



## PART ONE. THE SERIOUS CRIMES TRIALS IN EAST TIMOR: AN OVERVIEW

The creation of a hybrid judicial mechanism in East Timor to prosecute serious crimes, including genocide, war crimes, crimes against humanity, murder, torture, and sexual crimes, represented a response by the international community to the violence and massive human rights violations perpetrated by Indonesian military and security forces, and by the Timorese militias under their direction, in 1999. The history of this violence associated with the preparations for, and aftermath of, the vote for independence by 78 percent of the population of this former Portuguese colony has been well-documented and need not be rehearsed here.<sup>6</sup> Massive and widespread destruction of property and forced deportations, as well as large numbers of cases of sexual crimes, torture, and murder, formed the basis of the demand for accountability in the form of criminal prosecutions rather than some other transitional justice mechanism. These demands, however, focused far less on the pre-1999 violence associated with the 25 years of Indonesian occupation. In response to international pressure, and in order to avoid the creation of an international tribunal on the model of the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR, respectively), the government of Indonesia created a new court, the Ad Hoc Human Rights Court, of the Central Judicial District in Jakarta, to try Indonesian perpetrators who had played a leading role in the violence. The well-known failure of these courts to provide the desired accountability has been the subject of intense scrutiny and commentary and need not detain us further.<sup>7</sup>

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<sup>6</sup> See Chronology.

<sup>7</sup> See, for example, David Cohen, *Intended to Fail: Trials before the Ad Hoc Human Rights Court in Jakarta* (New York: International Center for Transitional Justice, 2003); Suzannah Linton, “Unravelling the First Three Trials at the Ad Hoc Court for Human Rights Violations in East Timor,” *Leiden Journal of International Law* (2004): 303–361; and the UN *Commission of Experts Report*.

## JUDGES: THE SPECIAL PANELS FOR SERIOUS CRIMES

In East Timor itself, the United Nations Transitional Administration in East Timor (UNTAET) was created by Security Council Resolution 1272 (1999) to govern the country until independence. The mandate of UNTAET was extended to 20 May 2002, when East Timor became formally independent (at which time UNTAET was replaced by the United Nations Mission of Support in East Timor, or UNMISET).<sup>8</sup> A decisive, and innovative, feature of the justice mechanism established by UNTAET under Security Council mandate was that it was located within the incipient justice system of East Timor. Thus, when UNTAET created four District Courts and a Court of Appeal for East Timor, it assigned to the Dili District Court alone exclusive jurisdiction over the “serious crimes” enumerated above. Within that structure it then established, in June 2000, a court which would exclusively deal with such cases: the Special Panels for Serious Crimes (SPSC). These panels were to be composed of one Timorese and two international judges.<sup>9</sup> No president was ever appointed for the SPSC. This, unfortunately, had as a consequence that no one ever had the official task of representing the interests of the tribunal and commensurate management authority. Moreover, the position of “Judge Coordinator” was created only in October 2003, apparently with a deliberate choice of title that left unclear the scope of its holder’s power to administer the Court and to represent its interests.<sup>10</sup> The choice for that first Coordinating Judge did little to utilize the potential of this position. The second Coordinating Judge, however, Judge Phillip Rapoza, used it after his appointment in 2004 to implement a program of reform which succeeded in greatly improving the management, efficiency, and effectiveness of the SPSC.<sup>11</sup> His success in this reorganization, like that of Deputy Prosecutor General for Serious Crimes (DPGSC) Siri Frigaard earlier in the SCU, points up the very significant difference that good appointments in key positions can make, as well as the damage that can be done by a weak appointments process. The failure to provide strong leadership and management at the very beginning plagued the process to the very end. These problems in chambers and with the prosecution were exacerbated by the failure to create a position of Registrar with overall administrative and management authority and responsibility, as is the practice at other international tribunals.

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Initially, serious crimes cases were heard by one, and later two, of these mixed panels of Timorese and international judges. In the second half of 2004, however, a third panel was added and trials were conducted simultaneously in a second courtroom. This measure was part of the effort to speed up the process in order to comply with the completion date of 20 May 2005 that the Security Council had mandated in Resolution 1543 (2004). More will be said later about the consequences of this deadline and the nature of the completion strategy which it provoked. It is ironic, however, that resources like a third panel of judges and a second courtroom only became available at the time when the premature closure of the Court was being implemented.

