the International Criminal Tribunal for Rwanda (ICTR). The comparison seems to be inspired by an urge to look for less costly forms of justice and based on the assumption that effectiveness can be reduced to the ratio between costs and convictions over time. However, the ICTY and the ICTR have access to vastly superior funding, staffing, and resources. Moreover, they both focus on the trials of a smaller and more highly ranked class of perpetrators compared with the suspects targeted by the serious crimes regime in East Timor. In any event, the nature of the crimes committed in the conflicts dealt with by these bodies is vastly different.¹¹⁰ For these reasons,

¹⁰⁴ UNTAET Regulation 2001/10, s. 27.4 and 27.6.

¹⁰⁵ Information received from members of the Transition Working Group on the Future of the Serious Crimes Process.

¹⁰⁶ Lia Kent, "Unfulfilled Expectations: Community Views on CAVR's Community Reconciliation Process," JSMP, August 2004, pp. 15-17; see http://www.jsmp.minihub.org/Reports/jsmpreports/CAVR_Reports/cavr_report_2004_e.pdf.

¹⁰⁷ Ibid.

¹⁰⁸ See conference proceedings, "Justice for Timor Leste: Civil Society Strategic Planning," organized by JSMP in September 2004 and posted on the JSMP Web site in October 2004: <http://www.jsmp.minihub.org>.

¹⁰⁹ See Kent, *supra* note 107, pp. 21-24.

¹¹⁰ For example, some have pointed out that the size of the massacres committed in Yugoslavia was far greater than the size of those that took place in East Timor. SCU investigators explained that different and time-consuming methods are required when a large number of individual murders occur, as opposed to when a single large-scale massacre takes place. See Interview, *supra* note 59.

comparisons of the number of indictments issued and trials conducted between various tribunals are potentially misleading.

It is more helpful to gauge the success of the serious crimes process by its original objectives. These included establishing accountability among those responsible (including those most responsible) for the commission of crimes in East Timor and carrying out trials in a fair manner and in accordance with international human rights standards.

The regime's objectives were partly achieved. The SPSC and the Court of Appeal heard a large number of cases in a comparatively short period, and 74 perpetrators have been held accountable for serious crimes. Over and above these objectives, a significant contribution to the historical record has been made by the numerous decisions detailing human rights violations and the context in which they occurred. Although the regime's inability to secure the presence of Indonesian suspects has widely been seen as the primary failing of the process, the decisions rendered contributed to the public record on the involvement of the Indonesian state in the crimes in question.

Furthermore, the beginnings of a workable justice system have been established in Timor-Leste. An enormous distance still needs to be traveled in this regard, but much has been achieved in a very short period of time. Despite these achievements, the serious crimes regime has suffered from numerous shortcomings. Some assessments of the process follow.

B. Lack of Cooperation from Indonesia

The most fundamental obstacle to the effective functioning of the serious crimes regime was Indonesia's failure to cooperate in the process. Despite the conclusion of the MOU between Indonesia and UNTAET, and even despite assistance rendered by UNTAET to the Indonesian *ad hoc* trials, Indonesia consistently failed to cooperate in the prosecution of serious crimes. The state's position has been that the agreement is not binding until ratified by its parliament, which did not occur. Indonesian authorities also claim that the MOU applied only to the period of the transitional administration of UNTAET¹¹¹ and that it therefore ceased to have any effect as of May 20, 2002. As a result of the government's refusal to cooperate, the SCU had to carry out investigations without assistance from Indonesian authorities.¹¹²

The most significant obstacle, however, has been the inability of the SCU to secure the presence of accused persons even when warrants, and in some cases Interpol red notices, have been issued. Of the 392 persons indicted, 304 are thought to be in Indonesia.¹¹³

C. Limited and Uneven Focus of Trials and Prosecutions

Inevitably, the failure of Indonesia to cooperate with the special crimes process had a significant effect on what types of suspects were tried before the SPSC. Higher-level perpetrators from the Indonesian military and government have been shielded by the Indonesian authorities and remained outside the reach of the serious crimes process. Even though SCU policy in more recent times has been to investigate and indict those most responsible, including the salient case of

¹¹¹ See Memorandum of Understanding, *supra* note 40, *dispositif*.

¹¹² See "Report of the Secretary-General on the United Nations Transitional Authority in East Timor (for the period July 27, 2000, to January 16, 2001)," S/2001/42, Jan. 16, 2001, para. 25.

¹¹³ "Progress Report of the Secretary-General on the United Nations Mission of Support in East Timor (for the period from November 10, 2004, to February 16, 2005), S/2005/99, Feb. 18, 2005, para. 30.

General Wiranto, none of these persons has been brought to trial, and the focus of the SPSC's work has been Timorese militia members. Thus the situation has allowed some to criticize the serious crimes process as placing accountability for the crimes of 1999 on the shoulders of the "small fish" (who are Timorese) rather than on the organizers and instigators of the crimes (members of the Indonesian military, police, and government). This was never the desired outcome of the process, and the responsibility for the situation rests squarely on Indonesia.

In addition, low-level perpetrators have not been prosecuted and tried consistently across the board. Only 88 have been tried by the SPSC. This is a small proportion of the Timorese militia who could be held responsible for serious crimes. Categories of local suspects who have not been tried include the following:

- Those indicted militia members who remain in West Timor and who therefore have not been tried;
- Perpetrators of approximately 800 murders in 1999 that have not yet resulted in indictments;
- Perpetrators of the many serious crimes other than murder that occurred in 1999 (including, for example, torture and sexual offences, whether on an individual level or as part of a crime against humanity) who have not been investigated or indicted; and
- Perpetrators of international crimes that occurred prior to 1999.

A minority of cases referred to the SCU through the CAVR's reconciliation process have resulted in indictments. As a result of the closure of the SCU on May 20, 2005, it seems unlikely that any action will be taken against those referred to the OGP by the CAVR on the completion of its final report in July 2005.

