

## **PART TWO. POLICIES, RESOURCES, PROBLEMS, AND RESPONSES**

Part Two will deal with some of the challenges and problems that the different components of the Serious Crimes regime confronted. These include the issues of resources, translation and interpretation, transcription, case management, witness protection, community outreach, and equality of arms. There are other important issues that could have been included as well. Some of these, such as the failure to bring high-ranking Indonesian accused before the Special Panels, have been dealt with so extensively by others that I will concentrate on other issues that have not received as much detailed attention. Others will be dealt with in Part Three, on trials and jurisprudence.

Although some of the issues addressed here may appear mundane, adequate resources, case management, and technical support are essential for the proper operation of a tribunal, especially one dealing with as many complex cases as the Special Panels. Serious failings of capacity in any of these areas can operate to the severe detriment of the accused. In any modern judicial system these functions may be taken for granted. One would also assume that they would be provided for in a justice process created, financed, staffed, and administered by the United Nations. This was not the case in East Timor. Apart from a general unwillingness to invest adequate resources, one of the principal reasons for these shortcomings was the failure to appoint individuals with the authority, experience, and commitment necessary to build a court from the ground up in a post-conflict context. Some of the other issues more immediately involve the rights of the accused and are fundamental to our notions of due process and a fair trial. Many of these issues will appear again and again in the review of specific cases in Part Three.

## PRELIMINARY REMARKS ON INTERNATIONAL STANDARDS

The deficiencies that plagued the Special Panels were identified early on as subjects of concern by the Judicial System Monitoring Programme (JSMP), Amnesty International, and other organizations. One of the most troubling aspects of the Serious Crimes trials is how long it took UNTAET/UNMISSET to respond to these shortcomings even after they had been acknowledged. It is imperative to remember that what was at stake was not bureaucratic efficiency or some administrative ideal of a court system, but rather the lives and liberty of individuals. One of the international judges of the Special Panels regularly supplied me with statistics that favorably compared the SPSC's number of convictions per year and per dollar spent with those of the ICTR. He took this to indicate the effective and successful functioning of the tribunal, and there is no question that such quantifications were well viewed by the UN administrators. Large numbers of convictions in a short time span and on a very limited budget, do not, however, necessarily mean that a tribunal is performing successfully. It may indicate exactly the opposite. The objective of international justice is to provide accountability for very serious violations of international law, while at the same time meeting the highest international standards of fairness, due process, and respect for the rights of the accused. This is especially the case when the trials it conducts are supposed to be a model for the establishment of the rule of law in a post-conflict society. One of the Timorese judges on the Special Panels, Judge Maria Natércia Gusmao Pereira, expressed her deep concerns about this issue at a public forum. To ensure its legacy, she said, the Special Panels can rely neither on the "mass production of Judgments" to enhance the statistics of the Court, nor on the brilliance of a few exceptional opinions.<sup>40</sup>

The Report of the UN Commission of Experts concluded that in the Serious Crimes process the "investigations, indictments, prosecutions, defence, and judicial proceedings" were "generally satisfactory" and met "international standards." In reaching this assessment, the Commission of Experts stated that they gave "due consideration to the national legal infrastructure of ... Timor Leste ... ."<sup>41</sup> This position seems misguided. First of all, there was, quite literally, no "national legal infrastructure" in East Timor when the United Nations took over administration of the country through the establishment of UNTAET. The infrastructure for the Serious Crimes process was created by the United Nations. Whatever might be the achievements or deficiencies of the Serious Crimes process they are to be credited to UNTAET, UNMISSET, and the UN management of the process. To the extent that the East Timorese government made some problems even more difficult to resolve, this is also the result of the way in which the United Nations chose to structure the tribunal. It is also a reflection of its lack of political will to directly confront certain policies of the Timorese side that had a negative impact upon the effectiveness of the system, and, ultimately, upon the way in which individual accused were tried and convicted.

Secondly, one cannot allow the United Nations to pass off problems with the excuse that the Special Panels were, after all, part of the Dili District Court and the national legal system of East Timor. This is simply a strategy to shift responsibility from the body that created, funded, managed, and, ultimately, completely controlled the process. The SCU/SPSC regime was created by the UN and its existence ended, prematurely, when the Security Council

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<sup>40</sup> Judge Maria Pereira in the "Future of Serious Crimes" panel at the UN Symposium in Dili, 28 April 2005.

<sup>41</sup> UN *Commission of Experts Report*, pp. 8, 87.

decided to stop funding it. Accordingly, there is no plausible argument why its trials should not be expected to meet the same standards of fairness and justice as other UN international and hybrid international tribunals. If the UN is not able to meet such standards in a particular judicial process in which it is involved, then as an organization committed to the establishment of human rights norms and international law, it should refrain from proceeding until it can do so.

