
PART FIVE.
CONCLUSIONS AND ‘LESSONS LEARNED’

*Three aspects of
the trials place
the legacy of the
Special Panels
in question*

What is the balance sheet of the UN’s four-and-a-half-year effort at achieving accountability in East Timor? To be sure, a relatively large number of alleged perpetrators were tried and convicted. But as Judge Maria Pereira aptly commented, the reputation of the Serious Crimes Panels cannot rest upon the “mass production of Judgments” to enhance the statistics of the Court. In retrospect, there are three aspects of the trials that place the legacy of the Special Panels in question.

The first, as Deputy Prosecutor General for Serious Crimes (DPGSC) Siri Frigaard feared, is that lack of an adequate defense and of competent translations and other resources will lead critics to conclude that justice was not done. These shortcomings were compounded by the inadequacies analyzed in the trials and appeals process. They were confirmed by the views of the Special Panels judges. Both at the trial level and before the Court of Appeal, an inadequate defense and flawed Judgments call into question the legitimacy of a significant number of convictions. This is especially the case in regard to the conviction of the accused for crimes with which they were never charged, in direct violation of the Transitional Rules of Criminal Procedure. The failure of UNMISSET to take corrective measures only makes the matter worse.

In light of the failures referred to above, the persistent attempt by the UN to label its justice process a success because of the large number of convictions and the completion of all pending cases by the target date of 20 May 2005 is unconvincing. The willingness of the Commission of Experts to endorse such conclusions calls into question the impartiality of their report. Further, such bureaucratic measures of “success” are radically inappropriate for a trial process whose aim must be to provide meaningful accountability while protecting the rights and interests of the accused through providing a fair trial, with a vigorous and adequate defense, accurate translation and transcription of proceedings, impartial and competent judges, and an appeals process that meets international standards. As this analysis has demonstrated, all of this the Serious Crimes process too often failed to do.

The second aspect has to do with the premature conclusion of the process. The decision not to limit prosecution to a small circle of those who bear the “greatest responsibility” and to instead conduct broad investigations into all the murders that occurred in East Timor created expectations among the population that justice would be done for the deaths of their relatives and friends. These expectations were solidified by numerous pronouncements on the part of the SCU and other UN bodies. As shown by the community meetings conducted by DPGSC Carl DeFaria, there was widespread anger among the communities of East Timor that had been most affected by the violence that the process was shut down midway toward completion. One can express this quantitatively, as Judge Rapoza has, in terms of the only 572 out of 1,400 murders that have as yet led to indictments. Or one can ask, as DPGSC DeFaria has, what someone in his position says to the father in Oecussi that still sets a place at the table for his son who was murdered in the 1999 violence.³⁰⁵

Whichever way one puts it, ending the process in midstream produced great frustration and resentment both within the Serious Crimes community and, more importantly, among

³⁰⁵ Speaking at the UN Symposium in Dili, 28 April 2005.

the East Timorese whose interests the trials were to serve. This will remain as another blemish on the record of the trials. This is particularly the case because there has never been an adequate explanation from the Security Council as to why they mandated a premature conclusion just when the Special Panels were beginning to function at an acceptable level of international practice.

The third aspect has to do with the failure to obtain custody of any even mid-level, let alone high-level, defendants. Here one may properly blame Indonesia, but the Security Council must also take a share of the blame for its failure to even attempt to give the trials the political support they required to succeed. This blame must be shared by the Timorese government who not only did not support the process but undermined attempts to pressure the Indonesians by indicating their lack of interest in, if not their outright opposition to, such prosecutions. From the very beginning of the process vocal critics like Judge Pereira pointed out the injustice of bringing to trial only the lowest-level Timorese perpetrators, mostly impoverished illiterate farmers who perpetrated single acts of violence in their villages under orders of the militias and TNI. As we saw, this view was shared by many of the judges of the Special Panels.

Underlying these three failings of the Serious Crimes process is the failure of the Security Council and UNTAET to define a clear mandate for the SCU at the very beginning of the process. DPGSC Siri Frigaard's decision in 2002 to pursue priority cases and to also focus upon a select group of high-level Indonesian perpetrators offered multiple advantages. It provided a focus for prosecutorial strategy, which was sorely lacking in the early stages when crucial decisions were made. It also enabled a concentration of prosecutorial and investigative resources to build strong cases and document the historical record, not just of individual killings, but the organizational and political mechanisms that enabled them to be perpetrated.

The indictments of high-level Indonesian suspects, and particularly General Wiranto, provided the kind of documentation of the larger picture of violence in East Timor that, as we have seen, was sorely lacking in the trials that were actually held. In very few cases was any evidence actually produced in Court about the broader context of the violence, and above all about those responsible for organizing it. The decision of the prosecution to rely solely upon a few human rights reports to establish the context for crimes against humanity prosecutions was consistently encouraged by the judges and rarely challenged by the defense. Because the prosecution did not make its case in Court about the full sweep and organization of the violence, little was added to the historical record beyond these reports, which predated the trials. For this reason, it is hard to see how most of the trials that did occur laid a foundation for the eventual prosecution of those at the highest levels of command. The Judgments in the 84 convictions do not provide a coherent account of the organization, financing, planning, and direction of the attacks and the mechanisms by which they were implemented at the local level. In this sense, as well, the Serious Crimes trials fell far short of their potential.