The fact that some prosecutions and trials occurred has great symbolic value and sends the message that serious crimes will be followed up and perpetrators potentially punished. However, the fact that so many suspects will not be prosecuted has the real potential to undermine the messages of justice and deterrence.

1. Prosecution Strategy

The prosecution's mandate was not clear. Prosecutors could concentrate on the high command or anyone within the jurisdiction, regardless of the roles they played.¹¹⁴ In the early years of the SCU, there was no clear prosecution strategy. Only in 2002 did the SCU assume a clear direction with the framing of indictments against military and political leaders within and outside East Timor.

A more comprehensive prosecution strategy may have enabled it to carry out district-wide indictments of senior perpetrators, or indictments targeting senior members of particular militia groups. Only a few such indictments were issued.¹¹⁵ The SCU felt that it was preferable to avoid this course in order to restrict indictments to a manageable size, particularly given the time and complexity involved in the trial of large indictments.¹¹⁶

¹¹⁴ Address by Siri Frigaard at the conference, "Domestic Prosecutions and Transitional Justice," organized by ICTJ and the Foundation for Human Rights on May 18, 2005, in Johannesburg, South Africa.

¹¹⁵ The Viqueque and Covalima indictments are examples of the former. The only militia indictment issued was the Zumulai militia indictment.

¹¹⁶ Information received from SCU staff.

Very few pro-independence perpetrators have been indicted, which could create the appearance that the process was not even-handed. But the small number of such indictments is better seen as a result of the SCU's policy of targeting crimes against humanity, and therefore necessarily involving organized or widespread violence. Since violations by pro-independence elements were more in the way of random "revenge attacks," they did not meet these requirements.

Some problematic strategic decisions were taken by the SCU's leadership at various times. One example is the decision in late 2004 that a number of potential indictees should not be pursued even though the investigations had been completed and indictments drawn up. This decision ostensibly was made because if too many new indictees were brought before the SPSC, the Court would be incapable of completing all of the cases by May 2005. Given that many of the suspects involved were believed to be in West Timor, however, the only work that would have been required of the Court in most cases would have been the issue of an arrest warrant. The SCU's failure to indict all those against whom it had sufficient evidence to convict is regrettable.

2. Pre-1999 Crimes

The SCU has not completed any investigations in relation to crimes committed before 1999. SCU management holds that its mandate was limited to crimes that occurred in 1999.¹¹⁷ It is clear that when the SPSC were established by UNTAET in 2000, they had universal jurisdiction to try genocide, war crimes, and crimes against humanity.¹¹⁸ Accordingly, these crimes could be tried regardless of when they took place. It has been suggested that the enactment of the constitution of Timor-Leste in 2002 changed this situation. Section 163.1 provides that:

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

The purpose of this section seems to be to provide for the timeframe in which the SPSC would operate. It is unclear why reference was made to the panels having jurisdiction only in respect of crimes committed in 1999, as there was no doubt at the time the constitution was drafted that the UNTAET regulations granted a wider competency to the SPSC. Ordinarily it would be expected that were the pre-existing jurisdiction of the court to be altered, this would be done expressly, whether in the constitution or in amending legislation.¹¹⁹

In any event, it is clear that at some stage before the creation of the constitution, a policy decision was made within the SCU to limit prosecutions to crimes that occurred in 1999. While this may have been a necessary decision in the light of severe resource shortages and time restrictions, it is nonetheless extremely unfortunate that pre-1999 serious crimes offenders have not been indicted.

¹¹⁷ See JSMP, "The Future of the Serious Crimes Unit," January 2004, p. 4.

¹¹⁸ UNTAET Regulation 2000/15, s. 2.1. Contrasts the crimes of murder, torture, and sexual offences, over which the SPSC is expressly stated to have jurisdiction only if they occurred between January 1, 1999, and October 25, 1999. See UNTAET Regulation 2000/11, s. 10.2 and UNTAET Regulation 2000/15, s. 2.3.

¹¹⁹ The JSMP has argued that s. 160 of the constitution should also be taken into account in interpreting the meaning of s. 163. See JSMP, *supra* note 118, p. 4. Section 160 provides that "acts committed between the 25th of April 1974 and the 31st of December 1999 that can be considered crimes against humanity or genocide or of war shall be liable to criminal proceedings with the national or international courts."

3. Gender and Other Crimes

Very few gender crimes were indicted by the SCU. Under DPSG Siri Frigaard, a special gender investigation team composed of three women was established, which is one of many valuable steps taken during her tenure. The team investigated rapes and other sexual violations, but the reluctance of female victims to testify in open court prevented the SCU from proceeding with many gender crime prosecutions.¹²⁰ According to DPSG Carl de Faria, torture cases were investigated only partially, while deportation and destruction of property cases were not investigated thoroughly.¹²¹

D. Obstacles to Investigation and Prosecution

Many of the difficulties faced by the SCU can be attributed at least in part to resource shortages and organizational problems. For example, the transitional working group in the serious crimes regime reported that administrative resource shortages led to inadequate recording and inputting of information into the database.¹²² In the early years of the SCU, investigators were not issued vehicles, nor did the unit have a forensic pathologist. Translators had to be funded independently.¹²³ These problems were exacerbated by the high turnover in staff.¹²⁴

Initially at least, many staff members were inadequately skilled. The unit had no criminal analysts and the seconded CIVPOL investigators were woefully insufficient in number. Although they brought a wide skills base to the unit, many had not carried out investigations before, let alone investigated complex cases such as those relating to crimes against humanity.¹²⁵

The small size of the unit relative to its enormous investigative task inevitably caused difficulties. For example, the SCU reported that the most international investigators it had at any one time was 12, and that those 12 investigators had to deal with crimes committed in all 13 districts of East Timor.¹²⁶ Difficulties in reaching remote areas of the country served to compound the problems caused by having an inadequate number of investigators.¹²⁷

Long-term planning and continuity were severely impeded by the short terms served by those in the office of the DGPSC. Repeated changes in leadership led to constant redirection of the SCU's efforts. Perhaps even worse, for some periods (for the first year that it functioned within the prosecution service and from April to October 2003), the unit was without a DGPSC. These difficulties were exacerbated by ongoing uncertainty about the lifespan of the SCU. Originally, the unit was to function only until mid-2001. This time period was extended gradually.¹²⁸ Only toward the end of 2003 did the SCU achieve a measure of capability, but the unit was instructed to commence with downsizing within months.¹²⁹

¹²⁰ See Frigaard, *supra* note 115.