<sup>8</sup> United Nations Mission of Support in East Timor (UNMISET), under Security Council Resolution 1410 (2002).

<sup>9</sup> See UNTAET Regulations 2000/15 and 2000/11 as amended by 2001/25. All further citations will be to the amended version of the Regulations.

<sup>10</sup> Interview with Judge Rapoza, 1 September 2004.

<sup>11</sup> Judge Rapoza thus held dual positions in the Special Panels for Serious Crimes (SPSC) after his appointment as Judge Coordinator in March 2004. When referring to his statements or actions in this administrative capacity, this title will be used.

A similarly constituted panel of two international and one Timorese judge (Judge Jacinta Correia da Costa) was established in the Court of Appeal to hear appeals from the Special Panels for Serious Crimes.<sup>12</sup> The Court of Appeal operates in Portuguese, though for a considerable period of time there were difficulties of communication in this language for the non-Portuguese speaking judges on the Court.<sup>13</sup> There was also a period of 19 months in 2002–2003 when the Court of Appeal did not function at all because of prolonged, unexplained, and unjustifiable difficulties in filling a vacant position.<sup>14</sup>

The decision to resort to the unique structure of a hybrid tribunal embedded in the District Court of Dili but staffed, financed, and administered by the UN had a number of consequences, many of which will occupy us later in this report. Three of them deserve mention here.

First, this structure served to diffuse responsibility for the Special Panels, *and* for the resources it would receive. To give a minor example of this, in sharp contrast to the Serious Crimes Unit and the UNTAET/UNMISSET headquarters in the Obrigado Barracks, both of which were located in heavily guarded walled compounds with guard booths and barriers manned 24 hours per day, there was virtually no security at the Special Panels. This lack of security extended to the courtrooms as well. When trials were in session one could enter at will and there were no guards, metal detectors, searches of briefcases, etc. The reason for this discrepancy, Judge Rapoza stated, was that the Timorese government did not want UN personnel guarding its buildings, but that they themselves failed to provide adequate security. As he explained, there was “one unarmed, untrained, and unequipped security guard during court hours. As a result, the courthouse was virtually an open building and it was not uncommon, for those who arrived early at work, to encounter people from off the streets sleeping on the floor of the court vestibule while others used the outdoor faucets to wash.” This guard also proved to be unreliable when needed.<sup>15</sup> UNMISSET did nothing to remedy this situation, despite repeated requests by the Judge Coordinator to obtain security assistance.<sup>16</sup> One could multiply such examples, and they extended even to disputes over who was responsible for providing fuel and repairs for the generator at the Special Panels, which for this reason did not have regular electricity until July 2004, four years into its

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<sup>12</sup> Established by UNTAET 2000/11. The President, Judge Claudio de Jesus Ximenes, has dual Portuguese/Timorese citizenship and has sometimes sat as the national judge with two other Portuguese judges.

<sup>13</sup> Until 2002 the Court of Appeal worked in English, Bahasa Indonesia, and Portuguese. At that time the judges had no effective common language and there was a lack of interpreters to aid them in communicating. When hearings before the Court of Appeal began to be held exclusively in Portuguese in 2003, Judge da Costa did not speak Portuguese well enough to communicate with her fellow judges or to read their written decisions. In 2003, Judge da Costa wrote her decisions in Indonesian, a language not understood by Judge Jose Maria Calvario Antunes and Judge Ximenes. Beginning in 2004 she wrote her decisions in Tetum (to establish the use of that language in the legal system), which was not understood by Judge Antunes and Judge Jose Luis da Goia. The Court of Appeal did not translate these decisions.

<sup>14</sup> During this period one case was heard by a specially appointed interim panel. See also JSMP, *The Right to Appeal in East Timor* (October 2002).

<sup>15</sup> Interview of 30 August 2004. The quotation is taken from “Hybrid Criminal Tribunals and the Concept of Ownership: Who Owns the Process?” Speech delivered at American University School of Law, 30 September 2005, manuscript supplied by Judge Rapoza to the author, pp. 9–10. To appear in *American University International Law Review* 21 (forthcoming).