The very different attitude of some UNTAET administrators towards this issue is indicated in an interview on 14 January 2002 with Mohammed Othman, an international appointee who, as the first Prosecutor General of East Timor, played a leading role in shaping the early prosecutorial process. Asked if the Special Panels for Serious Crimes was an international tribunal and whether the prosecution and tribunal had to meet international standards, his answer was “no,” on both counts. He said that the Special Panels were merely part of the Dili District Court and that international standards would be “inappropriate” in East Timor. This was a strange reply in that UNTAET regulations then in force made international law binding for the Serious Crimes process.<sup>42</sup>

When asked what standards were to be applied, Othman gestured with a sweep of his arm to the surroundings and said, “local standards.” When asked further what the local standards were, given that there was no functioning legal system in East Timor apart from what had been created by UNTAET, he changed the subject and did not answer. At the time of this interview, he was wearing a UN identification badge, sitting at a desk covered with letters and documents on UN letterhead, and doing his job in a building that flew the UN flag. Unfortunately, what many of my informants referred to as the “This is not the ICTY” attitude persisted among some UNTAET and UNMISSET staff. His answer also helps to explain why DPGSC Frigaard had to undertake a complete reorganization and revitalization of the SCU.<sup>43</sup>

It also may underlie one of the most perplexing questions raised by the history of the Serious Crimes process, a question central to the concerns of this report: How was it that on the first day of the first hearing before the Special Panels, confronted with no accurate or competent system for translation, no system for recording or transcribing the proceedings, and with manifestly unprepared and inexperienced defense counsel (to name only the most basic shortcomings), the Presiding Judge, an international recruited and employed by the United Nations, could have allowed his court to proceed?

A justice operation conducted by the United Nations must be held to the same standards of fair trials as the other UN-sponsored tribunals, without reference to the “national legal infrastructure.” National infrastructure is no more relevant in East Timor than it is for the ICTR, which also operates in a developing country, or in the other “hybrid” tribunals in Sierra Leone, Bosnia, or Cambodia. In the case of Sierra Leone, the United Nations has demonstrated that for far less money than has been lavished upon the ICTY and the ICTR, it can create an efficient, competent, and modern court administration and trial process in one of the very poorest countries on earth, a country that had been totally shattered by a brutal 10-year civil war. Why did it not do the same in East Timor?

<sup>42</sup> E.g., UNTAET 1999/1, Sections 2–3; 2000/11, Section 5; 2000/15, Section 3.1; and 2000/30, Section 3.

<sup>43</sup> The extent of the reorganization is noted in an SCU overview of DPGSC Frigaard’s term of office, though it diplomatically avoids mentioning why such a drastic restructuring was necessary: “During the first weeks of her tenure ... [she] oversaw the restructuring of the entire organization of the Serious Crimes Unit teams improving internal relations and increasing staff efficiency.” SCU, *Serious Crimes Unit Update*, 28 May 2003.

## RESOURCES AND INFRASTRUCTURE

The serious lack of resources that confronted all components of the Serious Crimes process has been noted in a general way by numerous reports.<sup>44</sup> These shortcomings had a direct impact on the quality of the judicial process and the ability to meet international standards. While some resource issues may have more to do with convenience and efficiency, others are absolutely necessary for credible, fair, and legitimate trials.

As an anecdotal example, in its Media Briefing Note of 27 April 2004, “Bringing New Voice to East Timor’s Justice System,” UNMISSET proudly announced the introduction of a simultaneous translation system for the Court of Appeal. The way the system was described is telling: “The system enables courtroom parties—the judges, defense, and prosecution—to talk to each other *for the first time* in languages that all of the participants can understand” (emphasis added). The date of the Briefing Note indicates that the installation occurred four years after the creation of the Court of Appeal and only one year before the completion of the Serious Crimes trials. Lest there be any confusion about the literal import of the phrase “for the first time,” interviews with Court of Appeal judges included in the Briefing Note make clear that this was indeed the case. Judge Jose Maria Calvario Antunes is quoted as saying, “This is a very important step for us . . . . It permits all of the parties in the courtroom *to understand what’s occurring*” (emphasis added). The consequences of the parties not being able to “understand what’s occurring” in the courtroom were spelled out by the Timorese judge on the Court of Appeal: “The parties, defense, the accused, the prosecution, they all speak various languages, even the audience speaks a variety of languages . . . . *With no interpretation, there were often misunderstandings as to what had transpired*” (emphasis added).

