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## ‘Justice on the Cheap’ Revisited: The Failure of the Serious Crimes Trials in East Timor

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**SUMMARY** From 2000 to 2005, a UN-sponsored tribunal in East Timor sought to achieve accountability for violence associated with the 1999 vote for independence from Indonesia. Despite criticism of the tribunal's performance, the UN has maintained that it was a success. In fact, the East Timor tribunal represents a virtual textbook case of how *not* to create, manage, and administer a “hybrid” justice process. It was handicapped from the beginning by a debilitating lack of resources, an unclear mandate, inadequate recruitment, ineffective management by a peacekeeping mission that had other priorities, and above all a lack of political will both at UN headquarters and at the mission level. Trial practices and jurisprudence were too often deeply flawed, in important respects did not meet international standards, and, in a significant number of cases, undermined the rights of the accused to a fair trial. Because the UN risks repeating some of the same mistakes in Cambodia, it is particularly important now to assess the failings of the East Timor trials.

## Introduction

In August 2002, I reported in this series on serious flaws in the trials underway before the UN's Special Panels for Serious Crimes in East Timor.<sup>1</sup> In the intervening two and a half years until the closing of the Special Panels in May 2005, substantial attempts were made to improve the performance of the tribunal. This paper will assess the effectiveness of these measures in meeting international standards and provide an assessment of the trial process as a whole.<sup>2</sup> It will also indicate how lessons learned from the East Timor experience are important for the new Khmer Rouge Tribunal now being created by the UN and the Cambodian government.

May 20, 2005, marked the end of the five-year UN Peacekeeping Mission in East Timor that aimed to set this new nation on the path to democracy and stability. The Security Council had also mandated the mission to achieve accountability for the estimated 1,400 or more murders and the widespread destruction associated with the September 1999 referendum that effectively ended the illegal 25-year Indonesian occupation of this former Portuguese colony.<sup>3</sup> This violence, which drove more than half of the population from their homes, was carried out by Timorese militias organized, financed, trained, equipped, and assisted by the Indonesian Armed Forces.

*Lessons learned from East Timor are important for the new Khmer Rouge Tribunal*

## The Special Panels for Serious Crimes

In 2000, the UN Transitional Administration in East Timor (UNTAET) created the Special Panels for Serious Crimes within the Dili District Court and the Serious Crimes Unit (SCU) under the Timorese Prosecutor General's Office, to try those responsible for "serious crimes," such as war crimes, genocide, and crimes against humanity. The Special Panels (and the Court of Appeal) were each composed of two international judges and one Timorese judge. This model was adopted despite the fact that none of the Timorese appointees had any previous judicial experience or training. The decision to employ mixed panels of national and international judges, and to embed the UN tribunal within the new, UN-created Timorese

## Indictees at large in Indonesia

The Serious Crimes Unit filed 95 indictments against 391 persons. Under the leadership of Deputy Prosecutor General for Serious Crimes Siri Frigaard from 2002 to 2003, prosecutorial strategy shifted away from a focus on low- and mid-level Timorese militia members toward indictment of high-ranking Indonesian military officers suspected of organizing or ordering the violence. Without this move against those bearing greater responsibility for crimes against humanity, the legitimacy and credibility of the work of the Special Panels and the Serious Crimes Unit might have been severely undermined. The continuing existence of those indictments and arrest warrants also offers hope, however remote, for accountability in the future. The reason for the discrepancy between the large number of suspects indicted (391) and the modest number of accused actually brought to trial (87) is that the vast majority of those indicted reside in Indonesia.

The issuance of an arrest warrant against General Wiranto in May 2004 by Special Panels Judge Phillip Rapoza resulted in a complete breakdown of cooperation between the Serious Crimes Unit and the Prosecutor General of East Timor. The Timorese government refused to request INTERPOL to issue an international arrest warrant against Wiranto, effectively ending the effort to use this mechanism to exert pressure on Indonesia. Some two weeks after the issuance of the warrant, Xanana Gusmao, the President of East Timor, flew to Bali and warmly embraced his "dear friend" General Wiranto in front of assembled journalists and photographers.

justice system, made this one of the first so-called "hybrid tribunals," designed to provide a new model for international justice.

Trials began in 2000, with inexperienced Timorese public defenders (all recent law school graduates) and a small group of international lawyers representing the accused against a professional international prosecution team. Operating without a clear mandate from the Security Council, the Serious Crimes Unit did not develop and implement an effective overall prosecutorial strategy until early 2002. Because of the inadequacies of the defense and numerous other critical shortcomings in the trial process in the period leading up to Timorese independence in May 2002, the UN faced severe criticism, both domestic

*The UN's performance in East Timor represents a virtual textbook case of how not to run a 'hybrid' justice process*

and international. Recognizing these inadequacies, the UN made substantial attempts from 2002 to 2005 to improve the performance of the tribunal.