<sup>16</sup> In the speech referenced in the note above, Judge Rapoza comments, “... no security assistance was ever supplied by the UN mission for the premises. This was the case even when the court was besieged by a large group of protesters and the court gates had to be closed to prevent an incident” (p. 10).

operation and 10 months before it was closed down.<sup>17</sup> That this dual nature had other, even more serious, consequences became apparent at the time of the controversy over the SCU indictment of Indonesian General Wiranto, when the UN (in New York and Dili) and the East Timorese Prosecutor General and his government found it both possible and convenient to disavow “ownership” of the process and, hence, responsibility for the indictment.<sup>18</sup>

The second consequence of the decision to create this hybrid structure involved the staffing of the Special Panels. Since there were no trained judges left in the country after the Indonesian departure, the statutory requirement of Timorese membership on the Special Panels had to be met somehow. Young Timorese lawyers, all of whom had received their legal education in Indonesia, were selected to be judges. Three of them served on the Special Panels and one on the Court of Appeal. They received no systematic training as judges, but the international judges were supposed to serve as mentors. In the initial phase of the trials this proved problematic because of the failure to provide interpreters, but eventually it did play a significant role. The decision to employ Timorese judges who had little previous legal experience led to disputes that are still ongoing over the capacity and qualifications of these judges (see Part Four).

The third result has to do with the fact that embedding the Special Panels in the Dili District Court enabled various Timorese state institutions to exert influence, in ways that were often detrimental, over appointments and other policies. This included requiring judges to come from a civil law jurisdiction.<sup>19</sup> A decision was also made to have one Panel of the SPSC and the Court of Appeal function *only* in Portuguese, despite the directive which provided that the existing four working languages could be used for the duration of the Serious Crimes process. Because of the lack of Portuguese-speaking international prosecutors and defense counsel in the Defense Lawyers Unit, it lengthened the duration of proceedings and added considerable strain to an already deficient and overburdened interpretation, transcription, and translation process.

A relatively high conviction rate has proved common among international and hybrid criminal tribunals, and East Timor proves no exception. The Special Panels for Serious Crimes tried 87 defendants. According to UN statistics, of these, 83 were convicted at trial of crimes against humanity or other charges.<sup>20</sup> One of these acquittals was reversed by the Court of Appeal, and in the end only three defendants were thus acquitted of all charges.<sup>21</sup>

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<sup>17</sup> Interview with Judge Rapoza, 30 August 2004.

<sup>18</sup> The UN *Commission of Experts Report* treats this issue in some detail on pp. 17–21.

<sup>19</sup> An American judge, Justice Phillip Rapoza of the Massachusetts Appeals Court, could be appointed because of his Portuguese ancestry, his ability to speak Portuguese, and his connections with the Portuguese judiciary. These factors served as a cosmetic excuse to violate the policy of appointing judges only from civil law countries. Judge Samith de Silva of Sri Lanka could also be appointed because the Sri Lankan legal tradition has a small civil law component.

<sup>20</sup> The ICTY has convicted 42 accused and 8 have been acquitted (in regard to 3 of whom, appeals are currently pending).

<sup>21</sup> United Nations, *End of Mandate Report of the Secretary-General on the United Nations Mission of Support in East Timor S/2005/310* (12 May 2005), p. 6. In a number of cases, however, the defendants were convicted on some charges but acquitted on others. Further, some of the defendants were acquitted on the offense charged but convicted on a lesser included offense. In many cases the accused made some kind of partial admission of guilt, which, though often not accepted by the Court, made the outcome of the trial predictable. Under UNTAET 2000/30, Section 29A, if the plea is accepted by the Court, there is nonetheless a presentation of evidence by the prosecution in support of its case. The Court considers the evidence and plea, and, if it is satisfied that the plea is adequately supported, it enters a conviction.

This represents a 97.7 percent conviction rate, a matter for some concern, as will be discussed in a later section.<sup>22</sup> In 13 other cases the Indictments were either withdrawn by the prosecution (SCU) or dismissed by the Special Panels. The reasons for some of these dispositions are interesting for an evaluation of the work of the Serious Crimes Unit, and will be discussed below. In one case the defendant was declared unfit to stand trial.<sup>23</sup>

### **PROSECUTION FUNCTION: THE SERIOUS CRIMES UNIT**

The Serious Crimes Unit (SCU) was established in June 2000 as an international unit within the Public Prosecution Service of East Timor, under which there was to be a Deputy Prosecutor General for Serious Crimes (DPGSC) and another for Ordinary Crimes. The head of the Public Prosecution Service is the Prosecutor General of East Timor, who, since October 2001, has been Longuinhos Monteiro. Because of the dual responsibility for the Serious Crimes process, the question of to what extent the Deputy Prosecutor General for Serious Crimes is functionally independent of the Prosecutor General has often been a troubled one. At times, the working relationship between Monteiro and the DPGSC has been extremely strained, though with noted improvement at the end, in 2005, under DPGSC Carl DeFaria.

