
SUMMARY

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The goals of this report are fourfold: (1) to provide an overall assessment of the “hybrid” UN-sponsored Serious Crimes process in East Timor; (2) to analyze the performance of the various structural components of that process; (3) to examine the legacy of the Serious Crimes enterprise; and (4) to discuss the lessons to be learned from the five-year experience of the United Nations in seeking justice for the people of East Timor.

The report’s conclusions are based upon a comprehensive and detailed analysis of a number of key areas and a full assessment of the jurisprudence of the trials. It draws heavily upon hundreds of hours of interviews with key participants in every aspect of the Serious Crimes process. It is substantially more critical of the trials and of the UN’s role in managing the process than, for example, the Report of the UN Commission of Experts (July 2005). It demonstrates that, on the whole, the process was so deeply flawed from the beginning that, despite the important and successful efforts of key individuals to make structural improvements, egregious problems remained until the very end. These problems are serious enough to at least call into question whether important aspects of the process as a whole met international standards. Further, an analysis of the impact of these problems upon trial and appellate proceedings and Judgments provides substantive grounds for questioning the basic fairness of a significant number of the Serious Crimes trials, the adequacy of the appeals process, and, hence, the legitimacy of some of the ensuing convictions.

One of the questions this report addresses is why this state of affairs was allowed to persist for so long. This is a question that must be answered if the “lessons learned” from East Timor are to be a guide for future tribunals and for the UN in its ongoing role of administering international judicial institutions. While the report reveals what a small group of judges, lawyers, and staff managed to accomplish despite unnecessary challenges and difficulties, it also points to the massive institutional failure of the United Nations, and of the government of East Timor, to create a judicial enterprise worthy of the values and standards that the United Nations represents.

The report consists of an introduction and five parts. Part One provides an overview of the Serious Crimes process and the institutions that constituted it. It describes some of the systemic problems that were built into the institutional structure from its inception as well as the negative consequences they produced. Part Two focuses on the concrete impact of resource and personnel problems on the institutional components of the process (prosecution, defense, and chambers) and upon the trials themselves. It reviews in considerable detail both the failed and successful (or partially successful) reform efforts in regard to vital court functions such as translation and interpretation, transcription and court records, witness and victim protection and support, outreach, infrastructure and resources, court administration and case and trial management, and equality of arms. While most of these areas have been discussed in other reports, they are treated here in greater depth and with fuller documentation than elsewhere. In all of these areas the report documents significant failures that had a direct impact upon the capacity to meet international standards. In regard to the particularly vital issue of equality of arms, it shows how, despite significant improvements in the defense function, serious concerns persisted about adequate representation for the accused and the fairness of the convictions produced in many of the trials and appeals. These concerns were expressed not only by defense counsel, but also by prosecutors and judges.

Part Three provides an assessment of the jurisprudence, standards, and judicial practices of the trial chambers (Special Panels) and the Court of Appeal. This assessment is based upon an examination of all of the Judgments, Indictments, and Court of Appeal decisions from the beginning of the trials in 2000 to their premature end in May 2005. Twenty-six of the 55 Serious Crimes cases are analyzed, revealing a very wide range in the quality of the proceedings and Judgments of the Special Panels from beginning to end. The analysis demonstrates that a significant number of cases failed to meet the requirements of UNTAET Statutes and international norms and standards binding upon the tribunal. The analysis of the Judgments of the Special Panels identifies:

- Many Judgments that do not follow the statutory standards for Final Written Decisions and that do not provide a reasoned justification for their findings and conclusions.
- Widespread failure to adequately enumerate, define, interpret, and apply the elements of all of the offenses, or to state clearly the theory of liability and the requirements necessary to prove it.
- Lack of due consideration on the part of the judges in some cases for the interests of the accused, especially in cases where the defense was manifestly unprepared to represent those interests. This is particularly true 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.
- A significant number of cases where the rights of the accused appear to have been compromised. This is especially glaring in cases where individuals were convicted of crimes not charged in the Indictment and against which they had no opportunity to defend themselves, a violation of UNTAET Regulations and applicable international norms. This is also true in cases where the Court misunderstood or misapplied the basic legal doctrines on which the conviction was based.