¹²¹ See De Faria, *supra* note 58, p. 5.

¹²² Information received from members of the Transition Working Group on the Future of the Serious Crimes Process.

¹²³ See Frigaard, *supra* note 115.

¹²⁴ See *supra* note 117.

¹²⁵ See Interview, *supra* note 59.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ See Frigaard, *supra* note 115.

SCU staff reported that the uncertainty caused a short-term focus in planning and decision-making and that the prioritization of investigations would have been better managed had it been known that the unit would continue operating until May 2005.¹³⁰ The high staff turnover contributed to a lack of consistency and the loss of institutional memory.¹³¹ Similarly, the fact that SCU management never knew with certainty when its mandate would end meant that it was left with little time to devise a handover strategy. Even when the unit's exit strategy was devised and implemented, it was impeded by the lack of uniform document management practices across the unit. Consequently, an enormous effort had to be undertaken in the final phase of its operations to organize, review, and archive all case files.¹³²

The stop-start approach to the unit's oversight undermined staff morale and inevitably affected its ability to pursue investigations. In the light of the many obstacles it faced, the SCU's accomplishments are highly commendable. However, management must bear responsibility for some of the unit's failings. While at times leadership of the unit was outstanding, this was not uniformly the case. Many of the criticisms leveled against the unit's prosecutorial strategies, or occasional lack thereof, might have been avoided by careful planning at an early stage.

E. Equality of Arms

One of the most serious concerns about the performance of the serious crimes regime relates to shortcomings in the legal services available to defendants.

Initially, no provision for defense services was made by UNTAET. A small number of Timorese lawyers who dealt with matters before the ordinary courts provided some defense assistance, along with a small number of NGO-funded international lawyers.¹³³ The quality of the defense that these lawyers were able to supply is reflected in the complete absence of defense witnesses in the first 14 trials that took place before the special panels.¹³⁴

UNMISSET finally created a Defense Lawyers Unit (DLU) in September 2002. The unit initially employed only one lawyer, growing to three by November 2002 and six by April 2003.¹³⁵ At the conclusion of the unit's activities in May 2005, it had seven international defense lawyers working under the head of the unit, along with three legal researchers.¹³⁶ The DLU only employed international staff and saw little or no collaboration with local lawyers.¹³⁷

The creation of the DLU provided some improvement in the provision of defense services; however, the perception has remained that there was an insufficient level of experience among many of the defense lawyers given the gravity and complexity of the crimes involved. While all DLU lawyers had law degrees, were permitted to practice in a recognized jurisdiction, and had some courtroom experience, levels of expertise varied greatly. The unit has been criticized for having inadequate expertise in international criminal law in particular. The insufficient

¹³⁰ See *supra* note 117.

¹³¹ Interview with Julia Alinho (External Relations Office) at SCU on March 11, 2005.

¹³² Interview with a member of the SCU legal staff.

¹³³ See Katzenstein, *supra* note 49, p. 251.

¹³⁴ See Cohen, *supra* note 21, p. 5.

¹³⁵ Information received from members of the Transition Working Group on the Future of the Serious Crimes Process.

¹³⁶ Information supplied by the Defense Lawyers Unit.

¹³⁷ See Frigaard, *supra* note 115.

experience and expertise of some DLU lawyers sometimes led to the provision of an inadequate defense.¹³⁸

In addition, the DLU suffered from a shortage of resources. For example, it did not have access to adequate legal resources, such as texts or online databases.¹³⁹ The unit had only minimal investigative staff and no researchers or witness managers.¹⁴⁰ The location of many potential defense witnesses in West Timor and the lack of direct access by the DLU to CAVR statements exacerbated the difficulties faced by the unit.¹⁴¹

The serious lack of adequate quality in the representation of the accused has the potential to bring the legitimacy of whole process into question.¹⁴² The perception that a conviction was more or less a *fait accompli*, in many cases as a result of the lack of adequate representation, constituted a serious setback for the serious crimes process. Despite the difficulties faced by the DLU, it should be noted that the unit was able to ensure that all defendants were represented at trial and on appeal.¹⁴³

F. Problems in the Functioning of the SPSC and the Court of Appeal

The Court of Appeal did not operate at all for a significant period of its existence because of difficulties in the appointment of international judges. This prevented the Court from sitting for more than a year and a half in 2001-2003. Precisely who was responsible for the delays in judicial recruitment is a matter of disagreement. UN officials accuse the Timorese government of obstruction at various points in the processes, including the imposition of language requirements that did not seem strictly necessary. Government sources attribute delays to unwieldy and slow UN processes.

A significant problem throughout the life of the SPSC was a severe shortage of resources. This meant that judges were not provided with administrative support staff and had to do their own research, drafting, editing, and administration.¹⁴⁴ Library resources were scarce and Internet access was unavailable until the end of 2001.¹⁴⁵

¹³⁸ JSMP, *The General Prosecutor v. Joni Marques and Nine Others (The Los Palos Case)*, March 2002, pp. 23-24.

¹³⁹ Information received from members of the Transition Working Group on the Future of the Serious Crimes Process.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² Former DGPSC Siri Frigaard, quoted at <http://www.etan.org/et2002b/june/23-30/28specal.htm>: “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.”

¹⁴³ Information received from members of the Transition Working Group on the Future of the Serious Crimes Process.

¹⁴⁴ UN OHCHR, “Comprehensive Report on the Progress Made to Date of Prosecutions Before the *Ad Hoc* Human Rights Court in Indonesia and the Serious Crimes Process in Timor-Leste in Respect to Crimes Committed in the then East Timor in 1999,” October 2004, pp. 46-47.

