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## PART FOUR. THE FUTURE OF THE SERIOUS CRIMES PROCESS

The Serious Crimes trials did not end because the Special Panels had dealt with all the available cases. Rather, Security Council Resolution 1543 mandated their conclusion as part of the closure of UNMISSET even though only 572 murders out of 1,400 had been captured in Indictments, more than 500 investigative files remained open, and numerous cases that were ready to go trial were not brought forward. This is to say nothing of the ongoing issue of how to provide accountability for the high-level indictees who are at-large in Indonesia. UNOTIL, the small advisory successor mission remaining in East Timor, has no mandate to involve itself in any future trials, which could now only result from decisions by the Timorese government and would be their sole responsibility.<sup>266</sup> What, then, are the prospects for a completion of the work of the Special Panels within the Timorese justice system?

In regard to the question of the high-ranking Indonesian indictees never brought to trial, this is a matter that will never be dealt with through a continuation of the Serious Crimes process. The government of East Timor has embarked upon its own solution by means of the joint Commission on Truth and Friendship (CTF) which it has established with the government of Indonesia. It is widely acknowledged that this is a mechanism that will not provide accountability because it lacks the necessary mandate, authority, and political backing. This is not surprising, in that to date the government of East Timor has given no indication that it has a serious interest in pursuing accountability. It seems clear that any mechanism that might achieve accountability for Indonesian indictees will have to come from the international community in response to the Report of the UN Commission of Experts. As such, it falls outside the scope of this report.

This section examines two factors that play a significant role in shaping any potential future East Timorese trials. The first has to do with the handover process by which the files and information necessary for a continuation of the process were provided to the Timorese government after the closing of the Special Panels. Examination of the handover will also provide a good indication of the political will of the government to pursue future prosecutions. The second involves the capacity of the Timorese justice system to deal with these cases. Discussing this issue will also enable us to evaluate aspects of the UN's capacity-building efforts in the judiciary during the five years of UNTAET and UNMISSET administration.

All through the 2004–2005 completion process senior members of the SCU and SPSC were warning UNMISSET and their Timorese counterparts that provision had to be made for future prosecutions because it was inevitable that individuals suspected of involvement in crimes against humanity would cross the border from West Timor and be apprehended in East Timor. For example, the UNMISSET Report of the Transition Working Group on the Future of the Serious Crimes Process noted in early 2005 that although a plan for the handover of documents from the SCU had been adopted, there was no plan that would

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<sup>266</sup> UNOTIL continues to assist the Timorese government in the area of the judiciary through international advisors in various government offices and by paying the salaries of many of the international judges and prosecutors from Portuguese-speaking countries who are functioning in the four District Courts of East Timor. If the Timorese government decided to pursue new Serious Crimes trials, statutes still in force would require it to recruit two international judges for the panel. In such a circumstance they would in all likelihood appoint one of the international judges from the District Courts to also serve on the new Serious Crimes panel.

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enable the continuation of the Serious Crimes trials. The report explained that this was particularly serious in regard to alleged perpetrators who might cross the border back into East Timor after 20 May. At a public meeting at the Judicial Training Center to discuss the Report of the Transition Working Group on the Justice Sector, Judge Rapoza made an extended argument for the need for a post-UNMISSET strategy to deal with this issue. Judge Claudio Ximenes, who co-chaired the meeting with Prime Minister Alkatiri, tersely dismissed the issue by saying it could be dealt with by international judges working in the Dili District Court.

The warnings as to the inevitability of arrests of serious crimes suspects after May 2005 proved accurate. This is precisely what happened when an SCU suspect, Manuel Maia, was arrested in August 2005, and other such incidents followed. There was in fact no plan in place to deal with them. It remains to be seen how they can or will be tried. The plan, as suggested by Judge Ximenes, to use international judges from the Dili District Court has the drawback that they are completely inexperienced in cases involving Serious Crimes and in the body of law involved. Moreover, it is hard to conceive how these judges will have the time to commit to Serious Crimes proceedings, which are often protracted, especially considering that in May 2006 they were facing a 2,500 case backlog of ordinary criminal cases.<sup>267</sup>

The Transition Working Groups' report also notes that "[t]he consequences of both Resolution 1543 and the absence of a successor judicial process will be to shift the Serious Crimes process from one that is almost entirely dependent upon international support to one that will be increasingly, if not exclusively, reliant on Timorese judges, prosecutors, and defense attorneys."<sup>268</sup> Therefore, the future of the Serious Crimes process is inextricably bound up with the future of the Timorese judiciary as a whole, which is why this report will consider the capacity-building efforts of the UN, the performance of Timorese members of the judiciary, the Judicial Training Program, and the troubling developments that have made it presently impossible to have Timorese judges, prosecutors, and defense counsel staff a successor process as envisioned by the report.

#### **THE 'HANDOVER PROCESS'**

The anticlimactic aftermath of the SCU handover plan does not bode well for the future of Serious Crimes prosecutions in East Timor. As noted in Part One, the SCU embarked upon a very intensive effort to prepare its files so that they would be in manageable form for future use by Timorese prosecutors. This involved not only putting all of the often chaotically maintained files in order, but also creating a database to organize their contents, scanning them into the database, translating them into Tetum, etc.<sup>269</sup> Apart from putting most existing staff at the SCU into the effort, Deputy Prosecutor General for Serious Crimes DeFaria hired 35 full-time translators, 10 data entry staff, and 9 scanning staff to

<sup>267</sup> See United Nations, *End of Mandate Report of the Secretary-General on the United Nations Office in Timor-Leste S/2006/251* (20 April 2006), para. 15.

<sup>268</sup> *Reports of the Transition Working Groups*, p. 63.