There were significant improvements in critical court functions, including defense, recruitment of judges, and translation, and the UN Secretary General now portrays the Serious Crimes process as a model of success. Timorese officials, however, disagree. For example, in a UN International Symposium held in Dili from April 28–29, 2005, Prime Minister Mari Alkatiri denounced the trials as having been a complete waste of time and money, and other Timorese government ministers echoed this sentiment.

In contrast to many ordinary citizens, Timorese governmental elites had never supported the trials in the first place. Their top priority was not accountability but to establish friendly relations with their powerful neighbor, Indonesia. This was perhaps most clearly manifested in the debacle over the refusal of the Prosecutor General of East Timor to forward to INTERPOL the arrest warrant for the Commander of the Indonesian Armed Forces during the 1999 violence, General Wiranto (see sidebar, p. 2). This policy reached its logical conclusion in 2005 with the creation of a joint Timorese-Indonesian Commission on Truth and Friendship. This discrepancy of purpose handicapped the trial process from beginning to end.

Under international pressure to end the impunity of high-ranking Indonesians accused of orchestrating the 1999 violence, UN Secretary General Kofi Annan appointed a Commission of Experts to assess both the trials undertaken by the Special Panels in East Timor and those held by Indonesia's Ad Hoc Human Rights Court (see sidebar, p. 3). Reporting in July 2005, the Commission somewhat cautiously concluded that the Special Panels trials had met international standards and produced jurisprudential innovations. At the same time they denounced the Indonesian trials and recommended the creation of a new international tribunal to try high-ranking Indonesian suspects if the two governments did not implement certain recommendations within six months. It may be argued, however, that the Commission applied a double standard to these two trial programs, failing to apply the

same critical criteria to the Dili trials as they did to those in Jakarta.<sup>4</sup>

In contrast, this paper argues that the performance of the UN in East Timor represents a virtual textbook case of how not to create, manage, and administer a "hybrid" justice process. Handicapped from the beginning by a debilitating lack of resources, an unclear mandate, inadequate recruitment, ineffective management by a peacekeeping mission that had other priorities, and above all a lack of political will both at UN headquarters and at the mission level, the Special Panels struggled to meet the many challenges they faced. In light of these challenges, it was perhaps inevitable that trial practices and jurisprudence were too often deeply flawed and in important respects did not meet international standards despite the best efforts of many highly dedicated participants. In a significant number of cases, including at the appellate level, these shortcomings were serious enough so as to undermine the rights of the accused to a fair trial. Because the UN risks repeating some of the same mistakes in Cambodia, it is particularly important now to assess the failings of the East Timor trials.

### The Trials

From 2000 to 2005 the Special Panels conducted 55 trials, involving 87 accused. Of these, 83 were convicted, but one of the four acquittals was later

#### The Jakarta Trials

In response to international pressure, Indonesia created the Ad Hoc Human Rights Court in Jakarta, to try Indonesian perpetrators who had played a leading role in the violence. In 2002–2003, 18 accused, mostly officers in the Indonesian Armed Forces, were tried by this court resulting in six convictions, including General Adam Damiri. On appeal, however, all convictions except militia leader Eurico Guterres (the only Timorese national on trial), were reversed. Because of the failure to punish these military officers, the Jakarta trials are regarded as having failed to provide accountability. (See endnote 4 for more information.)

reversed by the Court of Appeal in a controversial decision. Almost all of those convicted were low-level perpetrators, primarily illiterate or semiliterate farmers who had, in one way or another, come to participate in locally based pro-Indonesian militias. Only a few were (low-ranking) members of the Indonesian Army. These 55 trials, however, prosecuted only a small number of those indicted and about 600 other individuals were investigated but never brought to trial. Only 592 of the approximately 1,400 documented homicides were represented in the Indictments, which addressed an even lower proportion of crimes like sexual violence and torture.