¹⁴⁵ See Katzenstein, *supra* note 49, p. 260.

1. Language Requirements

More significant still were difficulties with language and translation. The SPSC operated in Portuguese, Tetum, Indonesian, and English.¹⁴⁶ Under UNTAET regulations, courts are required to provide translation and interpretation services in every case where a judge, witness, or party to a proceeding does not sufficiently speak or understand the language used in the court.¹⁴⁷ However, translation and interpretation services were severely inadequate.¹⁴⁸ Because judges, lawyers, defendants, and witnesses in a particular case may not share a common language and may require translation into four or even more language (where local languages are involved), a high level of interpretation service is required. Difficulties in finding translators with fluency in local languages and an understanding of legal terminology compromised the quality of translations. Most translation staff members were not professionally qualified and, because of staff shortages, they sometimes were required to work for long periods without a break. In these circumstances, it is not surprising that errors in interpretation occurred.¹⁴⁹ Shortages in language staff meant that the same staff translated documents and carried out interpretation during court sessions, which led to long delays in the completion of translations.¹⁵⁰ Language requirements presented a significant burden for the SPSC.

2. Quality of Jurisprudence

Criticisms have been made of the quality of the jurisprudence produced by the SPSC and the Court of Appeal.¹⁵¹ Early decisions in particular have been criticized for containing little reference to international criminal and humanitarian law, and of being based on poor reasoning. Although more recent decisions by the SPSC have demonstrated some improvement in this regard,¹⁵² concerns remain in relation to the work of the Court of Appeal. In some of its more problematic decisions, the Court relied for authority only on a decision of a U.S. district court in a civil case and held that the applicable criminal law in East Timor was that of Portugal rather than that of Indonesia.¹⁵³ More recently, the Court of Appeal overturned one of the SPSC's few acquittals. As the Judicial System Monitoring Program reported, this appears to have been done because the Court of Appeal disagreed with the assessment of the evidence at first instance, rather

¹⁴⁶ This was originally provided under UNTAET Regulation 2000/11, s. 36, which became s. 35 when that regulation was amended by UNTAET Regulation 2001/25; see also the constitution of Timor-Leste, s. 13 and 159.

¹⁴⁷ UNTAET Regulation 2000/11, s. 23.

¹⁴⁸ See Katzenstein, *supra* note 49, pp. 260-261.

¹⁴⁹ See JSMP, "The Lolotoe Case: A Small Step Forward," July 2004, pp. 23-24. See also JSMP, *supra* note 139, pp. 26-27.

¹⁵⁰ Information received from members of the Transition Working Group on the Future of the Serious Crimes Process.

¹⁵¹ See, for example, Sylvia de Bertodano, "Current Developments in Internationalized Courts," *Journal of International Criminal Justice* 226:1, 2003, pp. 232-233; and 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* 167: 4, 2001, pp. 187-189.

¹⁵² See JSMP, *supra* note 139, p. 34. See also JSMP, "The Lolotoe Case," *supra* note 150, p. 15.

¹⁵³ Armando dos Santos v. The Prosecutor General, Case No. 16/2001, July 15, 2003; and Agustinho da Costa v. The Prosecutor General, Case No. 07/2000, July 18, 2003. These decisions were nullified later by a law passed by the National Parliament: Law No. 10/2003, s. 1.

than on the basis of the more stringent test usually employed on appeal,¹⁵⁴ namely that the trial court's assessment could not have been reached by any reasonable tribunal or that it was "wholly erroneous."¹⁵⁵

3. Poor Transcription Services

Judicial decision-making, already hindered by a lack of legal and human resources, must inevitably have been made more difficult by the absence of trial transcripts. This was the case despite a requirement under the Regulation that a transcript be taken and made available to all parties.¹⁵⁶ Initially, trials took place with no court reporter or recording.¹⁵⁷ Beginning in mid-2001, video recording of court proceedings began, but it was not until much later that these began to be converted into transcripts. Even with this resource, there have been significant delays in accessing transcripts for the purposes of appeals. In one case, a notice of appeal was filed in April 2003 and the defense counsel still had not received by June 2004 court transcripts that were requested at trial.¹⁵⁸ The absence of transcripts, or the delay in receiving them, has been one of several significant obstacles to the availability of a fair appeals process. Without access to transcripts of trial proceedings, the right to appeal in many cases was severely impeded.¹⁵⁹ A further and related problem has been the failure of the Court in some cases to issue its decisions in languages understood by all the parties.¹⁶⁰

4. Handling of Arrest Warrant Applications

Significant criticisms of the Court's procedures can be made in relation to the SPSC's handling of warrant applications. As of April 28, 2005, 39 warrant applications pending before the Court remained outstanding.¹⁶¹ Some 18 of these had been filed with the Court as early as 2003.¹⁶² While there are no time limits in the Transitional Rules of Criminal Procedure for the making of a decision on a warrant application, responsibility for such lengthy delays ultimately must lie with the Court itself. Moreover, prosecutors have complained that the judges of the Court applied an incorrect and overly burdensome standard in determining whether to grant a warrant.¹⁶³ In one case, the Court of Appeal determined that the test was whether it was possible to reach "the sure conclusion that the accused had committed [the] crime."¹⁶⁴ The practical consequence of this was the expending of significant time and effort by the SCU in the compilation of briefs in support of warrant applications. The final figures as released by the SPSC are that of the 290 arrest warrants requested from the special panels, 285 were issued and five were denied.

¹⁵⁴ Prosecutor v. Zoran Kupreskic and Others, ICTY Case No. IT-95-16-A, Appeals Chamber Judgment, Oct. 23, 2001, paras. 30 and 41; Prosecutor v. Zejnil Delalic and Others, ICTY Case No. IT-96-21-A, Appeals Chamber Judgment, Feb. 20, 2001, paras. 434 and 491; Prosecutor v. Zlatko Aleksovski, ICTY Case No. IT-95-14/1-A, Appeals Chamber Judgment, March 24, 2000, para. 63; and Prosecutor v. Dusko Tadic, ICTY Case No. IT-94-1-A, Appeals Chamber Judgment, July 15, 1999, para. 64.