<sup>269</sup> DeFaria ("ET's Quest for Justice," p. 12) enumerates what the handover preparation involved: "an Herculean effort ... to organize hundreds of indicted and non-indicted files; prepare standard handover notes and indexes for all files; Translate thousands of pages of documents, indictments, arrest warrants, judgments ... into one or both of the official languages of TL; Scan 60,000 to 80,000 pages of documents and enter them into an electronically searchable database; And prepare all the files and evidence to be handed over to the Prosecutor-General of TL ... ."

make this possible.<sup>270</sup> After months of planning and sometimes almost around-the-clock efforts, all of which consumed the bulk of the resources available to the SCU in the last six months of its existence, the Timorese government indicated that it could not find a place to house the records. An initial plan to temporarily place them at the Commission on Truth and Friendship came to naught. As a result, when the SCU closed its doors the documents still had not been picked up. It must be remembered that these include the original investigative and case files. Months after the planned handover that was publicly announced and described in great detail by the DPGSC at the UN conference at the end of May, the documents still sat in boxes in the morgue at the SCU, with skeleton staff charged with their security. They remained there until October 2005, when they were transferred to the Crocodile Alley offices of the Timorese Prosecutor General. They remain, however, at least nominally under UN custody under a rather opaque arrangement as negotiations over access and other issues are still ongoing. Without them, however, there can be no possible meaningful continuation of the search for accountability.

Regardless of what happens in the case of Manuel Maia, numerous factors indicate that it is unlikely that there will be any serious attempt to take up the many cases contained in the SCU's files that were investigated but never brought to trial. The behavior of the Prosecutor General Longuinhos Monteiro in the aftermath of the indictment of Indonesian General Wiranto eloquently expresses the grounds for these doubts. The same was true in regard to the issuance of an arrest warrant against Wiranto. For months the Prosecutor General had been publicly criticizing the Special Panels in the press for failure to move ahead against Wiranto. When Judge Rapoza issued the warrant, however, the Prosecutor General immediately backtracked. Ultimately, the Timorese government refused to forward it to INTERPOL and request the issuance of an international arrest warrant. Shortly after, President Xanana Gusmao flew to Bali, where he publicly embraced his "dear friend" Wiranto. The most disgraceful part of this story, however, was the UN Secretariat's disavowal of the indictment and arrest warrant by saying the SCU was not part of the UN but rather of the Timorese Office of Public Prosecution.<sup>271</sup> Political will was in short supply on all sides during the Serious Crimes process.

## **CAPACITY AND CAPACITY BUILDING**

This chapter in the story of the quest for justice in East Timor is one of the most disturbing. As will be seen, it calls into question not only the integrity of central players and institutions in the Timorese justice system, but also raises serious questions about the capacity-building roles of UNMISSET and the UNDP.

### **Examining and Evaluating the Judges**

In regard to the question of the capacity to continue the Serious Crimes trials within the Timorese justice system, the answer, from one perspective, is very simple. At the moment,

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<sup>270</sup> Interview with DPGSC DeFaria, 29 April 2005.

<sup>271</sup> The UN press statement on the Wiranto indictment, dated 26 February 2003, stated that "Timor-Leste and not the UN has indicted ... General Wiranto." In 2003, SCU Indictments 1/2003, 2/2003, 3/2004, 4/2003, 4a/2003, 4b/2003/ 4c/2003, and 5/2003 (the latter against Wiranto) were issued on UN letterhead. From 6/2003 on, UN letterhead was not used, confirming what prosecutors told me: The SCU was ordered by the UN not to use UN letterhead for any more Indictments.

*All of the judges failed what had been announced as an examination of basic competency*

and for the next one and a half years, there are no Timorese judges, prosecutors, or public defenders in office. The reason for this is clear, though the explanation is complex. All of the judges in East Timor were serving in a probationary status pending an examination that would qualify them for a permanent appointment to the bench. That examination of 22 judges, including the 4 who had served in Serious Crimes cases, took place in mid-2004. The results, for reasons that were never explained, were long delayed and only finally announced at the end of January 2005.

All of the judges failed what had been announced as an examination of basic competency. All of the prosecutors and public defenders in East Timor were given a similar examination in November 2004. Although regulations required the results to be published by 15 December 2004, and despite the repeated protests of the Prosecutor General at the delay, the results, again for reasons that were never satisfactorily explained, were not announced until June 2005. Again, all failed. Because these results left the country quite literally without a judiciary, there is no way that, apart from isolated instances, Serious Crimes trials can continue for the foreseeable future as a Timorese process.<sup>272</sup>

Before inquiring into how and why this could have happened, two points must be emphasized:

1. This event suggests the complete ineffectiveness of five years of UN support for the justice system of East Timor. The failure of every single one of the judges, prosecutors, and public defenders in a minimum competency examination is itself an indictment of the UN and Timorese government's joint efforts at capacity building in the judiciary.
2. If one takes the results of the examination at face value, the failure of the four Timorese judges involved in the Serious Crimes trials in the Special Panels and the Court of Appeal raises serious concerns about the verdicts handed down by those judges. If all of these judges failed an examination to test their minimum competency, what does that say about the 83 convictions that they had voted on? Further, if they were so incompetent that after four to five years of experience on the bench they failed a minimum competency examination, why had the President of the Court of Appeal and the Superior Council of the Judiciary allowed them to continue exercising the authority of judge for so long? Moreover, how could they permit such purportedly unqualified judges to continue sitting on Serious Crimes cases, even after they had failed the exam?

A variety of factors indicate, however, that the examination cannot be taken at face value. Since the focus of this report is on the Serious Crimes process, the inquiry will confine itself largely to the Timorese judges who participated in that process. For those who know the Serious Crimes process, the most striking thing about the results of the examination was the discrepancy between these results and the actual performance of the judges on the Special Panels.

After the examination results were announced, when interviewed on this issue five of the six international judges of the Special Panels commented on the performance of Judges

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<sup>272</sup> A small number of ordinary criminal and civil cases are being processed by international judges and prosecutors from Portugal and other Portuguese-speaking countries. One of the reasons for the delay in announcing the results was clearly to allow time to recruit international Portuguese-speaking personnel. It was, of course, denied that the results were being delayed and claimed that the evaluation of the examinations had not been completed.