The Serious Crimes Unit was charged with the investigation and prosecution of crimes falling within the jurisdiction of the Special Panels. Like the Special Panels it existed for five years and underwent a number of changes. The history of the Special Panels and the Serious Crimes Unit is thus a complex one and cannot be treated in detail here. Under the Deputy Prosecutor General for Serious Crimes were teams of international prosecutors, Timorese trainee prosecutors, case managers and legal officers, UN police, international investigators, and technical staff in the areas of forensics, logistics, public affairs, translation and interpretation, information technology, and evidence. In 2002 the Serious Crimes Unit had a staff of 106.<sup>24</sup> Downsizing began in mid-2003, undoubtedly compromising the ability of the SCU to complete its mission. By November 2004 all but one international investigator (David Savage) was gone, pursuant to the UN mandate to close all investigations and to cease filing new Indictments by the end of that month. By early 2005, the Serious Crimes staff numbered 74, about half of whom were national staff. This was down from a high of 124 in April 2003.<sup>25</sup> Key SCU prosecution staff, including the head of the unit, Nicholas Koumjian (DPGSC) and a number of senior prosecutors, were leaving UNMISSET all through mid-2004 and the first half of 2005 as a result of the announcement of the closure of the unit in May 2005. There was no plan or effort by the UNMISSET administration to

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<sup>22</sup> Further, in the Aparicio Guterres Case (No. 18a/2003, discussed in Part Three: Section 4) the prosecution attempted to withdraw the Indictment at the beginning of the trial because of the weakness of its case. Prevented from doing so, it basically did not attempt to make a case, which led to an immediate acquittal. In terms of the Special Panels, not taking into account appeals, the conviction rate was 95.4 percent.

<sup>23</sup> Josep Nahak Case, No. 1a/2004, "Findings and Order on Defendant Nahak's Competence to Stand Trial," 1 March 2005, discussed in Part Three, Section 5. All of the Indictments and Judgments of the Special Panels are available online at [warcrimescenter.berkeley.edu](http://warcrimescenter.berkeley.edu).

<sup>24</sup> Carl DeFaria, Deputy Prosecutor General for Serious Crimes, "ET's Quest for Justice: The Serious Crimes Files," text circulated at the International Symposium on UN Peacekeeping Operations In Post-Conflict Timor-Leste: Accomplishments and Lessons Learned, Dili, 28 April 2005, p. 1. Symposium is referred to in subsequent citations as the UN Symposium.

<sup>25</sup> Serious Crimes Unit (SCU), *Serious Crimes Unit Update*, 21 April 2003.

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try to ensure retention of key personnel or continuity in cases at a time when the unit was functioning under pressure to complete all pending trials and prepare for the handover.

Rapid turnover in staff and ensuing lack of continuity and institutional memory were an ongoing problem in the SCU (and in the SPSC and defense) from the outset. A major cause of this was the UN's practice of typically giving short-term contracts (two to six months, with uncertain prospects for renewal) and ongoing doubts about how long the SCU would remain in existence. This was an issue that persistently impeded its effective functioning.

The Serious Crimes Unit filed 95 Indictments against 391 persons.<sup>26</sup> Of these, 309 were presumed to be outside of the jurisdiction of East Timor as of the end of April 2005. As noted above, pursuant to Security Council Resolution 1543, no new Indictments were issued after November 2005. The Special Panels received 290 requests for arrest warrants to be issued. Two hundred and eighty-five warrants were issued and five denied.<sup>27</sup> The reason for the discrepancy between the large number of indictees and the modest number of accused is the fact that the vast majority of those indicted are residing in Indonesia. These include Indonesians who are members of the Indonesian armed forces (TNI) or other governmental agencies, as well as Timorese who were either TNI members or leaders or members of militia groups opposed to independence. The refusal of the government of Indonesia, and particularly the Office of the Attorney General, to cooperate has meant that the SCU was able neither to interview TNI or militia witnesses or indictees located in Indonesia, nor to obtain custody of the accused. While international arrest warrants have been issued against a number of accused, after the warrant issued against TNI Colonel Yayat Sudrajat in 2003, no arrest warrants were forwarded to INTERPOL by the Prosecutor General of East Timor. The almost complete breakdown of cooperation between the SCU and the Prosecutor General over the issuance of the arrest warrant against Indonesian TNI General Wiranto sealed the fate of the attempt to exert international pressure against indictees through this mechanism.