The language problems of the Court of Appeal were well known within the UNTAET/UNMISSET community. They were caused by the fact that after 2003, two of the three judges operated in Portuguese, one in Tetum and Bahasa Indonesia (none fluently in English); the prosecution in English; the defense potentially in various languages including English, Bahasa Indonesia, and Tetum; and the accused in Tetum or other local languages, and possibly Bahasa Indonesia. English was not a shared working language of the judges, who were thus unable to understand each other *during proceedings* or to deliberate as a body about their decisions. Judge Jacinta Correia da Costa, for example, wrote some decisions in Tetum which could not be read by Judge Antunes, though he signed them. Likewise, the Portuguese decisions of Judge Antunes and Judge Claudio de Jesus Ximenes could not be read by Judge da Costa until, later in the process, she had learned Portuguese sufficiently well. More significantly, there was, as Judge da Costa and Judge Antunes indicated, an inability of the parties to understand what other parties were saying in the hearings.<sup>45</sup> The situation prior to 2003 was equally difficult because one of the judges spoke English, another only Portuguese and Tetum, and the third only Indonesian and Tetum, without adequate provision for translation of deliberations or written documents and decisions.

This would all make for a good comedy movie scenario, but in this case the consequences were all too real for the rights of those appealing convictions from lengthy prison terms, whose liberty and livelihood hung in the balance. When this “Tower of Babel” approach to courtroom proceedings is taken with the level of practice and jurisprudence of the Court of Appeal

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<sup>44</sup> See footnote 2 on page 5.

<sup>45</sup> See JSMP, *The Impact of the Language Directive on the Courts of East Timor* (August 2004), pp. 8–11.

(as will be seen in Section Three), there is a very strong case to be made that the Court of Appeal component of the Serious Crimes process, in important respects, failed to meet basic international standards. This failure calls into question the legitimacy of many of the decisions confirming the convictions and prison sentences handed down by the Special Panels.

The tragedy of this story is that so little was required to ameliorate the problem. As the UNMISSET Briefing Note indicates, the cost of the new system was US\$80,000. The UNMISSET budget for 2003–2005 was US\$296,557,000. The SPSC and SCU budgets for the same period totaled US\$14,358,600.<sup>46</sup> Yet despite the tiny expenditure required, UNMISSET could never see its way to allocate a mere US\$80,000 to ensure that the Court of Appeal, in hearing Serious Crimes appeals, could function as a court should so that the parties could “understand what’s occurring.” The US\$80,000 for the translation system was supplied by the government of Denmark.<sup>47</sup>

One might well ask both how it was possible that it would take four years to supply a multi-lingual court with the equipment it needed to function in a competent manner and how internationally appointed judges could not have demanded an immediate remedy to this problem.

The problems of translation resources for the Court of Appeal (to say nothing of other components), however, did not end here. Simultaneous translation systems required translators trained to use them. At the time the system was installed there were no translators trained in simultaneous translation. According to the UNMISSET Briefing Note the Court did have a “small staff” of translators for Portuguese, English, and Bahasa Indonesia. None of these, however, were professionally trained as translators. It did not, moreover, have translators for Tetum, the language of nearly all of the accused. The Briefing Note goes on to explain that in order to remedy this situation, the National University of Timor-Leste would, at the “end of June” 2004, begin “an eight-month pilot project ... training Timorese interpreters and translators.” Due to delays the project was not concluded until July 2005.<sup>48</sup> Why did UNTAET at the very outset make no provisions for professional training of Timorese interpreters and translators for a function that is absolutely vital for effective investigation, prosecution, defense, and adjudication, and where accuracy is of the utmost importance?

### **The Special Panels for Serious Crimes**

When I first interviewed Judge Sylver Ntukamazina of Burundi in January 2002, I found him moving his office furniture from one floor of the building to another. He explained that the judges had been told to move, and that as they had no staff, they had to do the moving themselves. The judges shared cramped, small offices. They had no research tools in the form of basic books or a library and no legal advisors or research assistants—all of which are commonly supplied at the Special Court for Sierra Leone and the other UN tribunals. They had no professional court clerk, no judge’s clerks, no secretarial support, no file and calendar management system, and so on.

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<sup>46</sup> UN *Commission of Experts Report*, p. 23.

<sup>47</sup> UNMISSET Briefing Note, 27 April 2004, p. 1.

<sup>48</sup> Despite the purport of the Briefing Note, according to UNMISSET Human Rights Officer Barbara Oliveira (email communication to the author, January 2006), this project was not aimed at solving the issues faced by the SPSC but designed to lay the foundation for the arrival of Portuguese-speaking judges and other court actors (who would take over the functions of Timorese who failed their examinations for permanent appointment).

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Judge Maria Pereira emphasized the difficulties produced by the fact that for the first two years of trials, lacking staff and transcribers, the judges had to rely on their own notes as a trial record.<sup>49</sup> This meant that there was no accurate court record of proceedings.