Maria Pereira, Deolindo dos Santos, and Antonio Helder.<sup>273</sup> All of them praised Timorese judges they had sat with as very good, conscientious, and capable. Two of them, incensed at the outcome of the examination, wrote a very positive evaluation of Judge dos Santos and sent it to the Superior Council of the Judiciary.<sup>274</sup> All of them expressed considerable skepticism about the results of the examination. Several of them praised Judge Maria Pereira as one of the very best judges who had ever served on the Special Panels. The evaluation of Judge Jacinta da Costa of the Court of Appeal was equally positive. Indeed, she is regarded by many as the best judge on the Court of Appeal. As noted above, her record on the Court of Appeal speaks for itself, for she was the one who repeatedly and correctly dissented against the aberrant ruling of the international judges in the “applicable law” cases.

The general opinion of the poor performance of international judges of the Court of Appeal on the other hand, was a constant refrain in discussions within the Serious Crimes community. Two of these international judges on the Court of Appeal, nevertheless, played a key role in the examination, in the training process, and, ultimately, in determining the fate of these judges.<sup>275</sup> Indeed, one of the concerns for the future of the Timorese judiciary is the enormous amount of power that has been concentrated in the hands of the President of the Court of Appeal.

Judge Claudio Ximenes is President of the highest court in the land and, by virtue of this office, is the head of court administration for all the courts in the country, encompassing policy, personnel, and budgetary matters. This office thus gives him far-reaching powers, which he has used, for example, by issuing an administrative decree on 5 February 2005 that restricts the right of public access to court records, such as Judgments and Indictments, which had previously been readily available to the public.<sup>276</sup> In addition to this office, he holds five additional key offices in the judiciary. He is:

- President of the Superior Council of the Judiciary (Constitution, Section 128[2])
- Chairman of the Evaluation Committee of the National Trainee Prosecutors
- Chairman of the Evaluation Committee for the National Trainee Public Defenders
- Member of the Council of Coordination for the Justice Sector
- Member of the Executive Board of the Judicial Training Center and a member of its Executive Committee

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<sup>273</sup> Judges Rapoza, Schmid, Blunk, Florit, and Gomes interviewed by the author (various dates).

<sup>274</sup> Interview with Judge Schmid, 17 February 2005. She and Judge de Silva wrote the evaluation.

<sup>275</sup> Judge Ximenes wrote the examination. Judge Antunes was one of the three graders for the judges. The evaluation of the prosecutors and public defenders was done by two committees, both of which were presided over by Judge Ximenes. Judge Ximenes informed me that the ultimate decision as to the examination was made by the Superior Council, of which he is the head (interview, 31 March 2005).

<sup>276</sup> According to this decree, access for non-parties to such records is only available upon written application setting out the justification for the request. This decree was even applied against members of the SCU seeking access to records from other cases. It must be emphasized that this includes public court documents like Indictments and Judgments. Some SCU staff were told that even the case numbers of files were covered by this ruling, so that one would have to make a written request for the case number before one could make a written request for the record itself. JSMP has been denied access to records even upon written application. On 29 April 2005, at the UN Symposium in Dili, Judge Ximenes stated that such written requests for access could not be processed because of lack of staffing.

By virtue of these offices, he is the central person who will largely determine the careers of all of the judges, prosecutors, and public defenders in East Timor. According to Judge Ximenes, the Superior Council of the Judiciary is the body that has the ultimate decision as to which judges will pass the two-and-a-half-year training program they are now required to complete at the Judicial Training Center. If judges or prosecutors had passed, they would have received tenured, career appointments. The failure of all Timorese judges, prosecutors, and public defenders offers an opportunity to control the composition of all of these vital judicial functions. Judge Ximenes will play a leading role in virtually all aspects of that process.<sup>277</sup>

In an interview with Judge Ximenes on 31 March 2005, he discussed the examination at great length and provided copies of both of its two versions (for the evaluation of judges and the evaluation of prosecutors and public defenders). When I asked if he was surprised by the failure of the judges he had been working with on the Court of Appeal and the Special Panels, Judge Ximenes stated that the failure of the judges “was a reality I had been expecting.” The problem, he explained, was that they had been “holding trials and writing opinions without knowing how to do it.” Asked if this wasn’t surprising or disappointing in that he was the mentor of some of these judges, he replied that he knew with absolute certainty that every one of them would fail because they are all incapable and incompetent. He knew this, he explained, because he has been working with them for four years. He went on to say that the results were also not surprising because after their appointment they were asked to do judges’ work with some judges acting as their mentors. But, he added, “[t]he mentors were sitting there every day, but nobody asked questions to their mentors. So the mentors got frustrated and left.” He did not mention that the mentors spoke English or Portuguese and the judges they were supposed to mentor did not.<sup>278</sup>

Judge Ximenes confirmed that the examination was “a minimum competency examination based upon Indonesian codes and UNTAET regulations that they had applied every day.” The exam included “questions that someone without any kind of legal knowledge could answer. But they could not answer even these questions.” Later he returned to this and said, “What we are seeing is that all of them need to get the minimum legal basis they don’t have. We are starting from scratch trying to get the minimum legal basis. To do this we have to overcome the problem of language.”

Judge Ximenes also stated that he was particularly disappointed that eight of the trainee judges (none from the Special Panels) who had been sent to the Judicial Training Center in Portugal for one year of training also all failed. His explanation was that “they did not get enough legal knowledge, though they did improve—just not enough.” He did not mention that they were not given sufficient Portuguese language instruction before being placed into advanced law courses along with Portuguese law graduates who were being trained as judges.<sup>279</sup> Finally, asked if the judges will have to take another qualifying examination at the end of their two and a half years of training, he explained that they will not and that the

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<sup>277</sup> These multiple roles also raise concerns about potential conflicts of interest.