An examination of the jurisprudence and practices of the Court of Appeal demonstrate it:

- Ignored the statutory grounds of review provided by UNTAET Regulations and failed to define or apply a standard of review.
- Failed to exercise an appropriate appellate function as defined by the Court's Statute, and, instead, functioned as a second court of first instance and simply overruled decisions of the Special Panels solely on the basis that the Court had reached a different conclusion.
- Seemed to lack awareness of the concepts of burden of proof and the presumption of innocence, and how they function in regard to the weighing of evidence.
- Made Judgments that display an apparent lack of basic knowledge of fundamental doctrines of international criminal law which the Court of Appeal was applying and reviewing. As a result, many of these doctrines were incorrectly applied, often to the detriment of the accused.
- Convicted defendants of crimes that had not been charged in the Indictment nor considered at trial and did so without notice or opportunity to defend.

- Made, in some cases, legally incoherent decisions as well as other Judgments that call into question the basic competence of some of the international judges of the Court of Appeal.

Part Four of the report examines the legacy of the Serious Crimes trials. It focuses upon the outcome of UN efforts at capacity building as well as the likely future of Serious Crimes prosecutions and of the Timorese judicial system of which they are now a part and on which their future depends. It examines the deeply flawed process by which all of the Timorese judges who served in the Special Panels and Court of Appeal, as well as every other Timorese judge in the country, failed what was called a “minimum competency” examination. It considers evidence that indicates basic incompetence in the preparation of the examination and that also suggests that the results may have been unfairly predetermined. Finally, it points up fundamental failings in the capacity-building efforts of the Judicial Training Center and in the United Nations Development Programme (UNDP) policies related to its staffing and programs. The Conclusion, Part Five, draws together the overarching themes of the report and presents recommendations based upon the “lessons” that may be learned from the complex and difficult history of the attempt to provide accountability for the 1999 violence in East Timor.

The general conclusions of the report may be summarized as follows:

- At the root of all the problems of the Serious Crimes process was the failure by the UN to ensure proper leadership, a clear mandate, political will, and clear “ownership” of the process from the very beginning. This included failing from the outset to appoint to key positions of responsibility individuals who understood the needs of a court and had the experience to build one from the ground up in a post-conflict environment. This included failure to appoint a Registrar with appropriate authority and experience to manage infrastructure, resources, personnel, and budget. In regard to the Special Panels, it involved failing to create a position of President (or the like), empowered to speak on their behalf, with sufficient stature and experience (as eventually happened in 2004) to know what the Court required and how to fight effectively to get it. Four years was too long to wait for this to happen.
- Underlying this first problem are the serious flaws in the UN recruitment process. If the UN is to be in the tribunal business it should develop a mechanism that ensures vigorous recruitment of the best persons available and a selection process advised or staffed by internationals of sufficient experience as judges and prosecutors to know how to select such individuals.
- The UN should have in place a standard process for creating tribunals and ensuring they have the resources they need to function properly and to meet the judicial standards that the United Nations aims to promulgate. There is no excuse for a UN court not to have, at the very least: competent translators and an appropriate translation system; accurate and professional transcription facilities; competent defense counsel to represent the accused; basic tools for legal research for all three branches; competent and experienced judges; legal officers and clerical staff to enable those judges to do their job; a functioning witness protection program that ensures that the interests of witnesses and victims are given their due; adequate and functioning case management, evidence management,

and file management systems with personnel trained to run them; and adequate security for the court. All of these were lacking for at least a substantial part of the time in East Timor. The lack of accountability for the failure to provide these is itself a systemic failing of the UN system.

- The lack of equality of arms for, at the very least, the first two and a half years of the Serious Crimes trials points to the lack of attention given to establishing a viable defense function. Failure to meet acceptable international standards in providing an adequate defense undermines the legitimacy of many of the trials and calls into question the convictions handed down in such cases.
- UNTAET and UNMISSET failed to make provision for adequate and effective training for court actors.
- Capacity building in the Serious Crimes process was an almost complete failure, from the collapse of the use of Timorese public defenders in 2002 to the debacle of the failure of all the judges in their competency examination in 2005. In regard to the latter, effective training should have been in place from the very beginning and should have been integrated into the judges' workload so as to enable them to do both.
- The UN failed to ensure the recruitment of experienced and professional qualified trainers and teachers for the capacity-building programs of the Judicial Training Center financed by the UNDP. If the UN is going to hire and pay trainers, they should not allow incompetence, language policies, or cronyism to dictate hiring, as was done in East Timor.