It was well known that the resource situation at the Special Panels was catastrophic in the first two years or so. But what of the improvements made later? To what extent and for how long did resource issues continue to impinge on the ability of the SPSC to function properly?

Resource issues continued to affect the basic functioning of the Court until very late in the process. They were ameliorated after the appointment of Judge Rapoza as Judge Coordinator in March 2004 (he had arrived in Dili in December 2003). For example, it was only in July 2004 that Judge Rapoza succeeded in getting reliable electricity for the Special Panels when, thanks to the cooperation of Special Representative of the Secretary-General (SRSG) Sukehiro Hasegawa, the generator providing power for the SPSC was fixed.<sup>50</sup> This meant that because of the erratic electrical power service in Dili (even smaller hotels have their own generators), it was not until 10 months before the closing of the Special Panels that judges could be sure of being able to use their computers, fax machines, photocopiers, and so on, or work with lighting in their small dark offices.

As for research resources, there was some improvement because of the hiring of legal researchers. According to Judge Rapoza, when he arrived in December 2003, there were two legal researchers, shared by eight judges on an “availability basis.” He succeeded in increasing this to three legal researchers for nine judges during the last year of the trials.<sup>51</sup> There was never a library of basic reference books in international criminal law and the practice of the international tribunals. Other problems were also never addressed. As had been done earlier for the Court of Appeal, a simultaneous translation system was finally provided for the Special Panels’ courtroom in late 2004. Because of mechanical problems and lack of trained staff, however, it proved impracticable to use.<sup>52</sup> As Judge Rapoza summarized the situation, “The basic resources that the Special Panels should have had when they opened were not made available until the very end of the serious crimes process.”<sup>53</sup> It is significant that apart from the head of the Court Registry appointed by Judge Rapoza, no member of the Special Panels staff “had ever worked for a court before. Accordingly, it was necessary for me to instruct staff in matters that might otherwise be taken for granted, such as the need for confidentiality with respect to court records and communications.”<sup>54</sup>

Judge Francesco Florit explained that “[i]f the UN had seen the process as important, these things would have been done from the beginning.” He pointed to the fact that there were no clerks, no real court interpreters or translators, no structure or court management until mid-2003. This, he concluded, “reflects the lack of importance that the UN attached to the process.”<sup>55</sup>

<sup>49</sup> Interview, 28 March 2005. I also interviewed Judge Pereira on these issues in January 2002.

<sup>50</sup> For details, see Judge Rapoza, “Hybrid Criminal Tribunals,” pp. 8–9.

<sup>51</sup> Interview with Judge Rapoza, 1 September 2004.

<sup>52</sup> Interview with Judge Pereira, 28 March 2005; author’s observations of trials from January–May 2005; and written communication from Judge Rapoza to the author, 5 December 2005.

<sup>53</sup> Interview with Judge Rapoza, 29 March 2005.

<sup>54</sup> Written communication from Judge Rapoza to the author, 5 December 2005.

<sup>55</sup> Interview with Judge Francesco Florit, 28 March 2005.

Judge Antonio Helder Viana do Carmo provided a similar assessment and emphasized the serious consequences of this lack of resources, giving the example of interpreters. Because he cannot speak English, in 2001–2002 *he was not able to follow his trials properly* because of the lack of competent legal translators.<sup>56</sup> When one of the judges who signs the Judgments convicting defendants of serious crimes cannot understand the testimony or arguments on which the Court’s decision must be based, it calls into question the legitimacy of the proceedings.

### **The Serious Crimes Unit**

Lack of resources affected the work of the Serious Crimes Unit, particularly in the initial phases of its work. This was particularly the case in regard to resources necessary to develop adequate investigative capacity, such as vehicles, competent interpreters, and numbers of investigative staff. As DPGSC Siri Frigaard explained at the UN Symposium in Dili, at the end of April 2005, the Serious Crimes process “got off on the wrong foot.” In January 2002, she had taken over a unit where the people wanted to do their job but did not have the resources to do so. She explained these difficulties in terms of a UN system where administrators who control budget “do not understand anything about a court process.” This was a theme that emerged frequently in my discussions with SCU, SPSC, and DLU senior staff. As SPSC Judge Francesco Florit put it, “This system was created without knowing what a court is and how it functions.”<sup>57</sup> DPGSC Carl DeFaria also pointed out that lack of adequate investigative resources at the beginning of the process had particularly serious consequences that may still be felt years afterwards when trials are underway.<sup>58</sup>

DPGSC Frigaard provided many examples of such difficulties. When she arrived to take over the SCU in January 2002 the investigators had not been given vehicles. But, she added, trying to explain to the UN that investigators absolutely require vehicles for field investigations “was like trying to talk to a wall.” Eventually, after much struggle, she prevailed. Not all of her attempts to get basic resources succeeded. For example, despite all of her efforts she could not get UNTAET to provide cameras for investigators. She also had to go to the United States Agency for International Development (USAID) to get translators for her prosecutors. When DPGSC Frigaard began to reorganize the Serious Crimes Unit in January 2002 to improve its capacity and effectiveness, she expanded the scope of the prosecutorial strategy to encompass high-level Indonesian suspects. In March 2002, however, only three months after her appointment, she was told that the UN in New York had decided to begin downsizing.<sup>59</sup> Decisions about budget and resource allocation were thus made independently of the needs of mandated tasks of the Serious Crimes Unit.