<sup>278</sup> According to Judge Ntukamazina, no provision was made for translators so that the mentors and probationary judges could communicate. Interview, 16 January 2002.

<sup>279</sup> They not only failed, but according to the examination results they scored on average lower than the judges who were not given this opportunity. This indicates the total lack of preparation that the Timorese judges were given, in particular adequate language training in Portuguese, so that they could be expected to benefit from such an experience.

evaluation will be subjective and “continuous,” based upon their performance in class, attendance, examinations, evaluations, etc. This view of how the process will proceed appears to conflict with the provision of UNTAET Law 8/2000 for an examination for the probationary judges.

There are some puzzling aspects to Judge Ximenes’s account. In January 2005, the Superior Council of the Judiciary voted to allow Judges Pereira, Helder, and da Costa to continue serving until the end of the Serious Crimes process. They are in theory now awaiting assignment to any new case that is brought forward to trial and appeal. If the judges were considered not even minimally competent, how can they have been allowed to continue to exercise the judicial function by the council responsible for judicial appointments and for maintaining the quality of the judiciary?

*If the judges were considered not even minimally competent, why were they allowed to continue to serve?*

Focusing on the Court of Appeal in particular, since Judge Ximenes stated that he had long known that none of the judges was capable of passing a minimum competency examination how could he have reappointed Judge da Costa to his Court? How could he have been sitting with her on cases since 2000, serving as her mentor, and nonetheless allowed an “incompetent” judge not only to vote but to write opinions? How could the highest judicial official, whose duties include supervising the judiciary, have sat by silently for years knowing that all of the Timorese judges whose opinions he was reviewing were completely incompetent yet done absolutely nothing to remedy this situation? Since all of these judges were probationary judges it would have been possible to take appropriate action. There are two possibilities here. The first one is that Judge Ximenes failed utterly in his role as President of the Court of Appeal by watching decisions that to his mind reflected incompetence pile up, doing nothing about it. The second is that the results of the examination were predetermined (hence not a single passing score).

Based on his public statements, Judge Ximenes has not acknowledged that the failure of all the judges in any way reflects upon his leadership of the judiciary. In an interview with *TIME* magazine after the examination results were announced, Judge Ximenes indicated that he expected the people of East Timor to find the results reassuring. Stating that he did not find the results surprising because the cases coming to the Court of Appeal had told him the judges “were not skilled,” Judge Ximenes added, “People are more confident when they see that if someone is not skilled, they are not allowed to serve as career judges.”<sup>280</sup> He does not seem to recognize that declaring every judge in the country incompetent after they have been sending people to jail for five years might not inspire confidence in the general public.

There is no question that the examination itself was deeply flawed.<sup>281</sup> The examination was written in two languages, Portuguese and Tetum. All of the examinees answered in Tetum. The examination for the judges was prepared, Judge Ximenes informed me, by himself. He has both Portuguese and Timorese nationality and speaks both languages. The examination was graded by a Judicial Evaluation Commission chaired by Judge Antunes of the Court of Appeal and consisted of judges who speak Portuguese but not Tetum, requiring that all answers had to be translated into Portuguese to be graded.

The examination was rife with translation errors, typographical errors, and serious editorial mistakes. In 26 questions (in two parts) there are more than 30 such mistakes,

<sup>280</sup> *TIME* Pacific, 14 February 2005.

<sup>281</sup> The examination is reproduced in the Appendix.

many of them serious enough to interfere with the ability of the examinee to answer correctly. A detailed analysis of the errors in the examination is attached in the Appendix. It is evident that this examination, which determined the fate of the entire Timorese judiciary, was sloppily prepared and translated, and never proofread. Considering that one of the examinees failed by only half of one point,<sup>282</sup> and another by only one point, even one or two minor errors in the examination could have made the decisive difference between a lifetime judicial appointment and two and a half years of probation. Judge Maria Pereira, for example, stated that she completely misunderstood three questions because of mistranslations.<sup>283</sup> Any errors would be a serious problem; more than 30 is simply inexcusable in an examination of this importance.

After the examination the Timorese judges expressed considerable dismay about the translation errors that had caught the attention of some of them during the exam. This was also one of the bases on which they appealed against the result. Judge da Costa, for example, said that the errors in the examination made her worry about the accuracy of the translation of the answers.<sup>284</sup> She added, "The translation was sometimes incorrect and caused confusion." Because her Portuguese is very good she could notice some of the errors, but this is not the case for many of the other examinees.<sup>285</sup>

Translation, Judge da Costa noted, was a problem in several ways. The test covered Indonesian law and UNTAET regulations. All of the examinees were trained in Indonesian law at Indonesian law schools. But, she pointed out, the test was written by Judge Ximenes, who has no expertise in Indonesian law, cannot read Bahasa Indonesia, and would have had to use English translations of Indonesian codes (though his own English is far from perfect). None of the evaluators has had any training in Indonesian law or can read Bahasa Indonesia. As she further pointed out, the answers were written in Tetum and then translated back into Portuguese, because none of the evaluators could read that language. It is hard to think of a process more likely to produce problems than this. Nineteen of the 22 judges immediately appealed. In late May 2006, 16 months after the appeal was lodged, it was rejected by the reviewing committee appointed by the Superior Council of the Judiciary. International Judge Sandra Silvestre of Brazil dissented, maintaining that the judges' appeal should have been approved.

Interviews with the evaluators who graded the examinations revealed that only one of them was furnished with the Portuguese translations of the answers and that he read them out to the others. The two others were not informed as to who prepared the translations, which were handwritten. This is inappropriately informal. The judges/examinees were not allowed to see the translation of their answers. They were given back only the Tetum originals which had no comments or marks, only a score.<sup>286</sup> An informant who had been connected to the process, but preferred to remain anonymous, stated that there was a very wide discrepancy between the grades of the evaluators. In his opinion the discrepancy and the pattern of grading of one of the evaluators was deliberately low so that no matter what scores the other examiners gave, all the judges would fail.<sup>287</sup>

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<sup>282</sup> Judge da Costa had the highest score on the examination: 9.45. A score of 10 was required for passing. This is based upon a copy of the examination results which I was provided by an informant in UNMISSET.