The issuance of Indictments against so many persons known to be residing outside of the jurisdiction of East Timor was the result of a choice, a deliberate prosecutorial strategy first developed in 2002. Lacking a clear mandate from the Security Council or UNTAET, as well as effective leadership in its first year of existence, over time the Serious Crimes Unit developed a two-pronged strategy. At an early stage, apparently following the model of the investigation conducted by Indonesian National Human Rights Commission Committee of Inquiry (KPP HAM), it decided to pursue 10 "priority cases" which involved crimes against humanity and massacres or the murder of multiple victims. It brought two of these cases to trial fairly early on (Los Palos Case and Lolotoe Case), but a number of the others, particularly because of limited resources and lack of organization and focus, languished in the pipeline. As of December 2002, no Indictments had yet been filed in 4 of the 10 cases.<sup>28</sup>

<sup>26</sup> DeFaria, "ET's Quest for Justice," p. 6. DeFaria notes that the figure given by the Special Panels for the number of persons indicted is 443. The discrepancy is due to the fact that "some accused appear in multiple Indictments."

<sup>27</sup> UN *Commission of Experts Report*, p. 27.

<sup>28</sup> Those cases were Kailako, Maliana, Suai Church, and "Attack on Bishop Belo's Compound and the Dili Diocese." SCU, *Serious Crimes Unit Update*, December 2002. By late May 2003, Indictments had been filed in 9 of the 10 cases. SCU, *Serious Crimes Unit Update*, 28 May 2003. The final Indictment, Maliana, was filed on 10 July 2003.

It was also not clear on what basis these cases deserved to be identified as having priority over all others. As Julia Alinho, the head of Public Affairs for the SCU put it, the creation of the label of 10 “priority cases” had as much to do with politics and public relations as it did with the substance of the cases. This included the labeling of certain events as “massacres” (where that term did not necessarily fit). More importantly, this gave an SCU lacking real focus or leadership a “seeming coherence in its prosecution policy,” but it also had high costs. Among these were that investigations and facts “were made to fit the pattern” indicated by the policy, and that other kinds of cases were neglected.<sup>29</sup>

In early 2002 under the leadership of newly appointed DPGSC Siri Frigaard, the Serious Crimes Unit attempted to refocus its strategy and use a great deal of its limited resources to investigate high-level Indonesian suspects who had played a leadership role in organizing or perpetrating the widespread and systematic crimes against humanity that occurred in 1999. The SCU was, of course, well aware that it was unlikely that they would ever appear before the Special Panels. They also continued to indict and prosecute low-ranking Timorese, many, but by no means all of whom, were connected to the 10 priority cases. This multipronged strategy inevitably meant that already limited resources (especially with downsizing having been ordered by the UN in 2003) were stretched even thinner. After all, at the peak of its staffing, the SCU only had 12 international investigators to cover the 13 districts of East Timor and investigate some 1,400 murders, not to mention other crimes.

An additional factor played an important role in 2004 in concentrating on defendants located outside of the country. Once the completion date of 20 May 2005 was announced and the responsible units were mandated to complete all pending trials by this date, it was inevitable that more new cases could not be fed into the pipeline. As a result, a policy decision was made in the SCU in mid-2004 not to indict any more accused who *could* be brought to trial. To do so would make it impossible to achieve the UN’s bureaucratically defined goal of completing the pending cases. DPGSC Nicholas Koumjian stated in September 2004 that it would require all existing resources just to complete the 11 cases then pending.<sup>30</sup> No more could be added. That this was the result of a deliberate decision not to indict more individuals who *were* in the country and could be brought to trial was confirmed for me in interviews with prosecutors in the SCU and judges in the SPSC.<sup>31</sup> As one prosecutor put it, “We had to think about not indicting people because of the time constraints. We had no choice.” He explained that the SCU was aware that there were serious crimes suspects in the jurisdiction, but “when time was really missing we selected cases we thought could be finished by 20 May.” Since in order to achieve the goal of the completion strategy they depended upon the ability of the Special Panels to complete pending cases, they made a decision not to indict so as not to create more work for the Court and slow up the completion process. He concluded, “We could have indicted so many more.”<sup>32</sup>