The premature ending of the UN justice process in East Timor thus arose not from the lack of cases to try, but rather from a decision by the Security Council to end the East Timor mission. Because the Special Panels were located within the mission, it was mandated that primarily for financial reasons the trials would also have to conclude at the same time: May 20, 2005. The UN defined “success” for itself as completing all pending cases and handing over its files to the Timorese government by that date.<sup>5</sup>

**Structural issues.** Being placed under a peacekeeping mission created difficulties for the Special Panels from beginning to end. In the early stages, vital security and infrastructural needs for the devastated country took priority over the more “marginal” task of adequately equipping the Special Panels and SCU. This neglect was exacerbated by allowing decisions about staffing, resources, and management to be made by mission personnel who lacked experience in court administration and were unaware of what the Special Panels and prosecution units required to carry out their mandate according to international standards. No powerful chief administrative officer (equivalent to the position of Registrar in most of the other international tribunals) was ever created, nor was a President of the Special Panels ever appointed. This, coupled with the failure to appoint a permanent head of the SCU until 2002, meant that the process never had spokespersons with the authority and responsibility to demand the resources they needed. In the later stages, the decision by the Security Council to

end the peacekeeping mission in May 2005 meant that the trials ended in mid-process.

The announcement of the mandate to end all trials by the mission’s May 20, 2005 completion date had a number of important consequences. Many lawyers in the Defense Lawyers Unit believed it produced pressure to agree to plea bargains.<sup>6</sup> As the head of the Defense Lawyers Unit commented, “Clients often have no choice but to enter into a plea agreement” as the result of “a highly coercive technique to elicit a plea of guilt and avoid trial and get a lesser sentence.”<sup>7</sup> On a few occasions certain judges cut short defense cross-examination with explicit reference to the time constraints imposed by the UN mandate.<sup>8</sup> Further, in order to comply with the Security Council Resolution and to ensure that the UN could claim a successful “completion” of the process, no further cases ready to go to trial were put into the pipeline after mid-2004. As one senior prosecutor informed me, “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 potential defendants within the jurisdiction, but “when time was really missing we selected cases we thought could be finished by May 20.” He concluded, “We could have indicted so many more.”<sup>9</sup> Many investigations underway were never completed because of the restriction on new indictments and downsizing in the SCU.

In addition to a general lack of resources, in the early phase of the process the most serious deficiencies affecting the quality of the early trials were a shortage of competent defense counsel and a lack of adequate translation and transcription services. Beginning in 2000, significant improvements were made in all of these areas but they were not sufficient to eliminate the problems. For example:

- Simultaneous translation systems were introduced, but they wound up not being used in trials before the Special Panels because of technical problems and because none of the translators had been trained in simultaneous translation.
- To the end of the process, none of the court translators were professional legal translators. Only

*The decision by the Security Council to end the peacekeeping mission in May 2005 meant the trials ended in mid-process*

one had any professional training. Despite significant improvements in performance, serious translation problems remained to the end.

- Until late 2001 there was no transcription or recording of trial proceedings. Judges' notes were the record used on appeal. A significant improvement was made when transcribers were hired; however, none of them were professional court transcribers. Only two of them had stenographic experience, but since there were no court steno machines, transcribers just took notes on laptop computers by, in the words of the Judge Coordinator Phillip Rapoza, "typing fast."<sup>10</sup> This resulted in flawed transcripts, often with gaps of several minutes or more because of the inability of the transcribers or translators to keep up.
- In late 2002 the UN administration decided to end the "experiment" with a defense function that relied on inexperienced Timorese public defenders working in uneven mentoring relationships with international counsel. An internationally staffed Defense Lawyers Unit (DLU) was created, though it became fully functional only in April 2003. The DLU brought about a marked improvement in the defense function, but as virtually all this author's informants noted, there remained serious issues of "equality of arms" (rough parity in resources and competence) between defense and prosecution.

Other problems persisted as well. Case and file management systems were only introduced or made effective in the last six to twelve months of the trials. Before that, chaos reigned. The number of illegal pre-trial detentions began to diminish in early 2004, but nonetheless remained unacceptably high. Because of unwillingness to provide funding, there was never an effective witness and victim protection program. Witnesses and victims coming to Dili sometimes rode in the same minibus as the accused they were to testify against—including in sexual violence cases. The accused had access to witnesses both at the courthouse and, in many cases, in their communities. Both the Coordinator of Witness Protection and prosecutors were aware of a significant number of serious cases of witness intimidation.<sup>11</sup>

Ultimately, it was lack of political will, on the part of the Security Council and the UN Secretariat, to correct recognized deficiencies that underlay such problems. They were exacerbated by problems in Dili, which included the dual role of the Special Panels as a UN creation located within the domestic justice system of East Timor, the lack of effective management and leadership, and the fact that crucial decisions about resources continued to be made by UN administrators with no understanding of how a court functions. Though there was an increase in the budget for the Serious Crimes process from US\$6.1 million in 2002 to US\$7–8 million in 2004–2005, lack of resources remained a crippling problem.<sup>12</sup>