To be even more abbreviated, one might summarize the four core problem areas as: *lack of commitment, resources, management, and accountability.*

INTRODUCTION: AIMS AND PERSPECTIVES

The goals of this report are fourfold: (1) to provide an overall assessment of the “hybrid” UN-sponsored Serious Crimes process in East Timor; (2) to analyze the performance of the various structural components of that process; (3) to examine the legacy of the Serious Crimes enterprise; and (4) to discuss the lessons to be learned from the five-year experience of the United Nations in seeking justice for the people of East Timor.¹

Numerous reports have described the trials before the Special Panel for Serious Crimes (SPSC).² While they have made valuable contributions to our understanding of the justice process in East Timor, this report focuses on certain aspects of the trials that have sometimes been neglected and provides a more comprehensive and detailed analysis of a number of key areas. It will also offer the first full assessment of the jurisprudence of the trials. It presents a substantially more critical assessment of the trials and of the UN’s role in managing the process than, for example, the Report of the UN Commission of Experts (July 2005),³ which confined most of its criticisms to the trials that were held in Indonesia, and limited itself to an extremely careful, understated, and abbreviated critique of the Serious Crimes process. If we take international justice seriously we must be prepared to apply the same criteria whether dealing with Indonesian national trials or with those conducted by the UN in East Timor. In fact, there are serious grounds for questioning the basic fairness of a significant number of the Serious Crimes trials, the adequacy of the appeals process, and, hence, the legitimacy of some of the ensuing convictions.

All interviews were conducted by the author, and, unless otherwise noted, were conducted in Dili.

¹ “Hybrid” refers to the mixed composition of tribunals that are composed of both international judges appointed by the UN or other international agency organizing the process and judges from the local jurisdiction where the crimes have taken place (or at least appointed by that local government). Such tribunals now exist in Sierra Leone, Kosovo, Bosnia, and, in the advanced planning stages, Cambodia.

² Some of the more recent include the July 2005 *Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999* (United Nations, 26 May 2005); Suzannah Linton, *Putting Things into Perspective: The Realities of Accountability in Timor Leste, Indonesia and Cambodia*, Maryland Series in Contemporary Asian Studies, no. 3-2005 (Baltimore: University of Maryland School of Law); Caitlin Reiger, *Hybrid Tribunals Case Study: The Serious Crimes Process in East Timor* (New York: International Center for Transitional Justice, 2006); and several reports in 2005 by the Judicial System Monitoring Program (JSMP), including *The Paulino de Jesus Decisions* (April 2005), *Torture and Transitional Justice in Timor Leste* (April 2005), *Submission to the United Nations Commission of Experts* (6 April 2005), and *Overview of the Justice Sector March 2005* (March 2005). JSMP is a Timorese NGO that has been effectively monitoring and reporting on the trials on an ongoing basis almost since their inception. These and other JSMP reports that will often be cited below were all published in Dili and are also available at www.jsmp.minihub.org/ (accessed 22 April 2006). See also the earlier assessments in Suzannah Linton, “Cambodia, East Timor and Sierra Leone: Experiments in International Justice,” *Criminal Law Forum* (2001): 185–246; Suzannah Linton, “Prosecuting Atrocities at the District Court in Dili,” *Melbourne Journal of International Law* 2 (2001): 415–458; Amnesty International, *East Timor: Justice Past, Present, and Future* (2001); and Open Society Institute and Coalition for International Justice, *Unfulfilled Promises: Achieving Justice for Crimes against Humanity in East Timor* (November 2004).

³ United Nations, *Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999* (26 May 2005). Submission of report, including the summary of the report (annex I) and the full report in English (annex II), is dated 15 July 2005 (UN Doc. S/2005/458). This report will be referred to as the UN *Commission of Experts Report* in subsequent citations and page numbers refer to the original printed version of the report.

Further, it is reasonable to hold trials conducted by the UN to even higher standards than those conducted by a national jurisdiction like Indonesia, which in general has a notoriously weak judicial system. In regard to the East Timor trials, on the whole, the process was so deeply flawed from the beginning that despite the important and successful efforts of key individuals to make structural improvements, egregious problems remained until the very end. These problems were serious enough at least to call into question whether the process as a whole met international standards, and it is clear that in some cases it did not.

It is not disputed that the Serious Crimes process from the very outset faced enormous obstacles and challenges. As one of the key participants, who did more than any other individual to reform the Special Panels for Serious Crimes, summarized the experience in a public UN International Symposium held in Dili to commemorate the end of the East Timor mission, “As the DLU [Defense Lawyers Unit] has become more robust, one can finally say that international standards of due process are being met. The Serious Crimes Process has now reached a point where it can do its job in a proper manner.”⁴

Why did the UN fail in East Timor to meet standards established by other UN tribunals?