¹⁵⁵ See JSMP, supra note 47, pp. 13-15.

¹⁵⁶ UNTAET Regulation 2000/11, s. 26.1.

¹⁵⁷ See Katzenstein, supra note 49, p. 260.

¹⁵⁸ See JSMP, supra note 150, p. 16.

¹⁵⁹ See JSMP, supra note 66, pp. 17-18.

¹⁶⁰ See JSMP, supra note 47, p. 12.

¹⁶¹ See De Faria, supra note 58, p. 6.

¹⁶² Ibid., p. 9.

¹⁶³ Ibid. The DGPSC said that the threshold for the grant of a warrant was raised to "practically the same level as that required for a guilty verdict."

¹⁶⁴ Ibid.

G. Capacity Building

Despite the very real difficulties that the SCU and the SPSC faced, some success has been evident in the process of capacity building among local professionals. The extreme need for this process must be understood in the light of the underdeveloped state of the legal community in East Timor in 1999. At that time, only a small number of Timorese had law degrees. None had worked as a judge, and only one had been a prosecutor.¹⁶⁵ All Indonesian appointed judicial and criminal justice officers left the country with the Indonesian retreat in 1999. The justice system had to be rebuilt from scratch.¹⁶⁶

Apart from the interpreters, all staff members appointed to the SCU were international. The two prosecuting units in East Timor, the SCU and the Ordinary Crimes Unit (OCU), were situated far from each other and there was almost no contact between them.¹⁶⁷ Initially, the UN put no plans in place to provide for the legacy of the unit or for the transferal of skills to local professionals. At the behest of DPGSC Siri Frigaard, a training program was initiated in 2002 and funding secured from the Norwegian government to pay the salaries of the trainees.¹⁶⁸

The first intake of trainees included five individuals in prosecution, two in case management, three in information technology, and two in data entry and evidence management.¹⁶⁹ During March 2005, the SCU had 13 Timorese trainees (seven of whom were women), including four in prosecution, six in information technology, and three in data entry.¹⁷⁰ The unit reports that it considers the program generally successful and that many Timorese were interested in the training program, which was stepped up to allow as many people as possible to be involved before the closure of the SCU on May 20, 2005. The training program did not detract from the day-to-day work of investigators and prosecutors.¹⁷¹ Lawyers who were trained in the SCU and who were transferred to the OCU are reputed to be the best prosecutors available in the country.¹⁷²

Perhaps the most significant deficiency of the SCU's capacity building program has been that there was simply not opportunity for enough of it. Only a relatively small number of professionals have been able to benefit from the SCU training program and for a short period of time. The legal professionals who were trained in the SCU did not have a chance to acquire practical experience by appearing in court. While the training program has provided the justice sector in Timor-Leste with a significant boost, much still has to be done to prepare local justice officers to deal effectively with ordinary judicial processes.

The SPSC's capacity building work was less structured. It took the form of an attempt at mentoring of national judges by their international counterparts. Five Timorese judges have been involved in the serious crimes process (four on the SPSC and one in the Court of Appeal).

¹⁶⁵ See Jones, *supra* note 22, p. 9. According to one commentator, only 60 Timorese held law degrees at this time. Also see Katzenstein, *supra* note 49, p. 254.

¹⁶⁶ See Frigaard, *supra* note 115, fn. 125.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.* Trainees initially were selected by the DPSG and the General Prosecutor. Trainees were not paid any more than they would earn as prosecutors in East Timor. It was more profitable to work as a driver for the UN than to work as a prosecutor. This presented problems, but the program eventually became very popular and the unit was unable to accommodate all applicants.

¹⁶⁹ See Interview, *supra* note 59.

¹⁷⁰ *Ibid.*

¹⁷¹ Interview with a senior SCU prosecutor.

¹⁷² See Frigaard, *supra* note 115, fn. 125.

Although the prosecution and defense work before the SPSC continue to be carried out almost exclusively by internationals, it is important to note that a significant foundation of training has been provided to at least some Timorese professionals. A comprehensive strategic training and mentoring plan together with financial support from the outset would have helped make significant advances in the building of the local justice system.¹⁷³

H. Lack of Political Will in Timor-Leste and the UN

Support from the Timor-Leste government for the serious crimes process has been far from constant or uniform. Rather, the government has demonstrated a lack of enthusiasm for, and at times opposition to, the prosecution of serious crimes that has adversely affected the process. Certainly, the power imbalance between Indonesia and Timor-Leste helps explain the Timorese government's failure to actively support justice efforts, but this factor alone does not explain why the Timorese leadership has chosen actively to endorse Indonesia's position to the dismay of human rights and victims' organizations. Significant responsibility also falls squarely on the UN. The reports of the Secretary-General on East Timor to the Security Council have regularly emphasized the need to bring perpetrators to justice, and Security Council resolutions have expressed a similar commitment. However, having established the serious crimes process, the UN regrettably failed to support it at its most critical junctures.