These kinds of decisions have faced every war crimes tribunal from Nuremberg to Sierra Leone. Prosecutors operate with limited resources and must establish priorities. A wide range of factors, inevitably including political ones, go into shaping that choice. In the case

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<sup>29</sup> Interview with Julia Alinho, 28 March 2005.

<sup>30</sup> Interview with DPGSC Nicholas Koumjian, 4 September 2004, Dubrovnik, Croatia.

<sup>31</sup> Interview with Judge Rapoza, 19 February 2005.

<sup>32</sup> Interview with Charles Nsabimana, 18 February 2005.

of the Serious Crimes Unit those choices were particularly difficult. This had to do with the fact that on the one hand its resources were extremely limited. On the other hand, literally all of the mid-level and high-ranking suspects were in Indonesia, outside of the jurisdiction of the Special Panels. The most obvious strategy option, to concentrate resources on those who, to use two current formulas, “bear the greatest responsibility” or were “most responsible” for the violence, was scarcely viable, for it might have meant having no trials at all. In the case of the Serious Crimes Unit, it was a serious failing of UNTAET not to have clearly defined their mandate, as was done for most of the other “hybrid” tribunals. Under Security Council Resolutions 1543 and 1573 (2004) the SCU and SPSC were mandated to complete their 10 “priority cases,” but this was very late in the day for the Security Council to concern itself with the SCU’s mandate and strategy.

The SCU could, of course, have concentrated its resources on investigating and prosecuting cases where the defendants were likely to be obtainable. Moreover, the 95 Indictments represent only 572 of the at least 1,400 murders thought to have been committed in East Timor as part of the 1999 violence. Many other cases of serious crimes, and, in particular, crimes against humanity such as rape, torture, forced deportation, and destruction of property were not investigated at all, because of the prioritizing of murder cases in general and of indicting high-ranking Indonesian alleged perpetrators. Further, at the closure of the SCU, 514 investigative files remained open and had not been brought to indictment, and another 50 cases that had been brought to the SCU had not yet been investigated.<sup>33</sup> None of the cases referred to the Serious Crimes Unit by the Commission for Reception, Truth, and Reconciliation (CAVR) were prosecuted and a number were in fact sent back because of lack of capacity.<sup>34</sup>

The justification for the decision by DPGSC Siri Frigaard in 2002 to pursue indictments for a group of key high-ranking Indonesian officers is clear. To have done otherwise would have meant that those most responsible for the violence in East Timor in 1999 would have not only enjoyed total impunity but would not even have had a record of their crimes provided for the international community and the people of East Timor. If international arrest warrants could have been issued against all of them, the force of this accusation would have been amplified even if the results might have been the same. Responsibility for the failure to do so must be laid jointly at the doorstep of the UN and of the government of East Timor.

Further, not to indict those Indonesians and Timorese who played leadership roles in planning, organizing, orchestrating, or perpetrating the violence would have meant that only very low- or relatively low-level Timorese militia members were accused. As it is, one of the most frequent criticisms of the Serious Crimes process is that it only succeeded in convicting a relatively small number of low-level followers, nearly all illiterate farmers and fishermen caught up in the conflict at the local community level. The work of the Serious Crimes Unit, however incomplete, is widely praised for having helped to document a part of the historical record and provided the basis for future prosecutions against the high-ranking indictees before a future international or other tribunal. One need only imagine how marred the legacy of the Serious Crimes Unit would have been if these high-ranking suspects had remained unindicted.

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<sup>33</sup> UN *Commission of Experts Report*, p. 16.

<sup>34</sup> Linton, *Putting Things into Perspective*. Linton aptly concludes that “... it was always predictable that none of the cases of Serious Crimes that were extracted from the CAVR process would be indicted, let alone tried. So, accountability for Serious Crimes has boiled down to a question of luck.”