Despite such obstacles, and thanks to improvements in the recruitment process, serious attempts were made to improve the performance of the SCU and the Special Panels. A more or less complete reorganization of the SCU and a rethinking of prosecutorial strategies and priorities occurred at the beginning of 2002 with the advent of Siri Frigaard as the Deputy Prosecutor General for Serious Crimes. By early 2003 the Defense Lawyers Unit was functioning at a level that had ameliorated, though not eliminated, the weakness of the defense function. In 2004 and 2005, major improvements were made in the Special Panels under the leadership of Judge Coordinator Phillip Rapoza and with the support of the new Special Representative of the UN Secretary General Sukehiro Hasegawa.

While we may justifiably laud the dedicated individuals who succeeded in addressing some of the most serious problems that had plagued the Court from its earliest stages, this does not excuse the UN administration in New York and the mission administration in Dili for having allowed them to occur in the first place and, even worse, to persist for so long after they were clearly recognized. In the case of the reorganization of the defense function, the head of the DLU has acknowledged that his unit did not become fully functional until April 2003, midway through the four-year trial process.<sup>13</sup> It cannot be emphasized enough that what was at stake here is not bureaucratic efficiency, but rather the lives and liberty of individuals accused of the most serious crimes. Many of those individuals convicted in trials in which their rights

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were not adequately protected continue to serve out their sentences in Becora Prison in Dili.

In regard to the Special Panels, the improvements initiated by Judge Coordinator Rapoza only occurred in mid-2004, the last year of trials. These improvements included functions as basic as providing reliable electricity for the Court, hiring the first professional Court Clerk and the first professional translator, and creating a file and calendar management system. These are all resources that are fundamental to the proper functioning of such a court. As Judge Rapoza summarized the situation at the end of the trials, “We only now are where we should have started out.” Beyond the question of resources and court systems, the same, he added, was true of “equality of arms” between prosecution and defense, which also was only achieved in the last phase of the trials.<sup>14</sup> Who is responsible for the fact that it took three years to create conditions that should have been at hand on the day that the first trial began? In January 2002 UN administrators in Dili were already fully aware of all of these problems and of their potential impact on the adequacy and fairness of the trials.<sup>15</sup>

Such problems also affected the Court of Appeal, which, in addition to deciding all appeals from Serious Crimes cases, is the only appellate court and the highest judicial institution in East Timor. To cite only the most serious of these problems, because of the failure of the UN administration and the Timorese government to agree on the recruitment of new judges, the Court of Appeal did not function for a full 19 months in 2002 and 2003. This meant that during this period of more than one and a half years there was no appellate institution in the country. During this period neither appeals from convictions nor appeals from pre-trial detention hearings could be heard. Here one can again see how the failure to expeditiously solve problems facing the Court had a direct impact upon the rights and welfare of the accused.

There has been no adequate explanation of why the problems mentioned above took so long to even partially correct. In the end they represent a failure of management and accountability by those UN officials in New York and Dili with responsibility for the Special Panels, and of political will on the part

of the Security Council in its role of oversight of the Mission.

**Individual trials.** Apart from the systemic and structural issues that affected the Serious Crimes institutions as a whole, problems also manifested themselves in particular cases. In interviews with eight of the nine Special Panels judges serving in 2004–2005,<sup>16</sup> a significant majority expressed reservations about the adequacy and/or fairness of some aspects of the proceedings. These ranged from complaints about the negative impact of persistent translation difficulties to comments about excessively high conviction rates and doubts about the adequacy of defense representation in some trials. Some of the reservations were even more serious and focused on the 97 percent conviction rate. One of the international judges opined that some of the judges were not willing “to hear both sides.” He added, “They do not have an open mind about the defense.” These judges, he said, think that if the defendant is a militia member he is for this reason guilty: “They ignore the presumption of innocence” and use their power in an arbitrary manner.<sup>17</sup> Another expressed deep concern over the low number of acquittals and stated that he had not come to Dili “just to rubberstamp a machine that produces guilty verdicts.”<sup>18</sup> Several others focused on the fact that only the lowest level militia members, most of them desperately poor, had been convicted.

The Judgments handed down by the Special Panels and Court of Appeal vary widely in quality and content. These range from jurisprudential high points such as a groundbreaking decision by Judge Rapoza on competency to stand trial<sup>19</sup> to decisions that manifest an apparent ignorance of basic doctrines of applicable international criminal law. A few cases involve decisions that violated provisions of the UNTAET Regulations governing the Special Panels and the fundamental rights of the Accused. Three of these will now be briefly considered.