None of this was helped, of course, by what a number of prosecutors referred to as the “complete lack of management” and direction in the SCU prior to 2002.<sup>60</sup> One of the lessons to be learned here is that the initial appointments made in a new tribunal largely determine the course that the tribunal will take. Once an institution gets “off on the wrong foot,” it

<sup>56</sup> Interview with Judge Antonio Helder, 28 March 2005.

<sup>57</sup> Interview with Judge Florit, 28 March 2005.

<sup>58</sup> Interviews with Carl DeFaria, 16 February and 28 April 2005.

<sup>59</sup> Speech by Siri Frigaard at the “Future of Serious Crimes” panel of the UN Symposium in Dili, 28 April 2005, and interview on 29 April 2005.

<sup>60</sup> Interview with Prosecutor Wambui Ngunya, 31 March 2005.

may take years to make up for it and establish the standards and practices which should have been put in place at the very beginning. In the case of the Serious Crimes Unit it took three years; in the case of the Special Panels, which suffered from no, or very weak, leadership until March 2004, more than four years. This is not to fault the individuals involved here. The blame is rather to be laid squarely on the doorstep of the UN for its notoriously weak recruitment and appointment practices and, even more so, for UNTAET's failure to provide effective management structures and meaningful oversight and performance evaluations.

The lack of resources in the SCU extended beyond investigation and prosecution to the technical support services necessary to ensure effective functioning of the unit. Two examples of these service functions within the SCU will illustrate the problem.

Kylie Taloo, SCU Coordinator for Translation, spoke of the challenges her unit faced when she joined the SCU in March 2002 as part of the reorganization then underway. Her impression of the resources situation when she joined the SCU was "no equipment, no cars, no computers, no paper." It took her two months to get a computer, even though the use of a computer was essential for her work. The situation dramatically improved as DPGSC Frigaard increased her staff from 3 translators to 42. Taloo emphasized, however, that the Serious Crimes Unit "never had professional translators." For the inexperienced national translation staff, there was no training program, but rather "on the job" training.<sup>61</sup> Many questions subsequently arose at the trial stage over the accuracy of the translation of pre-trial statements given by witnesses to SCU investigators.

Despite three years of efforts, Taloo never succeeded in convincing UNMISSET to buy TRADOS, which is a standard translation database. She had requested this, or any other translation database software, repeatedly since 2002. Ironically, in the flurry of frantic activity to ready SCU files for the handover to the Timorese Prosecutor General's Office, she finally, in March 2005, received TRADOS to assist in the massive translation effort for the handover. But because it came so late it was never installed due to lack of time. She emphasized that TRADOS was not a frill, but a software system that provides the consistency in translation they could never have had without such a database. She was also never given a place to keep translation files despite frequent requests (her office was literally the size of a broom closet).<sup>62</sup>

The lack of SCU investment in software systems extended to file management and evidence. Until the handover process was underway in 2005, there was no proper database and document management system for investigative files, case files, and translations of documents.<sup>63</sup> Different prosecutors managed their documents as they saw fit. Because the case files were in a state of total disarray, the preparation for the handover was a Herculean task.<sup>64</sup>

Frequent turnover of staff on short-term contracts added to these problems as, for example, in the Evidence Unit where new staff kept changing the evidence management system. This resulted in three different archiving systems being used "and they were never harmonized and each erased some previous data." The SCU head of Public Affairs

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<sup>61</sup> Interview with Kylie Taloo, 31 March 2005.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

concluded, “The way the SCU was set up makes it seem like they expected to close it quickly. There was no long term planning.”<sup>65</sup> Again, only at the end of the process was an effective electronic file management system introduced because without it there could not have been a proper handover of documents. It is to the credit of DPGSC Carl DeFaria and his staff that, in a few months, they were able to remedy years of neglect and put the files in order.