<sup>283</sup> Interview, 28 March 2005.

<sup>284</sup> Interview, 30 March 2005.

<sup>285</sup> Interviews, 30 March and 1 April 2005.

<sup>286</sup> Interview with Judge da Costa, 30 March 2005.

<sup>287</sup> Interview, 27 April 2005.

That the results of the examination were not solely determined by performance on the test may also find some confirmation in a remark by Judge Ximenes. At the end of a lengthy discussion in which he described the entire examination process, he concluded by saying that “[t]he final decision on the exam was taken by the Superior Council.”<sup>288</sup> If the failure of all of the judges was based on the examination results alone, what “decision” would the Superior Council have had to make?

The translation errors, omissions, and egregious lack of proofreading in the exam itself call into serious question the accuracy of the translation of the answers. At the very least, the general lack of professionalism displayed calls for an independent evaluation of the examination itself, the translations of the answers, and the administration of the examination and evaluation process. This responsibility should fall to the UN, since those who wrote, graded, and administered the examination were international judges employed by UNMISSET.

### **The Judges’ Training Program**

An examination of the training program currently underway for those who failed will clarify the nature of the political context in which the evaluation and training of the Timorese judiciary operates. It will also reveal much about the UN’s efforts at capacity building and their prospects.

The lack of forethought given to the Judges’ Training Program is indicated by the fact that after their failure on the exam, the Timorese judges of the Special Panels were authorized to continue to serve. At the same time, because they had failed, they were required to attend classes at the Judicial Training Center (JTC), where missing more than a small number of class sessions, no matter what the reason, mandates dismissal from the program. It was unclear how they could have been expected to fulfill both functions as required; that is, to sit in court hearing cases and attend classes at the same time. This arrangement was particularly puzzling in that it was Judge Ximenes who was responsible for both the designations to serve on the Special Panels and the requirement to attend daily classes. Thus this was not a case where the “left hand didn’t know what the right hand was doing.” It was only through the intervention of the Judge Coordinator that the class schedule was adjusted and “make-up” classes were scheduled for weekends.<sup>289</sup>

The training takes place through daily courses at the JTC.<sup>290</sup> The program is developed, financed, and administered by the United Nations Development Programme (UNDP). Attendance is mandatory. Any participant who does not attend 90 percent of the classes will be failed, and sickness, vacation, and official business all count as absences. The instruction is conducted by international judges, prosecutors, and public defenders, all of whom are Portuguese speaking. These include the three international judges from the Court of Appeal. Instruction is in the new draft law codes in legal Portuguese and legal Tetum. In effect, Portuguese law is the basic subject because all of the new legal codes that have been drafted for adoption (Criminal Code, Code of Criminal Procedure, and Code of Civil Procedure) are basically cut-and-paste versions of Portuguese codes, which have been prepared by a

<sup>288</sup> Interview with Judge Ximenes, 31 March 2005.

<sup>289</sup> Email communication by a source involved closely in the process, April 2006.

<sup>290</sup> A more detailed account of the Judicial Training Center and its programs may be found in David Cohen, *The Legacy of the Special Panels for Serious Crimes* (International Center for Transitional Justice, forthcoming).

consultant from Portugal.<sup>291</sup> They exist only in Portuguese language versions. There are no Tetum translations, even though this means that a majority of the members of Parliament cannot read them. The same is obviously true for the 90–95 percent of the Timorese population who also can not read or speak Portuguese. It is worth recalling that according to the Constitution both Tetum and Portuguese are the official languages of East Timor.

In an interview on 28 March 2005, Judge Helder stated that the problem was not training but communication. He said the judges feel they can benefit from further training, but the problem is that they cannot understand the trainers. The trainers, he explained, speak high Portuguese in class and “98 percent of trainees cannot understand what they are saying.” He explained that the trainees come to class anyway in the hope that they will understand something and because they have to: “We waste mornings and afternoons. We students meet after class and the students don’t understand anything. This happens every day. And the teachers ask if we understand and no one says anything. So the teacher goes on lecturing.” Though his Portuguese is quite good and better than that of most of the others, he also cannot understand the high formal Portuguese often used in the lectures. Because the other students know that he speaks better, after lectures they ask him, “Did you understand that?” He has to tell them that he didn’t understand it either. Asked if the teachers know that the students don’t understand because they can’t speak Portuguese well enough, he became very heated and replied, “They know! They are aware 200 percent that 99 percent don’t know Portuguese and can’t understand!” He concluded with resignation, “It is a political decision. We must go with the wave or be washed away.”

Judge Helder’s account was corroborated by the other Timorese judges from the SPSC. Judge Pereira explained that there has never been any translation in the training courses. Some governments and NGOs offered to fund interpreters, but, she explained, this offer was refused by the Ministry of Justice. The trainees were told they would have to use Portuguese exclusively because the new codes would only be available in Portuguese. What they are learning in the training, she explained, is much what they had been taught early in law school, but because it is in Portuguese they don’t understand it. She concluded, “In theory there are two official languages; in reality, only one.”<sup>292</sup>

Judge da Costa also stated that in the training, the teachers are her international colleagues from the Court of Appeal and the instruction is basically all Portuguese law.<sup>293</sup> Her Portuguese is quite good, she explained, as she has been working in the Portuguese-speaking Court of Appeal, but she says that when the trainers speak high Portuguese even she cannot understand. “None of [the trainees] can,” she adds. She concluded by asking why the judges did not receive training from the very beginning.

Judge da Costa reported that the trainers had informed the trainees of how different the system of legal education in Portugal is compared to what the trainees experienced in Indonesia. The trainers, she stated, repeatedly told them that, unlike in Indonesia and East Timor, in Portugal only the most brilliant and highly motivated students are able to study law because it is so intellectually demanding. She understood the implication to be that the East Timor trainees would not have had the intellectual capacity to survive in the Portuguese system.