**The trial of Rusdin Maubere.** Rusdin Maubere (Case No. 23/2003, Judgment of May 27, 2004) was indicted on September 22, 2003, on charges of enforced disappearance and torture as crimes against humanity, committed during an anti-independence

militia operation. The defense, not unusually, called no witnesses at trial, and the Judgment hardly referred to the case, if any, made by defense counsel. Among other shortcomings, the Court acknowledged serious contradictions in the testimony of prosecution witnesses but stated that this was understandable because of the lapse in time and the fact that the witnesses are illiterate and have a limited capacity for reasoning and memory. The effect of these contradictions on the issues of burden of proof and reasonable doubt was not considered.

But there is another far more serious aspect of the Rusdin Maubere case: The accused was convicted of a crime—murder as a crime against humanity—with which he was not charged and against which he had no opportunity to defend himself. How could this have occurred?

In considering the evidence on the charge of disappearance, the Court concluded that there was no disappearance because the victim was taken to a militia post to be beaten and murdered. His body was not found, but his fate was known. This conclusion, however, did not lead to an acquittal. The Court instead found that the evidence before it was sufficient to establish the elements of murder as a crime against humanity, which had not been charged and on which, accordingly, no evidence was introduced.<sup>20</sup> The Judgment concluded the Panel was justified in making a “new juridical-penal qualification of these facts” and on this basis entered a conviction against the accused for murder as a crime against humanity.

Such a conviction violates the most basic principles of fairness and due process by denying the accused his right to be informed of the charges against him and an opportunity to defend himself against them. It is also prohibited by the Statute that governs the Special Panels, UNTAET Regulation 2000/30, Section 32.4, and violates Article 14.1 of the International Convention on Civil and Political Rights, which is binding upon the Special Panels. In other words, in this and other similar cases, the Court violated the law that it was supposed to apply. Rather than providing a model of the rule of law for this newly founded legal system, such Judgments represent an excuse for violating it.

***More than one defendant was convicted of a crime with which he was not charged and against which he had no opportunity to defend himself***

The excuse has sometimes been offered that this manner of proceeding, while it may seem alien to Anglo-American lawyers, reflects the practice of civil law systems such as those of continental Europe. Even if this were true, however, there is no question that the Special Panels and Court of Appeal were legally bound to follow the Rules of Procedure of their own Court. Moreover, all legal systems provide regulations for circumstances under which charges may be amended. But they also provide rules that carefully define when such changes are permissible. In the Rusdin Maubere and other similar cases, these rules were ignored by the Court sworn to apply them.<sup>21</sup>

In short, the conviction of Rusdin Maubere on a charge that was not included in the Indictment (and that was not a lesser included offense) represents a serious miscarriage of justice. It also demonstrates the judges’ apparent ignorance of the procedural law of their own Court. The conviction also violated the virtually universally recognized principle that the accused must be given an adequate opportunity to answer the charges against him. This, clearly, he was prevented from doing when, after the trial was over, the Court’s Judgment made a new “juridical-penal qualification of the facts,” transmuting a charge of enforced disappearance into one of murder as a crime against humanity.

Indifference to the rights of the accused was manifested also by the fact that after making their “juridical-penal qualification,” the judges did not even enumerate the required elements of murder as a crime against humanity or make specific findings on the evidence and facts that could support that charge. They also gave no indication of what theory of responsibility their conviction was based upon. On this basis Rusdin Maubere was sentenced to three years imprisonment for a charge against which he had no opportunity to defend himself. The decision of the Special Panel was appealed and the Court of Appeal changed the conviction to one of ordinary murder, which was also not charged in the Indictment. The Court of Appeal seemed equally unconcerned about convicting an individual while denying him an opportunity to contest the charges against him.

*In certain cases the Court of Appeal almost completely ignored the substantive and procedural standards that should govern its decisions*

**The trial of Paulino de Jesus.** In a number of other cases the Court of Appeal also rendered highly controversial decisions in which it convicted individuals of crimes with which they not only had not been charged, but also had not been convicted during the trial before the Special Panels.<sup>22</sup> Among the most notorious of these are the Paulino de Jesus and Armando dos Santos cases.

Paulino de Jesus, having been charged with murder as a crime against humanity, was acquitted of all charges by the Special Panel in a well reasoned decision concluding that the Prosecution had clearly not met its burden of proof beyond a reasonable doubt. He was then convicted by the Court of Appeal based solely upon its opinion of the credibility of particular witnesses (all family members of the deceased).