It was also the case that the database construction for the handover revealed previously unsuspected patterns in indictments and cases. These showed how important it would have been to have proper case management and database systems from the beginning. For example, the 2005 database showed that some accused had actually been indicted multiple times, and sometimes for the same event. It also showed that in some cases there were multiple arrest warrants for the same accused. In the case of one individual, there turned out to be six arrest warrants which had been issued because of minor differences in spelling. Having a proper database and case management system would have prevented all of this superfluous effort.<sup>66</sup> According to the SCU lead investigator, who was with the Unit since the very beginning in 2001, Australia offered to send a case management expert to set up a database but the offer was refused.<sup>67</sup>

### **The Defense Lawyers Unit**

We have already noted above the complete lack of resources for the Timorese and internationals who served as defense counsel before the Defense Lawyers Unit began to operate in late 2002. This included a lack of funds for even the most basic needs, including investigators, transportation for them to go into the field to identify potential witnesses, transportation and accommodation for witnesses (should there be any) in Dili, computers, research aids, internet access, books, translators, and so on. The inexperienced Timorese defense counsel were operating in conjunction with international defenders, but they too suffered from the same lack of resources and also varied widely in terms of experience and ability. In the period up to April 2003, 7 SPSC trials were defended by Timorese counsel working alone, 11 by Timorese and international counsel together (often with multiple defendants), and 7 by international counsel alone. After that date, Timorese counsel appeared in only one trial. In the first 14 Serious Crimes trials (almost one-third of the total number of trials) not a single defense witness was called. In a substantial number of later trials this continued to be the case.

The Defense Lawyers Unit was supposed to remedy this situation and it certainly enjoyed greater resources than its predecessors. Even so, serious problems with funding remained, particularly for investigators, translators, and the like. Alan Gutman of the Defense Lawyers Unit made the same point as did SCU staff about the consequences of allowing UN administrators with no experience in court administration to make decisions about resources. In addition to never being given professional investigators, the Defense Lawyers Unit had no research staff, no law books, no access to the Lexis-Nexis online legal research database, and other deficiencies.<sup>68</sup>

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<sup>65</sup> Interview with Julia Alhinho, 18 February 2005.

<sup>66</sup> Interview with Julia Alhinho, 28 March 2005. Alhinho was heavily involved in the database project.

<sup>67</sup> Interview with David Savage, 17 February 2005.

<sup>68</sup> Interview with Alan Gutman, 30 August 2004.

## TRANSLATION

Previous sections have highlighted translation issues in the Court of Appeal and in the Serious Crimes Unit. Translation problems affecting the performance of the Special Panels for Serious Crimes were even more serious. It is in the courtroom, in the trial process, that translation capacity most directly affects the interests of the accused and has the greatest impact upon the fairness of the proceedings.<sup>69</sup>

In late 2001 and early 2002 the principal issues regarding translation in court revolved around the lack of sufficient numbers of translators; the lack of translators to deal with specific languages of East Timor or who could translate directly from, for example, Tetum to English; the experience, qualifications, training, and competence of translators; and the accuracy of translations, particularly those involving technical legal terms or concepts.

The standard practice in international tribunals is for translators to trade off at frequent intervals because of the strain of maintaining concentration for prolonged periods of time and the errors that occur when this practice is not followed. The lack of sufficient numbers of translators at the SPSC meant that translators often had to translate for hours without interruption and to continue to do so over a full trial day. This led to a number of serious problems, as well as to the lack of translators for certain languages when one became ill. There were no translators at the SPSC who could translate from local languages other than Tetum. Lack of translators with specific linguistic competencies meant that “chain translation” was typically resorted to. For example, one translator would translate from Tetum into Bahasa Indonesia, another from Bahasa Indonesia into English, and yet another into Portuguese.<sup>70</sup> As all participants frequently complained, this not only enormously lengthened the time required for trials but, more significantly for the accused, greatly multiplied the opportunities for errors or inaccuracies. JSMP has documented such specific instances.<sup>71</sup> It was hoped that the introduction of simultaneous translation equipment in one of the two courtrooms would ameliorate this situation.

The JSMP trial report on the Lolotoe Case, which ran through 2002 and into 2003 reveals, however, that such difficulties persisted. The report notes that towards the end of the trial, an increase in the number of translators did help to ease the workload strains. It also notes, however, that long exchanges between the judges and some of the parties were often not translated at all, even when the rulings that resulted from the exchanges had a vital impact on the case of the accused.

The most pertinent example of this occurred when Jose Cardoso made an admission that all of a particular witness’ testimony was true. A lengthy debate ensued between the Panel, prosecution and defence to determine whether this admission could be considered an admission of guilt of the charge in question. The majority of this discussion was not translated even though it had a massive impact on the accused’s case.

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<sup>69</sup> Very serious deficiencies involving translation were noted early on by observers and have been reliably and persuasively reported on in some detail. See JSMP, *Justice in Practice* (2001), pp. 24–28, and JSMP, “Special Panel for East Timor Ignores the Importance of Public Participation in Court Proceedings,” news release, 19 November 2003.