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<sup>291</sup> UNDP Senior Legal Advisor Marcus Ferreira, who visits East Timor every two to three months.

<sup>292</sup> Interview, 28 March 2005.

<sup>293</sup> Interview, 30 March 2005.

A theme running below the surface of all these interviews was the condescension of the Portuguese trainers toward the Timorese trainees. Several very well-placed sources, all of whom asked not to be named, stated that disparaging remarks were commonly made by a number of the trainers at the JTC. Three informants stated that one trainer in particular, an international judge from the Court of Appeal, had fits of temper in the classroom, where he had repeatedly called the trainees “stupid,” “ignorant,” and “incapable of learning.” On one such occasion, the three informants stated, he called the trainees “savage misfits.” One administrator in the Court of Appeal, according to my informants, said of the non-Portuguese speaking Timorese, “Are they goats that they can’t speak Portuguese?”

Judge Antunes of the Court of Appeal is one of the trainers at the JTC. Asked about the results of the examination and about how the training program was progressing, he explained that the basic problem with the trainees is that Indonesian law schools are so abysmally poor.<sup>294</sup> As a result, although the trainees were working as judges for several years, “their legal knowledge is very poor.” As for the examination, he stated that “[i]n most parts of the world *students in their first or second year* could do this exam” (emphasis added). Reflecting further, he said that the real problem underlying the judges’ poor performance was not their education in Indonesia, but “their intellectual ability to reason with the law.” He concluded by saying that although the trainees are motivated, in two and a half years “we will not have good judges,” but they will have “basic knowledge.” One may recall here that Judge Antunes wrote the Paulino de Jesus decision for the Court of Appeal and, together with Judge Ximenes, made up the majority in the “applicable law” cases discussed above.

Turning to language problems in the training program, Judge Antunes stated that “they are getting better.” He confirmed that the training lessons are all in Portuguese and stated that since beginning the preliminary training in October 2004, the students are trying to speak Portuguese. Now, he explained, they are “beginning to be able to understand Portuguese at a basic level.” Thus he was aware that for eight months of instruction his students had been unable to understand, because only now are they “beginning” to grasp “basic Portuguese.” When asked about his role as a mentor, he affirmed that he had a very good mentoring relationship with the trainees. Asked to illustrate, he explained that for many months the trainees did not talk to him at all, but that now during the breaks they sometimes have some “small talk” conversations. Under normal professional standards, such small talk does not demonstrate an effective mentoring relationship.

Not all those involved in the training process shared the views of Judges Antunes and Ximenes. The International Public Defender Pedro Andrade, from Portuguese-speaking Cape Verde, also serves as a trainer at the Judicial Training Center.<sup>295</sup> He was particularly outspoken in his criticism. He confirmed that the Timorese public defenders, for example, badly needed training. On the other hand, he referred to the language policy of the training program as “crazy.” He stated, “You must speak Tetum to them so they can understand.” He explained that he considered a large part of the problem to be what he calls the “amazing degree of cultural isolation” of the Portuguese judges/trainers who cannot speak any other

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<sup>294</sup> Interview, 27 April 2005.

<sup>295</sup> Interview, 1 April 2005.

languages and who, he continued, have a very narrow national perspective and range of knowledge.<sup>296</sup>

I also interviewed several persons from both the Timorese government and the UNDP involved in developing and running the training program. In many ways, these interviews were even more troubling than those with the program's critics. Two of them are particularly worth discussing here.

Ana Graca is the UNDP Coordinator of the training programs at the Judicial Training Center.<sup>297</sup> She explained that the UNDP judicial training program was a result of an assessment of needs in 2002 and characterized it as one of the "main achievements" of the UNDP program. Asked who selected and appointed the trainers, she replied that the Superior Council of the Judiciary, headed by Judge Ximenes, assessed the qualifications of the trainers and appointed them. Asked about the UNDP role in this process, she explained, "The UNDP did not evaluate the qualifications of the trainers," adding, "They are not trainers." When asked if this meant that none of those appointed were professionally qualified as trainers, she confirmed that was the case. But, she added, she and her colleagues at UNDP have no doubt that they are "the best people for the job."

Upon further inquiry about the applicant pool and why they did not look for professionally qualified trainers, she explained that "the Council of Coordination and Superior Council did not want trainers from outside." She clarified that "from outside" meant those who were not already working as internationals in the judiciary in East Timor. She further stated that they had also decided that only native Portuguese speakers would be considered. Asked to summarize the selection criteria for the trainers, she confirmed that there was an explicit policy decision to hire trainers who had no professional qualifications as trainers, and to consider only those already in East Timor and who had native proficiency in Portuguese. She also stated again that the UNDP did not evaluate the qualifications of the trainers.

Asked about the UNDP's position on the issue of language, she stated that the UNDP policy is that the training is to be conducted only in Portuguese "because that is the policy." She confirmed that it was for this reason that the Timorese Council of Coordination decided not to allow translation into Tetum in the classroom when the provision of translators had been offered. The UNDP was thus aware translation was needed to facilitate the learning process but completely deferred to the policies of the Timorese government on this issue, regardless that doing so might undermine the capacity-building program that the UNDP was financing and administering.

She stated that the UNDP not only recognized, but also fully approved and supported *that failing the judges on the examination was a tool used to force the trainees to exclusively use Portuguese*. Indeed, her explanation directly linked the failure of the judges on the examination to the issue of Portuguese language politics. She stated, "*It's their fault. They had three years to learn Portuguese*" (emphasis added). Upon inquiry as to what she meant by "fault," she explicitly stated that the trainees had to be forced to learn Portuguese by failing

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<sup>296</sup> Similar highly critical views of the training program and its language policy were expressed by Prosecutor General Monteiro. He stated that whenever he raised the issue of the language policy, "the government always has 101 answers." In his opinion the language policy was being driven in response to impetus from the government of Portugal. Interview, 30 March 2005.