The Special Panel had carefully analyzed all of the testimony both for and against the accused and the credibility of the witnesses who had given this testimony. The decision by the Court of Appeal completely ignored findings on the serious contradictions and frequent changes in the testimony of the victim's family. These included contradictions on facts as basic as whether or not one of these two witnesses was even present at the scene when the killing allegedly occurred. It also did not discuss the testimony or credibility of the four defense witnesses whose testimony contradicted them and supported the accused's alibi. The decision of the Court of Appeal did not even mention the Special Panel's meticulous analysis of credibility and reasonable doubt, let alone provide a rationale for overruling it. The decision of the Court of Appeal clearly failed to provide a reasoned justification for this deprivation of liberty and displayed an almost complete ignorance of the substantive and procedural standards that should govern its decisions. There was no consideration of the burden of proof or the standard of review, and there was considerable confusion about the required elements of the relevant offenses.

**The trial of Armando dos Santos.** In the Armando dos Santos Case, the accused was convicted by the Court of Appeal of a crime that was not charged in the Indictment and that is also legally incoherent. Having been indicted and convicted by the Special

Panel of murder, he was then convicted by the Court of Appeal of "a crime against humanity in the form of genocide." No such crime exists under international criminal law, for genocide and crimes against humanity are completely separate *categories* of crimes. The decision of the Court of Appeal also failed to consider the elements of genocide and whether they were met by the evidence introduced at trial.

Beyond all of this, however, is the simple fact that the accused had no opportunity to defend himself against this charge, a charge on which no evidence was presented by the prosecution since it was not included in the Indictment. This conviction, like those of Paulino de Jesus and Rusdin Maubere, violated not only basic principles of justice and relevant international conventions, but also the Rules of Procedure of the Special Panels and Court of Appeal themselves. Since the Court of Appeal is the highest court in East Timor, the accused were unable to appeal their convictions, and served their sentences in Becora Prison. The Court of Appeal, with its international judges recruited and paid by the UN, is supposed to be a model for the fledgling legal system of East Timor. Such judgments hardly set a good example. These problems were well known to UN administrators in Dili since mid-2003 and no steps were taken to correct them.

**Summary of problems.** The shortcomings of the Special Panels and Court of Appeal can be summarized as follows:

- A significant number of Judgments that: (1) do not base their findings upon a reasoned analysis of the facts and legal issues or a systematic assessment of credibility; (2) fail to address, or sometimes even to mention, the defense's case; or (3) fail to enumerate, define, or discuss the elements of the offense, the theory of responsibility and the requirements to prove it, or the relevant jurisprudence.
- Lack of due consideration in some cases for the interests of the accused, especially where the defense was manifestly unprepared to represent those interests. This is particularly true in earlier



*The failures of the process are a result of the lack of political will on the part of the UN administration*

cases in regard to advice pertaining to the right to remain silent and the consequences of admissions or partial admissions of guilt as well as to the production of potentially exculpatory witnesses or evidence.

- Inadequate translation and transcription of proceedings.
- Inadequate protective measures for victims and witnesses.
- Serious questions about “equality of arms” until the last year or so of the trials.
- Numerous cases of illegal pre-trial detention in violation of applicable statutory time constraints.
- A significant number of cases in which judges misunderstood or misapplied the basic legal doctrines on which the conviction was based, or in which they failed to consider evidence or issues of credibility that would have weighed in favor of the defense.<sup>23</sup>
- In final decisions of the Court of Appeal, a general lack of concern for the standard of review, the grounds of appeal, the rights of the accused, the presumption of innocence, and the burden of proof and how it operates in regard to the weighing of evidence.
- Problems in the recruitment of international judges that resulted in a very wide range of experience and competence among the judges who served on the Court of Appeal and the Special Panels. These problems were exacerbated by the failure to provide adequate training in international criminal law for the judges and to equip the Special Panels with sufficient research resources and legal officers with expertise in the relevant areas of international law and practice. This was a particularly serious problem because the international judges were supposed to mentor the inexperienced Timorese judge on each panel.

In light of these and other inadequacies, the findings of the UN Commission of Experts that the trials of the Special Panel met international standards neglect that group of trials where this was clearly not the case. It is striking that the Commission’s report contains a careful and fair, though highly critical,

analysis of the Indonesian trials in Jakarta and the Judgments rendered in these cases. On the other hand, it does not analyze a single one of the trials or Judgments of the Special Panels or the Court of Appeal. One is left with the impression that to do so would have called into question the Commission’s conclusions.