Despite all of the challenges, however, the dedication and hard work of very capable individuals in all three branches of the process—chambers, prosecution, and defense—saved the trials from what could have been a complete failure of credibility and legitimacy. Also of crucial importance was the willingness of UNMISSET's head in 2004–2005, Special Representative of the Secretary-General Sukehiro Hasegawa, to provide the support requested by the Judge Coordinator and others. The history of these trials shows how individuals can

The hard work of individuals in all three branches saved the trials from what could have been a complete failure of credibility and legitimacy

make a difference, because at crucial junctures they did. Without their efforts, the Special Panels, the prosecution, and the defense would have fared far worse. Though it is an indictment of the UN that it was not until mid- to late-2004 that the Special Panels began to function as they should, it is a tribute to the contributions of many individuals that this was possible at all. No matter how harsh some of these criticisms of the process may seem, an effort has been made throughout this report to highlight the ways in which many outstandingly capable individuals struggled to improve it.

The remaining part of this Conclusion will draw together some of the main themes and rephrase them in terms of lessons to be learned from the challenges of seeking accountability in East Timor:

- 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 means appointing individuals to key positions of responsibility who understand the needs of a Court and have the experience to build one from the ground up in a post-conflict environment. A fatal mistake in regard to administration, resources, and management was the failure to appoint a Registrar and to invest him or her with appropriate authority and responsibility. The tenure of Robin Vincent as Registrar at the Special Court for Sierra Leone demonstrates what a difference the presence of a highly capable person in such a position can make.
- Underlying the problems encountered by the Special Panels was the failure to create a position of a President or Presiding Judge empowered to speak on behalf of the Panels and to appoint a person of sufficient stature and experience (as eventually happened in 2004) who would know what the Court required and fight effectively to get it. Four years was too long to have to wait for this to happen.
- Underlying both of these first points are the obvious and well-known problems 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.³⁰⁶
- The UN should also have in place a standard process for creating tribunals and ensuring they have what they need to function properly. This means, above all, providing oversight through some kind of committee composed of very experienced judges, prosecutors, and judicial administrators rather than UN bureaucrats who understand nothing of the functioning of a judicial process.
- There should be no need to fight for the resources necessary to enable a court to function as a proper court and to meet the standards that the United Nations aims to promulgate. The failure to provide the basic resources described in Parts One through Three of this report is a disgrace to the United Nations. There is no excuse for a UN

³⁰⁶ Prior to the appointment of Judge Rapoza as Coordinator, judges and court staff had been recruited entirely by UNMISSET staff with little or no participation by or consultation with the Court. Judge Rapoza instituted a process whereby the judges of the Special Panels reviewed applications, interviewed candidates, prepared a ranked shortlist, and forwarded it to UNMISSET with recommendations. The result was a significant improvement in both transparency and the quality of successful candidates.

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 the Special Panels and SCU existed. 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. Proper planning must ensure human and material resources for the defense from the very beginning. Failure to meet acceptable international standards in providing an adequate defense undermines the legitimacy of the trials and calls into question the convictions handed down in such cases.
- There must be proper management and oversight of the three branches of the judicial operation. The UN practice of operating with short-term contracts has many disadvantages, but it also allows for moving out incompetent or unmotivated personnel. There was a striking failure to do so in East Timor. Many cases have been noted here that called for intervention in the form of not renewing personnel whose work did not meet even minimum standards of competence let alone the best international standards. One must ask why, in light of UNTAET/UNMISSET's awareness of the problems, this was not done. One reason is that lack of clear ownership of the process provided an easy excuse for shifting the blame from the UN to the Timorese side.³⁰⁷ But if the UN recruits and pays the salaries of its appointees it should also provide effective oversight and management of them.
- The problem of lack of accountability cannot be underscored enough. Failures such as the non-existence of a Court of Appeal for 19 months are simply inexcusable because they have such a direct impact on the rights and interests of accused. As Timorese Judge Jacinta da Costa commented, "How can it be that there are no judges at the Court of Appeal? Human rights can't be only talk." Likewise, the failure of UNMISSET to take any steps at all after the Armando dos Santos, Paulino de Jesus, and other notorious decisions of the Court of Appeal only harmed the standing and ultimately the legitimacy of this important institution. It did not serve the interests of anyone, or of "judicial independence," to allow the highest court in the land to become a standing joke and source of constant mockery among all branches of the UNMISSET legal operation, yet this is exactly what happened in Dili.
- There must be adequate and effective training for court actors. The failure to either hire individuals who already possessed the requisite skills, or to provide mandatory training

The problem of lack of accountability cannot be underscored enough

³⁰⁷ For example, the Superior Council of the Judiciary officially appointed the international judges after the UN shortlisted them.

for the international judges of the Special Panels and especially the Court of Appeal, as well as members of the Defense Lawyers Unit, did much to compromise the quality of the trials in ways that directly harmed the interests of the accused. The failure to provide adequate legal officers to advise the judges on international criminal law only exacerbated this problem. The results of this failure were detailed in the critiques of the jurisprudence of the Special Panels and Court of Appeal in Part Three.

- 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 only exception was the fine training program for Timorese prosecutors at the SCU, which ultimately proved futile because the UNDP training program refused to recognize this training. All of the SCU-trained prosecutors and investigators were made to start over at the Judicial Training Center.³⁰⁸
- If the UN is to engage in judicial capacity building it should ensure the recruitment of experienced and professional qualified trainers and teachers. That every judge is not necessarily a competent professional trainer is amply manifested by the problems of the program implemented at the Judicial Training Center, as described in Part Four. 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.

Four concepts represent what was missing most from the justice process in East Timor and should, instead, have been its mantra: *political will, leadership, management, and accountability*. In the end, the necessity of a commitment to these concepts is the most important lesson to be learned if the UN is going to put its imprimatur on a judicial mechanism that has the power to deprive individuals of their liberty.

³⁰⁸ See Cohen, *The Legacy of the Special Panel for Serious Crimes* (forthcoming) for a detailed account.