<sup>297</sup> Interview, 30 March 2005.

them on the examination because they had previously not done so voluntarily. This, she explained, was a mechanism to coerce them through the training program. Asked to confirm what she had just said, in order to make sure that there had been no misunderstanding, she did so.

Her remarks indicate that the results of the examination were manipulated according to political concerns wholly extraneous to performance on the questions. It also indicates the knowledge of at least some UNDP staff, including the person most directly responsible for the JTC program, of this attempt to use a blanket failure on the exam as the instrument for enforcing the unpopular language policies of the Superior Council and Council of Coordination.<sup>298</sup> Graca's linking of the failure on the examination to failure to learn Portuguese is revealing. Since the examination of the judges was given in both Tetum and Portuguese, and since they could write their answer in Tetum (and receive two bonus points for doing so), knowledge of Portuguese had nothing to do with their ability to take the examination. It was rather that having failed previously to learn Portuguese, a mechanism had to be found to force them to do so. That mechanism, on her account, was the examination.

*'We fully support this policy of the exclusive use of Portuguese in the judiciary'*

Graca also stated the UNDP position on the use of Portuguese to the exclusion of Tetum in the judiciary: "We fully support this policy of the *exclusive* use of Portuguese in the judiciary" (emphasis added). When asked about her use of the word "exclusive," given that the Constitution provides for two official languages, she stated, "The UNDP fully supports the policy of the Superior Council that only Portuguese will be used in drafting laws, training judges, and in the court system." She added, "One day, maybe in five or six years, Tetum will be introduced." Asked for an explanation, she stated that Tetum (which she does not speak) is "unfit" for drafting laws and for legal usage because it is such a "primitive" language. When it was pointed out that she herself had admitted that one of the courses for trainees at the JTC was called "Legal Tetum" and that in their training they are translating parts of the Portuguese Codes into Tetum, she said, "That's different." When it was also pointed out that at the Court of Appeal decisions are being written in Tetum by Judge da Costa and at the Special Panels translators are translating closing and opening arguments, legal discussions, and the like into Tetum every day, she broke off the interview.

Perhaps the most striking thing about the interview, apart from her admission that the examination results were predetermined, was that throughout she did not distinguish the capacity-building goals of the UNDP from the policies of the Timorese government. She displayed no awareness that it might be inappropriate for the UNDP Coordinator of the Judicial Training Center's programs to deem it legitimate to coerce the trainees to use Portuguese by failing them on the examination. Like many of the Portuguese individuals I encountered working as UN employees, she expressed a fundamentally neo-colonial outlook towards the Timorese. This came out repeatedly when talking about both the trainees and the "primitive" nature of Tetum as a language.<sup>299</sup>

<sup>298</sup> Graca's account was confirmed by another UNDP staff member who requested to remain anonymous and asked me not to use any of the specific information he provided. Interview, 1 April 2005.

<sup>299</sup> In early 2005 three Timorese judges approached Judge Rapoza and asked him to be their mentor, "as they felt abandoned by the international staff working in the judicial sector." They subsequently had to ask him to forget their request because they had been given reason to fear retaliation by Judge Ximenes if they proceeded. Email communication with the author by one of the parties involved, December 2005.

To inquire further about the rationale of these language policies, Carla Marcelina Gomes, Legal Adviser to the Minister of Justice, was also interviewed.<sup>300</sup> When asked if there were plans to translate the Draft Portuguese Codes into Tetum, she stated that there were none. Because Tetum is “too undeveloped,” she explained, the drafting team for codes used Portuguese “because it is the only language left.” When asked about the advisability of enacting laws exclusively in a language that only five percent of the population can read, she replied, “Do you expect that in any country in the world the little peasant can read the law?” As an international advisor, part of her job is to help establish a democratic legal system and the rule of law.

In the course of a lengthy discussion about the use of Tetum in the Special Panels and in the “Legal Tetum” course at the JTC, she took the position that it is simply “impossible” to translate “any legal terms or abstractions into Tetum.” Her response to the daily translation of Tetum over the past five years in the Special Panels was, “If you can call it translation.” Because, in her view, Tetum is such a “primitive language,” what the Special Panels’ translators are doing “is not really translation.” The translators, she stated, “are just explaining in simple words” what the person speaking “meant.” When it was pointed out to her that the Superior Council of the Judiciary had apparently decided that the technical legal questions *could* be translated into Tetum, because they themselves ordered that the examination of the judges be drafted in that language as well as in Portuguese, and the examination included both statutory interpretation and the drafting of Judgments, she responded by saying that Tetum was still “in development” and that some few terms had been “provisionally translated.” She soon after ended the interview.

These interviews give a good sense of the depth of the ideological commitment to the Portuguese language politics of the Timorese regime by these international advisers (both Portuguese themselves). As stated by Graca, it is here that one finds the explanation of the results of the examination and an indication of the goals of the training program. Obviously, only those who manage to learn Portuguese well enough along the way will survive this program. Since there appears to be little concern with what the trainees are actually learning in the program, the enforced production of a Portuguese-speaking cadre of judges, lawyers, and public defenders appears to be its real aim.

Concerns about the exclusive use of Portuguese in the legal system despite the constitutional mandate for two official languages are heightened by recent developments in the training of lawyers. The government of East Timor recently announced that with the help of the Portuguese government the law faculty of the University would begin accepting applications for its first class. A written examination of Portuguese competency is a prerequisite for admission, the language of instruction will exclusively be Portuguese, and all of the faculty will come from Portugal.

The training program described above (including the examination process) was financed and staffed by the United Nations, through UNMISSET, UNOTIL, and the UNDP. The UN administration in East Timor has been well aware of all of these problems. An interview with one of the UNMISSET Human Rights Officers concerned with the judiciary confirmed that these issues had indeed long been a matter of concern in the Human Rights Office and had been brought to the attention of the Special Representative of the Secretary-General.<sup>301</sup> This Human Rights Officer also stated that they had received

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<sup>300</sup> Interview, 31 March 2005.