A key moment followed General Wiranto's indictment on February 24, 2003. The indictment caused a strong reaction from the Indonesian government, which blamed the UN for what it saw as a politically motivated case. UNMISSET declined to support the work of the SCU and issued a statement declaring that the indictment was issued through the prosecution service of Timor-Leste and not by the UN.¹⁷⁴ While this is technically correct, it does not take into account that the work of the prosecution service was carried out by a UN unit and staffed by UN employees. This attitude provoked the dismay of those in the Timorese leadership who had expected the UN to show a clear commitment to the justice process¹⁷⁵ and strengthened the view that the UN's support for justice could not be taken for granted. Shortly thereafter, the Timorese government publicly declared that the indictment was the work of the UN and not of Timor-Leste,¹⁷⁶ therefore completing the disavowal of the SCU. The government of Timor-Leste also declined offers of overseas aid for the funding and staffing of the serious crimes regime.¹⁷⁷

Another critical moment occurred after the SPSC issued its warrant for the arrest of General Wiranto on May 10, 2004. President Alexandre "Xanana" Gusmao met then Indonesian President Megawati Sukarnoputri to agree that outstanding human rights issues between the countries would not be solved judicially but through a reconciliatory approach.¹⁷⁸ Later, President Gusmao used his Independence Day national address to praise the objectionable trials conducted in Indonesia¹⁷⁹ and, finally, met personally with General Wiranto to perform an act of reconciliation that received strong condemnation from victims' groups and civil society organizations.¹⁸⁰

¹⁷³ Ibid.

¹⁷⁴ "Timor-Leste, Not UN, Indicts Indonesian General for War Crimes," United Nations News Center, Feb. 26, 2003.

¹⁷⁵ Jill Jolliffe, "Timor PM Slams UN on War Criminals," *Asia Times*, May 15, 2003.

¹⁷⁶ Berni K. Moestafa, "E. Timor Denies Indicting RI Generals," *The Jakarta Post*, Feb. 28, 2003.

¹⁷⁷ See Katzenstein, *supra* note 49, pp. 268-269.

¹⁷⁸ "Wiranto Thankful About Result of Megawati-Xanana Meeting," *Asia Intelligence Wire*, May 18, 2004.

¹⁷⁹ "It is undeniable that the fact that Indonesia created an *ad hoc* court and tried military men, even generals, shows courage and determination to change the previous system. To the present, no country in Asia, not even the always lauded reconciliation process of South Africa, has shown such attitude of

The general conciliatory orientation of the Timorese government toward Indonesia directly undermined the serious crimes process¹⁸¹ and influenced the role of the General Prosecutor. While he had originally been supportive of the indictment, he reversed his position immediately after the arrest warrant was issued and presented a motion to the Court seeking to have the indictment against Wiranto “revised.”¹⁸² The motion was refused by the SPSC,¹⁸³ but the General Prosecutor has not forwarded this or any other warrant to Interpol for the issuance of a red notice despite a large number of applications being prepared by the SCU and sent to him for his signature.¹⁸⁴

The SCU, as has been seen, also was debilitated by a premature process of deactivation decided by the UN as part of the progressive downsizing of UNMISSET.

The High Commissioner for Human Rights, the late Sergio Viera de Mello, proposed in early 2003, as the first Jakarta trials were concluding, that the Secretary-General appoint a Commission of Experts to assess the trials and the proceedings in East Timor, as well as to propose ways to further justice in Timor-Leste. But the UN only appointed the Commission two years later on February 18, 2005, well after the SCU had ceased to submit indictments and three months short of the scheduled closure of the SCU and the SPSC. The Commission was therefore unable to submit its report to the UN Security Council before the scheduled shutdown.

The lack of Indonesian cooperation, clearly the main cause for the serious crimes process’ weaknesses, was compounded by the UN’s lack of support for justice in Timor-Leste, creating an environment in which the Timorese leadership opted for active and public support of the Indonesian position.

V. CURRENT OUTLOOK FOR THE PROSECUTION OF SERIOUS CRIMES

The serious crimes regime was effectively shut down on May 20, 2005, together with the downsizing of UNMISSET.¹⁸⁵ Although the formal framework for the regime places it within the domestic court and prosecutorial system of Timor-Leste, it seems highly improbable that the process will continue without the support of the UN.

political courage,” Mensagem à Nação do Presidente da Republica Kay Rala Xanana Gusmão. 2º Aniversário da Restauração de Independência. Díli, May 20, 2004.

¹⁸⁰ “Xanana and Wiranto Meeting Reaped Condemnations in Timor-Leste,” *Tempo Magazine*, 40:IV, June 8-14, 2004.

¹⁸¹ “The Wiranto Warrant: Political Interference in the Serious Crimes Process,” JSMP Press Release, June 22, 2004.

¹⁸² See news reports at <http://www.etan.org/et2004/may/09-14/11etpros.htm>. The motion was refused.

¹⁸³ Deputy General Prosecutor for Serious Crimes v. Wiranto and Others, Case No. 05/2003. Decision on the Motion of the Prosecutor General to Review and Amend the Indictment, May 17, 2004.

¹⁸⁴ The DGPSC has indicated that some 120 red notice applications were submitted to the General Prosecutor for his signature during the SCU’s work. See De Faria, *supra* note 58, p. 2. Seventy-seven red notices had been issued previously.

¹⁸⁵ Only a small skeleton staff remains pending the announcement of the Commission of Experts’ recommendations and the decision of the Security Council. In February 2005, the UN Secretary-General appointed the Commission to assess the process of accountability and to make recommendations on any future actions that may be necessary to ensure accountability.

The work of the DGPS as carried out by the SCU, which forms part of the UNMISSET mission, ceased on May 20.¹⁸⁶ Defense work as carried out by the DLU ceased on the same date. International judges on the SPSC and the Court of Appeal are funded by UNMISSET, and it is anticipated that funding for the SPSC judges will cease. Therefore, although the legislative framework for the investigation, prosecution, and trials of serious crimes within the Timorese legal system will remain after May 20, the international participants in this process who are crucial to its functioning will no longer be involved.

A. Constitutional and Legislative Issues

Significant impediments exist to the continuation of the process without international involvement. The first, and perhaps least, of these involves a formal constitutional and legislative question. Sections 10.3 and 15.5 of UNTAET Regulation 2000/11 and section 22 of UNTAET Regulation 2000/15 (which will continue to be law in Timor-Leste until replaced by a law of the National Parliament)¹⁸⁷ require the special panels in the Dili District Court and Court of Appeal to be composed of a combination of Timorese and international judges. More significant still is Section 163.1 of the constitution of Timor-Leste, mentioned above, which provides that “the collective judicial instance existing in East Timor... shall remain operational for the time deemed strictly necessary to conclude the cases under investigation.”