### Conclusions

The root causes of many of the problems discussed above go back to the decision to locate the tribunal within the peacekeeping mission without appointing an independent and experienced court administration or setting up an effective management structure. In the end, the failures of the process are a result of the lack of political will on the part of UN administrators in Dili and New York to correct problems that were clearly recognized early on.

The problems were exacerbated by lack of support for the trials on the part of the Timorese government, as well as by the Security Council. The resulting failure to bring to trial any high-ranking individuals and to convict only lowly Timorese perpetrators undermines the legitimacy of the process in the eyes of many Timorese, as does the premature closure of the Special Panels.

Despite the struggle by many outstandingly competent and dedicated individuals to ensure that justice was done in individual cases, at the systemic level there were failures of political will, of effective management, in the appointments process, and, above all, of accountability. The price for these failings was paid by those accused who in some cases did not receive the kind of trial that a UN-funded and staffed international tribunal should provide. It was also paid by the people of East Timor, who did not receive a trial process worthy of what they had suffered prior to achieving independence.

It appears that similar challenges face the new Khmer Rouge Tribunal (KRT). The partners creating that tribunal, the UN and the Cambodian government, do not share a unity of purpose, and—as in East Timor—their conflicting aims have plagued the process of creating the Tribunal since its inception. The lack of political support from the government of

***There is no excuse for the discrepancy in the quality of proceedings found between the various UN-sponsored tribunals when it is so great as to impinge upon the right of the accused to a fair trial***

East Timor had numerous pernicious effects on that tribunal's ability to function,<sup>24</sup> most significantly on its ability to obtain custody of Indonesian indictees. Similar concerns exist about the willingness of the Cambodian government to allow the trial of certain former high-ranking Khmer Rouge leaders. As of the time of this writing it also appears that the defense component of the KRT is to be largely entrusted to Cambodian public defenders. Given that the state of the Cambodian legal community is scarcely better than in East Timor, and given the disaster that ensued from such a plan in East Timor, this lack of an international component in the defense effort does not bode well for the accused. The funding difficulties that have beset the KRT (though with a budget more than twice the size of the Special Panels) may also result in a lack of resources for translation, witness and victim protection, outreach, and other key functions. If this turns out to be the case, the KRT will encounter problems similar to those that hampered the Special Panels.

The lessons to be learned from the East Timor experience are painfully obvious. In a sense, the key lesson is that of political will and accountability. If the UN is to engage in the enterprise of international justice, there is no excuse for the discrepancy

in quality of proceedings found between the various UN-sponsored tribunals. The UN is supposed to be setting an example for the development of the rule of law and adherence to international standards of judicial practice and human rights. It must begin by doing so in its own courts, regardless of whether they are located in East Timor, Kosovo, or Phnom Penh on the one hand, or in The Hague or Arusha on the other. In other words, once a decision has been made by the Security Council to create and participate in a justice process, it must have the political will to do so in a manner that upholds the standards that the organization purports to espouse. This it failed to do in East Timor. To prevent this from happening again, the Secretary General and the Security Council must provide effective management (especially including a recruitment process that does not compromise on competence for the sake of political considerations). Above all, they must provide accountability for failings of the kind that occurred in East Timor. Without such accountability, and without a refusal to compromise on competence and international standards in key court functions, the mistakes of East Timor are all too likely to be repeated in Phnom Penh and elsewhere.

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**Notes**

Unless otherwise noted, all interviews were with the author and conducted in Dili, East Timor.

<sup>1</sup> 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). Available online at [www.EastWestCenter.org](http://www.EastWestCenter.org).

<sup>2</sup> A comprehensive report on the trials (*Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor*) is planned for publication by the East-West Center in June 2006 and will further document the claims made here. For analyses of the trials, see the many fine reports of the Judicial System Monitoring Programme (JSMP), available online at [jsmp.minihub.org](http://jsmp.minihub.org), as well as the following: 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), available online at [www.ictj.org](http://www.ictj.org); Suzannah Linton, "Cambodia, East Timor and Sierra Leone: Experiments in International Justice," *Criminal Law Forum* (2001), 185–246; Open Society Institute and Coalition for International Justice, *Unfulfilled Promises: Achieving Justice for Crimes Against Humanity in East Timor* (New York: Open Society Institute, November 2004) available online at [www.justiceinitiative.org](http://www.justiceinitiative.org); Suzannah Linton, *Putting Things into Perspective: The Realities of Accountability in Timor Leste, Indonesia and Cambodia*, Maryland Series in Contemporary Asian Studies, no. 3 (Baltimore: University of Maryland School of Law, 2005).