<sup>301</sup> Interview with an UNMISSET Human Rights Officer, 31 March 2005.

*'In large part the administration of UNMISSET abandoned the judicial sector to its international staff from Portugal'*

repeated protests from the trainee judges that they were not benefiting from training because of language problems.<sup>302</sup> As for the appointment of trainers, the Officer confirmed that an arrangement was made between UNMISSET and the UNDP that rather than hire international trainers, the judges who were hired for District Courts, or who were serving in the Court of Appeal, would do both tasks. There was no attempt to recruit professional or even experienced trainers. She also confirmed that the Human Rights Office had received repeated complaints that some trainers treated the trainees in an insulting and contemptuous manner. She had heard complaints from the trainee judges that they had been “treated like animals.” She had also been told of the insulting remark that the trainees were “savage misfits.”

A number of themes have run through this section on the UN's capacity-building efforts for the Timorese judiciary. One of them has been the way in which Portuguese language policies and the “neo-colonial” role assumed by Portuguese experts, and the Portuguese-speaking Timorese elite that runs the country, have skewed these efforts in ways that scarcely seem compatible with the democratic values that the UN espouses and that undermine its capacity-building goals. In regard to these issues, it is worth reflecting upon the conclusions drawn by a person who played a key role in the Serious Crimes process and in judicial capacity building in East Timor in 2003–2005:

In large part the administration of UNMISSET abandoned the judicial sector to its international staff from Portugal. Although international staff from Portugal (both UNMISSET and UNDP) took the same oath as all other UN employees to operate pursuant to UN goals and guidelines, they invariably used their positions to advance the agenda and interests of their home country. This was, of course, with the approval of the Timorese leadership, but it produced what was essentially a bilateral program in international guise.

Another example: At a point the Brazilian Ambassador in Dili announced that his government was prepared to provide, at its sole expense, teams of judges, court clerks/registrars, prosecutors and defense lawyers for each of the district courts in Timor (Dili, Baucau, Suai, Oecussi). This offer was rejected by Chief Justice Ximenes on the ground that one country should not play such a dominant role in Timor's judicial system. This position would have rung true if it were not for the fact that almost every such position was already held by a Portuguese paid for by the UN. In other words, his real concern was that the Brazilian offer challenged the already dominant role of Portugal.<sup>303</sup>

An underlying issue in this discussion is the failure of the UN to effectively monitor and evaluate the work of its staff and their implementation of training and other programs. This problem is further complicated by an apparent policy to defer to any decision made by the President of the Court of Appeal. The rationale is that despite his dual citizenship and employment by the UN as an international judge, because he is also Timorese he represents the national framework that the UN must allow to make policy decisions. Such a rationale offers an easy out for not accepting responsibility for the actions and policies of a UN employee. When policies or programs go wrong, it is then possible for the UN to simply say that this is what the Timorese wanted and they can only act in an “advisory” capacity.

<sup>302</sup> This problem was highlighted in 2005 to the Commission on Human Rights.

<sup>303</sup> Written communication to the author, March 2006. The writer requested to remain anonymous.

## CONCLUSIONS

In terms of the prospects for a continuation of the Serious Crimes process, this discussion has provided few grounds for optimism. For one thing, it is clear that there is no political will in the Timorese government to pursue such a course. The debacle of the handover process and the adoption of the Commission on Truth and Friendship with Indonesia make this clear enough. Though there may be a few trials of individuals who are apprehended, the Superior Council has indicated no interest in taking up the task left unfinished by UNMISSET. An amnesty measure for those convicted of serious crimes has recently been proposed to the Parliament.

In terms of capacity building, the five years of UNTAET/UNMISSET and UNDP efforts can scarcely be credited as a success in light of the failure of all of the probationary judges, prosecutors, and public defenders in the entire country. A mentor who sees all of his or her charges fail in a “minimum competency” evaluation should ask himself some very hard questions. In this case the international mentors of the trainee judges have acknowledged no responsibility for the results. As shown, there are sound reasons to maintain that the failure of all the judges was not determined by the examination, but by political aims. These political aims have thus far admirably succeeded. As Judge Helder put it, the wave will wash away all who resist this trend.

That the United Nations has financed this effort is deeply troubling. That international trainers in a UNDP program spent at least eight months lecturing in a language that they *knew* their students could not understand, and insulted them in the process, is even more disturbing.

Finally, that another UN employee, whose own performance and competence in the judiciary is at best controversial, now occupies six key positions that put the future of the judiciary basically in his hands, does not bode well for the future of the courts or for the rule of law in a democratic Timor-Leste. There are serious concerns here regarding transparency, impartiality, and conflicts of interest. When one takes into account the record of the Court of Appeal, including the incompetent jurisprudence and methodology of many of its decisions, its reputation in the Serious Crimes community for a lack of professionalism in its administration, and its persistent disregard for the provisions of its own Statute and international norms, one can only question the management and oversight policies of the United Nations, which has been well aware of these problems.

The service of UN international advisers and other judicial personnel should assist in the foundation of a culture of judicial independence, impartiality, the rule of law, and a vigorous legal culture. Yet in East Timor too many of them are rather neo-colonialist in their outlook. This diagnosis was confirmed by a number of persons employed by UNMISSET/UNOTIL or the UNDP in advisory or other capacities connected to the justice system. It is also fair to characterize such an assessment as widespread among present and former members of the Serious Crimes community.<sup>304</sup> If this assessment is accurate, this, of course, will be the greatest failure of UN capacity building in East Timor.

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<sup>304</sup> Those who expressed such sentiments preferred not to be named, though I note that they include individuals who served in a wide variety of positions in UNDP, UNMISSET, SCU, and SPSC. These concerns are also widely shared in the NGO human rights community in East Timor.