It has been suggested that a legislative amendment to remove the requirements in Regulations 2000/11 and 2000/15 for the involvement of international judges might itself indicate that “the time deemed strictly necessary” has elapsed.¹⁸⁸ This appears to be an unjustifiably artificial argument. The elaborate lengths gone to by the SCU to preserve the possibility for continuing investigation and prosecution in its handover procedures should be a sufficient indication that more time is necessary to conclude the cases.

It therefore appears that the only options for the continuation of trials before the special panels after the departure of UNMISSET-funded judges are the funding of international judges from another source or a constitutional amendment and legislative amendment. It is also necessary to bear in mind the difficulties likely to attend a constitutional amendment. Amendments may not even be considered during the constitution’s first six years without agreement from four-fifths of the Parliament,¹⁸⁹ and a two-thirds majority is required for an amendment to be adopted.¹⁹⁰

B. Lack of Domestic Capacity

A more fundamental problem is the significant lack of capacity in the domestic legal system to continue the serious crimes process without significant international assistance. Despite the highly commendable work carried out by the various sections of the serious crimes regime in the training and mentoring of local lawyers and judges, it is universally recognized that the capacity does not yet exist in Timor-Leste for the prosecution of serious crimes without international help. One example of this is the recent results of examinations taken by trainee judges, in which all 22

¹⁸⁶ Security Council Resolution 1543 (2004), May 14, 2004, para. 8.

¹⁸⁷ Section 4, UNTAET Regulation 1999/1, Nov. 27, 1999; and Timor Leste National Parliament Law No. 2/2002 on Interpretation of Applicable Law on May 19, 2002, s. 1.

¹⁸⁸ UNMISSET, “Reports of the Transition Working Groups,” September 2004-January 2005, p. 63.

¹⁸⁹ Constitution of Timor-Leste, s. 154.

¹⁹⁰ Constitution of Timor-Leste, s. 155.

candidates failed.¹⁹¹ An equivalent lack of capacity applies in relation to national investigators, prosecutors, and defense lawyers, who also have failed examinations.¹⁹² In the very short time since the end of the Indonesian occupation, there has been inadequate time and training to permit local practitioners to develop the skills that their international counterparts have developed over an entire career.

C. Lack of Political Will

Another fundamental obstacle to the continuation of the prosecution of serious crimes after the winding up of UNMISSET is the lack of any political will for such a course of action within the Timorese government in the context, as we have seen, of clear Indonesian opposition and lukewarm UN support. Increasingly it appears that there is little appetite for the prosecution of those who committed human rights violations during the Indonesian period. Rather, the focus is on promoting friendly relations with Indonesia, even if that means jettisoning justice. This position is demonstrated nowhere better than in recent statements by Foreign Minister José Ramos-Horta before the UN Security Council and Human Rights Commission, in which he asserted that Timor-Leste needs “restorative justice” focused on the future, rather than “retributive justice” focused on prosecution, punishment, and the past.¹⁹³ This attitude is evident in the agreement between Timor-Leste and Indonesia in March 2005 to establish a Commission for Truth and Friendship (CTF) that is to begin its work by August 2005.¹⁹⁴ This Commission is said to be “based on a forward-looking and reconciliatory approach.”¹⁹⁵ Its terms of reference 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.¹⁹⁶

The terms of reference also expressly state that the CTF will not lead to prosecutions.¹⁹⁷

While the CTF’s terms of reference indicate that the process should not prejudice ongoing judicial processes,¹⁹⁸ they provide a wide scope for the granting of amnesties. Amnesties will be recommended for those who cooperate fully in revealing the truth.¹⁹⁹ No restrictions exist to prevent the granting of amnesties in respect of even the most serious crimes. It is likely that the CTF process will result in the granting of amnesties in respect of these crimes, whether or not this

¹⁹¹ In order to permit the courts to continue functioning, five candidates were permitted to continue judicial duties despite having failed the examination. Four of these judges serve on the SPSC and the Court of Appeal. See UNMISSET, “Reports of the Transition Working Groups,” pp. 49-50. See also JSMP, *supra* note 67, p. 12. Nineteen of the 22 judges who failed the examination have appealed; however, no decision on the appeals has yet been made.

¹⁹² “Legal practitioners fail evaluations,” UNOTIL Daily Press Review, May 26, 2005.

¹⁹³ Address by H.E. José Ramos Horta, 61st Session of the Commission on Human Rights, March 14-April 22, 2005; and the 5132nd meeting of the Security Council, S/PV.5132, Feb. 28, 2005.

¹⁹⁴ Terms of Reference for the Commission of Truth and Friendship Established by The Republic of Indonesia and the Democratic Republic of Timor-Leste, para. 15.

¹⁹⁵ *Ibid.*, para. 7.

¹⁹⁶ *Ibid.*, para. 10.

¹⁹⁷ *Ibid.*, para. 13(c).

¹⁹⁸ *Ibid.*, para. 13(e).

¹⁹⁹ *Ibid.*, para. 14(c)(i).

accords with Timorese law.²⁰⁰ Clearly, the possibility of amnesties for the most serious offenses, such as crimes against humanity, war crimes, and genocide, runs counter to international law and is against the principles that have been firmly espoused by the UN Secretary-General.²⁰¹

The mandate of the CTF also provides for measures to rehabilitate “those wrongly accused of human rights violations.”²⁰² This may be a reference to those persons indicted by the SCU. But while the CTF’s terms of reference are overly generous toward perpetrators, they are silent about the rights of victims. The possibility of comprehensive reparations for victims and the reform of the offender institutions is not even mentioned. Another reason for concern is that the CTF will have access to the archives of the SPSC and the CAVR,²⁰³ which contain sensitive information related to victims and witnesses. Disclosure of such information may endanger the personal safety of many victims and witnesses should their details fall into vengeful hands.²⁰⁴

D. Reasons to Retain the Serious Crimes Regime

There are important reasons why some form of justice process in respect of serious crimes should be implemented in Timor-Leste. One reason is that some of those already in the serious crimes process will require access to mechanisms for the determination of appeals and applications for conditional release.²⁰⁵ These mechanisms will be unable to operate under the relevant regulations without the presence of international judges, and they are unlikely to operate effectively without international prosecutors and defense lawyers.