<sup>70</sup> See JSMP, *Trial Report on the Los Palos Case* (March 2003), pp. 26–27.

<sup>71</sup> JSMP, *Trial Report on the Los Palos Case* (March 2002), pp. 25–27.

The accused was repeatedly questioned to clarify his admission, however his responses indicate that he failed to appreciate the legal ramifications of his admission. The lack of interpretation of exchanges between counsel and judges undoubtedly contributed to his confusion.<sup>72</sup>

According to Judge Rapoza, in September 2004 significant translation problems remained. He attributed this to the fact that all of the translators at the SPSC were appointed at the United Nations Volunteer (UNV) level; thus there were no professional translators among them. This resulted in what he referred to as “significant variations in quality” among the translators. Under his leadership the SPSC was finally authorized to advertise for professional translators with legal experience. Asked why this had not been done earlier, he replied, “It was nobody’s job to fix it.”<sup>73</sup> Other Special Panels judges agreed that despite improvements, translation problems persisted until the end of the Serious Crimes process. When interviewed on 28 March 2005, Judge Antonio Helder said that of the challenges facing the Special Panels, “the biggest is communication, language problems in hearings.”

Judge Samith de Silva, while agreeing that translation in court was “not very competent,” pointed out that the issues of translation in SCU investigations also had a significant impact upon the accused. He explained, “Were the statements given to investigators properly transcribed and translated? There are cases where they were clearly not and the parties take advantage of it.” This phenomenon, he said, arose from two problems. The first is the translators were not good, and second, the investigators may have influenced answers or tried to make them “look nicer.” He added that it was disturbing and revealing that in these cases there were usually not originals of witness statements against which to check translations. He gave as an example one case where the witness said that what she was saying in Court was the same as what she had said in her statement. The problem was that the statement said something entirely different. The judges found her explanation credible and summoned the translator. It turned out that he was still, long after the time of his translation of the statement, in what Judge de Silva called the “very early stages of learning English.”<sup>74</sup>

Some of these difficulties were put in perspective in an interview with the SPSC staff member in charge of translation and transcription.<sup>75</sup> Like Rapoza, she pointed out that all of the interpreters and translators were appointed at UNV level (United Nations Volunteer), and hence lacked professional qualifications and experience. None of them had had courtroom experience prior to being hired at the Special Panels. It was only in the second half of 2004 that pressure from Judge Rapoza led to the appointment of two interpreters with some legal background.<sup>76</sup> They were not, however, trained as legal translators and had no courtroom experience. As to resources, she said that they could not afford to hire people trained to use the simultaneous translation equipment they had. The problem, she stated, was that

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<sup>72</sup> JSMP, *The Lolotoe Case: A Small Step Forward* (July 2004), p. 23.

<sup>73</sup> As SPSC Judge Siegfried Blunk put it, one of the greatest failings he observed during his years at the SPSC was the failure of effective management and the lack of adequate performance assessments. What was needed, he stated, were heads of units who had to write substantive appraisals of their staff and evaluate their performance. Interview, 27 March 2005.

<sup>74</sup> Interview with Judge de Silva, 1 April 2005.

<sup>75</sup> Interview with Shanti Karuppiyah, 29 March 2005.

<sup>76</sup> Judge Rapoza, written communication to the author, 5 December 2005.

the budget did not allow for hiring people at the UN professional salary level. The net result of all the difficulties she detailed was frequently incomplete translations in the courtroom, with the result that some of the parties and transcribers could not follow what had been said. For example, “[w]hen the judges speak too fast for them to keep up, the interpreters will not be able to translate and will just say, ‘The Judges and the Defense Counsel had an exchange.’” In cases where interpreters were required for Timorese languages other than Tetum, because the Special Panels did not have such resources, they had to borrow translators from the SCU or police, or find local court staff or United Nations Development Programme (UNDP) or UNMISSET staff who spoke the language. None of these, of course, were professional legal translators and some of them may have had no experience in translation at all. She stated that in these circumstances “you just look around and see who you can find.” Unfortunately, the liberty of the accused may depend upon the success of such efforts. JSMP has provided vivid examples of how the accuracy of the translation of testimony of witnesses who only speak languages other than Tetum can be vital to the case.<sup>77</sup>

### TRANSCRIPTION

An accurate and complete transcript of proceedings is essential for the parties in the case, for the judges in writing their opinions and ruling on motions, and, of course, for the appeals process. Indeed, it is hard to see how an appeals court can fulfill its responsibilities to review proceedings if there is no complete and accurate record of the trial.<sup>78</sup> Nonetheless, for more than two years little was done to address this problem at the Special Panels.