*UNTAET  
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### **DEFENSE FUNCTION: THE DEFENSE LAWYERS UNIT (DLU)**

The third leg of the Serious Crimes process was the defense function. UNTAET originally made no provision for defense. When I interviewed UNTAET senior staff in early 2002 I was told that there was no UNTAET budget for the defense function. At the same time, Timorese public defenders and their international advisor stated that they had no funds for investigation, to bring witnesses to Dili, or for interpreters, office supplies, or virtually anything else. Indeed, at this time the lack of capacity in the defense component was one of the most serious and troubling shortcomings of the trials and made itself vividly felt in the courtroom to the obvious disadvantage and detriment of the accused.<sup>35</sup> This was exacerbated by the fact that the Timorese defense counsel lacked courtroom experience and had no training or experience in international criminal law. It was originally envisaged that the utilization of Timorese defense counsel with international mentors serving as defense lawyers would assist in capacity building. This effort failed because of lack of funding, resources, and commitment. In early 2002 there were no funds for interpreters, so that the international mentors and the Timorese lawyers could effectively communicate with one another. Library and research resources were also not made available for those young Timorese lawyers who were somehow supposed to prepare defenses in murder cases while “learning on the job.” It was only in mid-2002 that these problems began to be addressed, eventually by phasing out Timorese participation altogether.

The glaring deficits of the defense arrangement were well-known to all of the Serious Crimes Unit and UNTAET staff that I interviewed in 2002. Stuart Alford, a prosecutor in the SCU, recounted numerous times when he had coached defense counsel in the courtroom while the trial was underway out of his dismay for the consequences of their inexperience for their clients.<sup>36</sup> At this time the Serious Crimes Unit also began to fund the transportation costs for bringing defense witnesses to Dili out of the prosecution funds for its own witnesses. No witnesses had been called by the defense in the first 14 trials. Two of the international advisers to the Special Representative of the Secretary-General stated at this time that discussions were underway to deal with this issue because it was recognized that they now had “a Rolls Royce” of a prosecution unit and “an old heap” for the defense.<sup>37</sup> These “concerns” finally bore fruit in September 2002 with the creation of the Defense Lawyers Unit as a component of UNMISSET, where it was also housed. By April 2003 only international defense counsel in the DLU were representing defendants before the Special Panels. Why the development of a viable defense function took so long, however, has never been adequately explained.

The creation of the Defense Lawyers Unit was a welcome development, especially for the accused, but its effectiveness has also been questioned. There was certainly a wide range of qualifications, experience, and capabilities among DLU staff. As Judge Rapoza has noted, “Although the creation of the Defense Lawyers Unit was a significant step forward, the fact that it was staffed primarily by inexperienced trial lawyers was always a serious concern. It

<sup>35</sup> Interview with international defense counsel Sylvia de Bertadano, January 2002. See also David Cohen, *Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?* AsiaPacific Issues, no. 61 (Honolulu: East-West Center, August 2002).

<sup>36</sup> Interviews, 14 and 16 January. Interview with Prosecutor Brenda Sue Thornton, 14 January 2002.

<sup>37</sup> Interviews, 16 and 18 January 2002.

was hard to accept that many of the defense lawyers who appeared before us were trying *their first case ever* in front of the Special Panels” (emphasis added).<sup>38</sup>

The DLU was clearly not adequately resourced in terms of investigators, research tools, and staff. From September 2002 to closure in May 2005 it grew from three to seven defense lawyers. The inadequacy of defense representation before the creation of the Defense Lawyers Unit is beyond doubt. The “Equality of Arms” Section of Part Two will assess the critical question of to what extent this situation improved under the DLU. As DPGSC Siri Frigaard put it, “What I am afraid of is that afterwards, some years ahead, people will say that it’s not justice because they didn’t have a good enough defense or they didn’t have proper interpreters.”<sup>39</sup>

It is understandable that the failure to provide accountability by trying high-ranking Indonesian indictees has occupied center stage in concerns about the East Timor trials. From an international justice and human rights perspective, however, the issue of whether or not accused were afforded fair trials that met the highest international standards and provided them with an adequate opportunity to defend themselves is at least an equally serious concern, especially when the trials are being conducted by the United Nations.

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<sup>38</sup> Written communication to the author, 5 December 2005.

<sup>39</sup> Quoted in Megan Hirst and Howard Varney, *Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor* (New York: International Center for Transitional Justice, June 2005), p. 21, n. 142.