Another reason is the significant number of investigations and prosecutions that are not yet closed. In many cases, such as those involving pre-1999 crimes and crimes other than murder, investigations have not even begun.²⁰⁶ Even in respect of the estimated 1400 murders from 1999, only 572 have resulted in indictments so far.²⁰⁷ In addition, the individuals referred to the OGP by the CAVR through the screening process for CRPs have not been indicted, as investigations were completed by the end of 2004.²⁰⁸ It is also likely that, with the completion of the final report of the CAVR in July 2005, numerous additional referrals to the OGP will be made.

Another 304 persons who have been indicted by the DGPSC have not yet been tried because they remain outside the jurisdiction of Timor-Leste. Most of these individuals are suspected to be in Indonesia and especially in West Timor. It seems likely that many of the Timorese ex-militia

²⁰⁰ Section 95(3)(g) of the constitution of Timor-Leste provides that it is incumbent on the National Parliament to grant amnesties.

²⁰¹ Report of the UN Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies, UN Doc S/2004/616*, Aug. 23, 2004.

²⁰² Terms of Reference for the Commission of Truth and Friendship, para. 14 (c)(ii).

²⁰³ *Ibid.*, paras. 14(a) and 19(b).

²⁰⁴ Mark Dodd, “East Timorese Still at Risk, UN Warned,” *The Australian*, May 30, 2005.

²⁰⁵ A prisoner may be considered for conditional release after having served two-thirds of his or her prison sentence. However, motions for conditional release are required to be heard by the presiding judge of the sentencing panel, or, when that judge is no longer available, by a judge selected by the Judge Administrator. It is not clear whether a judge not serving on the SPSC may hear such a motion. See UNMISSET, Reports of the Transition Working Groups, p. 64.

²⁰⁶ In addition to indicting and prosecuting perpetrators, investigations serve the needs of victims, such as ascertaining the fate of missing persons. The investigation of the many unresolved missing persons cases is another area in which Timor-Leste is likely to need international assistance after the SCU ceases to operate. See UNMISSET, Reports of the Transition Working Groups, p. 64.

²⁰⁷ See Alinho, *supra* note 132. Also see Progress Report, *supra* note 114, para. 31.

²⁰⁸ See Interview, *supra* note 59.

members in this group will seek to return to Timor-Leste at some stage, at which time a question will arise as to how they should be treated.

Some have expressed concerns that if some form of justice program in respect of serious crimes does not replace the current regime, instability may result as the perpetrators of crimes return from West Timor.²⁰⁹ It has been suggested that victims, their families, or communities generally may take revenge on returning perpetrators, and equally that those involved in crimes may retaliate against victims or persons who involved themselves in the justice or reconciliation processes.

VI. CONCLUSION

The UN and the international community responded to the savagery of 1999 with an initiative aimed at delivering criminal justice to the victims of East Timor that involved the domestic jurisdictions of both East Timor and Indonesia. While the response was welcomed, it fell short in meeting the challenges from the very outset. The UN and the international community failed to assess seriously the ability of the Indonesian justice system to pursue independently and fearlessly the most politically sensitive cases. The UN-sponsored domestic justice initiative in East Timor failed to provide the authorities with effective and coherent oversight. An unclear mandate provided little direction to the first attempts to prosecute serious crimes.

The paucity of overall strategic planning dealt severe blows to those attempting to keep the serious crimes process together. Highly unrealistic timelines were developed that resulted in attempts to secure quick justice on the cheap. This resulted in a volatile work force, with several adjustments occurring in the leadership of the SCU. The resulting uncertainty was at times reflected in the quality of the work produced. The lack of commitment in planning and support ultimately contributed to the spread of a culture of impunity in the wider region.

In the final analysis, the UN and the international community abandoned ownership of the pursuit for justice in East Timor. This is seen nowhere better than in the refusal of the UN to associate itself with the Wiranto indictment in a practical denial of explicit commitments reiterated in reports of the Secretary-General and the Security Council. In so doing, the UN effectively subverted the cause of justice for East Timor and the struggle for international justice in the region. It forgot the sacrifice of UN staff members killed in 1999 as they tried to ensure that the Timorese people could exercise their right to self-determination. While regional power and economic imbalances adequately explain the conduct of the Timor-Leste government in distancing itself from the indictment, the same cannot be said for the UN and the international community. Indeed, it is because of such power imbalances that the UN was expected to intervene on the side of the powerless.

Notwithstanding the considerable odds stacked against them, the members of the serious crimes regime in East Timor completed an impressive number of investigations, indictments, and convictions. Their work was carried out within East Timor, and it has contributed significantly to the building of the truth of the nation's violent past.

The evidence collected by the SCU's investigators and prosecutors must be properly preserved. Aside from possible use in future prosecutions, the documents and files represent an important record of the most tragic period of the history of Timor-Leste. The interests and safety of the

²⁰⁹ See UNMISSET, Reports of the Transition Working Groups, p. 65, and JSMP, "The Future of the Serious Crimes Unit," January 2004, p. 9.

victims and witnesses who provided the evidence must be protected at all times. Such evidence was provided solely for the purpose of bringing to book the perpetrators of serious crimes. The statements must only be disclosed to a credible criminal justice body tasked with completing the prosecutions. The identities of witnesses who gave evidence in confidence and victims of sexual violations must never be disclosed publicly or to any other process not aimed at prosecutions.

If there is one lesson to be learned from the East Timor experience, it is that where there is insufficient local capacity and an adverse political environment, the international community and the UN should commit sufficient resources and political capital to vindicating the rights of victims and ensuring that justice is done.



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