The implication is clear that only in April 2005, when the trial process was about to be closed down by the UN, had it reached a point where it could meet appropriate standards. Applied to the larger institutional context of the trials even this assessment is optimistic, because to the very end central components of the process, like the Court of Appeal, remained unreformed. One of the questions this report will address is why this state of affairs was allowed to persist for so long. This is a question that must be answered if the “lessons learned” from East Timor are to be a guide for future tribunals and for the UN in its ongoing role of administering international judicial institutions.

Observers have noted the way in which in the face of enormous challenges, such as lack of resources, the Serious Crimes process was able to accomplish as much as it did. While these challenges were very real, the more important question is why the task was made so unnecessarily difficult in the first place. Those dedicated individuals who worked hard to improve the process deserve enormous respect. The real issue, however, is why the United Nations failed so utterly to provide the resources (human, technical, and financial), cooperation, oversight, and political backing necessary to meet the standards that have been set by other UN tribunals in Arusha, The Hague, and Freetown.⁵ If it had done so, heroic efforts would not have been required to make the process work at all. We must distinguish on the one hand between what a small group of judges, lawyers, and staff managed to accomplish despite these hurdles and, on the other hand, the massive institutional failure of the United Nations and of the government of East Timor to create a judicial enterprise worthy of the values and standards that the United Nations represents. We must also ask why the key countries that supported this enterprise financially, and who were well aware of many, if not all, of the problems, did not do more to insist that they be corrected.

⁴ Speech of Judge Phillip Rapoza, 28 April 2005.

⁵ I am referring, of course, to the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone.

The previous paragraphs have made some sweeping claims, and it will be the task of the rest of this report to support them with evidence and objective analysis. It is important, however, to make this critical perspective clear from the beginning. These paragraphs have foreshadowed some of the key themes of the report already, but for the sake of clarity they are enumerated here:

- Lack of political will on the part of the UN to give the Serious Crimes institutions the resources and support necessary to make the process work effectively and to carry its work through to the end.
- Failure to establish clear “ownership” of the process between the UN and East Timor.
- Failure of key components of the process, and of individual trials, to meet appropriate, and sometimes even the most basic, international standards. This includes the retention of key court personnel, including international judges, even after serious issues of competence had been raised.
- Failure of the UN to provide effective oversight, management, and accountability.
- Failure to sufficiently address the needs of victims, witnesses, and communities through effective victim/witness-protection and community-outreach programs.
- Failure of the international community and the Timorese government to insist upon the correction of these failings and to stop the early closure of the Special Panels.
- Failure to develop a coherent completion strategy for the Serious Crimes Unit (SCU) at an early date so as to anticipate the myriad problems that premature closure of the Unit would bring.
- Failure of the Timorese government, the United Nations, and the international community to support the attempt to end the impunity of high-level perpetrators located in Indonesia.
- Failure to provide a clear mandate for the Serious Crimes Unit at the very beginning of its operations and to define and allocate its structure and resources, and that of the Special Panels, commensurately with this mandate.
- Failure to provide training in international humanitarian law for the judges of the Special Panels and the Court of Appeal or to provide legal officers with such expertise.
- Failure of capacity-building efforts to the degree that East Timor was left without a judiciary at the end of the UN mission.

After this Introduction the report will be presented in five parts. Part One will provide “An Overview” of the Serious Crimes process and the institutions that constituted it. Part Two, “Policies, Resources, Problems, and Responses,” will examine the challenges that the

different component institutions faced and the ways in which they responded. It will deal with what happened in the courtroom of the Special Panels for Serious Crimes, but also with the many processes outside the courtroom that shaped the possibilities and limitations of the trial process. Part Three, “Judgments and Jurisprudence,” will provide a fairly comprehensive assessment of the jurisprudence, standards, and judicial practices of the trial chambers (Special Panels) and the Court of Appeal. Stepping back from the detailed analyses of Parts Two and Three, Part Four, “The Future of the Serious Crimes Process,” will discuss the legacy of the trials. This will necessarily involve considering the outcome of UN efforts at capacity building as well as the likely future of Serious Crimes prosecutions and of the Timorese judicial system of which they are now a part and on which their future depends. Part Five, “Conclusions and ‘Lessons Learned,’” will draw together the overarching themes of the report and present recommendations based upon the “lessons” that may be learned from the complex and difficult history of the attempt to provide accountability for the 1999 violence in East Timor.