<sup>3</sup> Officially there were two UN missions during this period: the United Nations Transitional Authority for East Timor or UNTAET, followed after independence on May 20, 2002, by the United Nations Mission of Support in East Timor or UNMISSET. For purposes of prosecution, the relevant period of violence connected to the referendum was January 1 to October 25, 1999.

<sup>4</sup> On the Indonesian trials, see David Cohen, *Intended to Fail: Trials Before the Ad Hoc Human Rights Court in Jakarta* (New York: International Center for Transitional Justice, 2004). Available online at [www.ictj.org](http://www.ictj.org).

<sup>5</sup> Phillip Rapoza (Judge Coordinator), interview, August 30, 2005; Carl DeFaria (Deputy Prosecutor General for Serious Crimes), interview, February 16, 2005.

<sup>6</sup> Alan Gutman (Defense Lawyers Unit lawyer), interview, September 30, 2004.

<sup>7</sup> Ramavarma Thamburan (Defense Lawyers Unit Head), "Defence Lawyers Unit for Serious Crimes," (handout accompanying lecture, UN International Symposium in Dili, East Timor, April 28, 2005), 2–3.

<sup>8</sup> Gutman, interview.

<sup>9</sup> Charles Nsabimana (Prosecutor), interview, February 18, 2005.

<sup>10</sup> Phillip Rapoza (Judge), interview, September 1, 2004.

<sup>11</sup> Shyamala Alagendra and Wambui Ngunya (Prosecutors) and Witness Sharon Lowery (Protection Coordinator), interviews, May 12–13, 2005, Freetown, Sierra Leone.

<sup>12</sup> The 2004–2005 budget figures were provided to the author by the Special Representative of the UN Secretary General Sukehiro Hasegawa. This compares with US\$18 million per year for the Special Court for Sierra Leone, which will only conduct three trials, with nine accused.

<sup>13</sup> Ramavarma Thamburan (lecture, UN International Symposium in Dili, East Timor, April 28, 2005).

<sup>14</sup> Phillip Rapoza (Judge), interview, March 29, 2005; Philip Rapoza (lecture, UN International Symposium in Dili, East Timor, April 28, 2005).

<sup>15</sup> Cohen, *Seeking Justice on the Cheap*.

<sup>16</sup> The judges interviewed were Brigitte Schmid, Phillip Rapoza, Oscar Gomes, Samith de Silva, Maria Natercia Gusmao Pereira, Sigfried Blunk, Francesco Florit, and Antonio Helder Viana do Carmo (various dates).

<sup>17</sup> Interview with anonymous source, March 28, 2005.

<sup>18</sup> Francesco Florit (Judge), interview, March 28, 2005.

<sup>19</sup> *Josep Nahak* case (Case No. 1A/2004, Interlocutory Decision of March 1, 2005).

<sup>20</sup> The "elements" of an offense are constitutive definitional requirements that the prosecution must establish to justify a conviction. If any one of them is not proved the accused must be acquitted.

<sup>21</sup> But, in fact, the *German Code of Criminal Procedure*, a model for many civil law systems, provides that "the accused may not be convicted of another penal provision than the one mentioned in the Indictment unless this change of legal aspect has been especially pointed out to him and he was given the opportunity for defense" (265). Similar provisions are found in the pertinent codes of Portugal and many other civil law countries.

<sup>22</sup> See the Judicial System Monitoring Programme, *Overview of the Jurisprudence of the Court of Appeal in its First Year of Operation since East Timor's Independence*, August 2004, and *The Paulino de Jesus Decisions*, April 2005. Both available online at [www.jsmp.minihub.org/reports.htm](http://www.jsmp.minihub.org/reports.htm).

<sup>23</sup> Among the more egregious cases are the trials of Augusto Asamera Tavares, Carlos Soares Carmone, Marculino Soares, Umbertus Ena and Carlos Ena, Carlos Soares, Julio Fernandes, Francisco Pereira, Armando dos Santos, Mateus Lao, Damiao da Costa Nunes, and Augusto dos Santos. The Indictments and Judgments in all of these cases are obtainable at the website of the Berkeley War Crimes Studies Center, [warcrimescenter.berkeley.edu](http://warcrimescenter.berkeley.edu). All of them will be discussed at length in the forthcoming report from the East-West Center.

<sup>24</sup> UNMISSET, *Reports of the Transition Working Groups* (UNMISSET internal publication, January 2005), 61.

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