The problem of the lack of transcripts was one focus of considerable criticism in 2001–2002.<sup>79</sup> Until the introduction of audio/video recordings in the Los Palos Case in late 2001, there were no records of the proceedings in the first 13 trials other than the notes of one of the judges designated for this role in each case. The fact that some of the judges did not have English as their native language was only one of the problems that this practice raised. Reliance on the notes of the judges against whom an appeal is lodged is hardly a good starting point for a viable appeals process. Even apart from this, such notes, especially given linguistic difficulties, are simply not a complete and accurate record of what was said at trial. When recording equipment was introduced it did not solve the problem, because no transcriptions were made from the recordings.

Steps were taken later in the process to remedy this situation. Transcribing began in late 2002, but there was no one supervising the transcription process until the job of Coordinator was filled on 23 May 2003. In 2005, the Translation and Transcription Unit comprised five transcribers, all of them appointed at the UNV level. They included no professional court reporters.<sup>80</sup> The Transcription Unit, its Coordinator explained, possessed no transcription equipment, only laptop computers. Two members of the staff knew stenography, but they had no steno machines. When asked why there were no machines for

*How can an appeals court review proceedings if there is no complete and accurate record of the trial?*

<sup>77</sup> For one such example, see JSMP, *The Lolotoe Case*, pp. 23–24.

<sup>78</sup> Linton has documented the serious consequences that the lack of an accurate court record caused in early cases at the SPSC and Court of Appeal in “Prosecuting Atrocities,” p. 431.

<sup>79</sup> Cohen, *Seeking Justice on the Cheap*.

<sup>80</sup> Interview with Shanti Karuppiah, 29 March 2005.

the staff who could use them, and why there were no professional court reporters, she cited the problem of funding, concluding, “You just compromise and do the best job you can.”<sup>81</sup> This remark aptly encapsulates much of the experience of the Serious Crimes trials.

Some of the Judgments indicate that the transcripts are incomplete. For example, in the Jose da Costa Case, the Judgment, written in 2004, notes that “it has not been recorded in the transcript, but several witnesses, questioned on very basic details, confessed to ignore the months of the year . . . .”<sup>82</sup> Judge Coordinator Rapoza explained that none of the transcription staff were trained as court reporters. Several of them were also non-native speakers and because of their lack of training and experience did not know legal terminology. As a result, he explained, the transcripts vary greatly in quality according to the ability of the transcriber, supervision, and review by judges. In some cases there are gaps, of 5 or 10 minutes, when the transcribers could not keep up with an exchange.<sup>83</sup>

The resources necessary to ensure accurate transcription were not *ever* made available to the Special Panels. Thus, the official record of the proceedings must be considered potentially unreliable in any given case. One judge described the state of the transcripts as an “embarrassment” for the Court.<sup>84</sup> That “5 or 10 minute gap” in the transcript as a result of the transcribers being unable to keep up, or inaccuracies due to their lack of linguistic or professional competence, may operate to the prejudice of the case of the defendant on appeal. The whole point of professional transcription is to prevent that eventuality from occurring.

### **COURT ADMINISTRATION, CASE AND TRIAL MANAGEMENT AT THE SPECIAL PANELS**

The first professional Court Clerk, or head of court registry, to serve at the Special Panels, Katia Galindo Malaquias Romijn, was hired by Judge Coordinator Rapoza in September 2004 as part of his program to reform the Court. She was the first to serve in this position who had actual experience in managing a court registry.<sup>85</sup> Efficient functioning of a court over time depends upon proper management of the court’s calendar and files, and an effective case management system. All of these were lacking at the Special Panels before the advent of Galindo.

In January 2002 there was no functioning calendar at the Special Panels. As a result, much time was lost because sometimes not all of the parties would appear for a hearing, or sometimes the parties were there but the defendant had not been brought from jail. Such events were routine and resulted in the repeated rescheduling of hearings and delay in finishing cases. On the morning of a hearing, telephone calls would often be exchanged between judges and the parties to find out if the hearing would, in fact, occur. The record of trials in 2001–2003 makes clear that repeated postponements for a variety of reasons could have been avoided by effective case management and a functioning calendar. Given the very limited resources of the Special Panels, such delays represented a significant obstacle in the

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<sup>81</sup> Ibid.

<sup>82</sup> Case No. 12/2002, Judgment of 23 February 2004. See also p. 12, which also indicates the incompleteness of the transcript.

<sup>83</sup> Interviews with Judge Rapoza, 1 September 2004 and 28 March 2005.

<sup>84</sup> Interview, 27 April 2005; the interviewee preferred to remain anonymous.

<sup>85</sup> Interview with Judge Rapoza, 28 March 2005.

timely processing of cases through the various stages and created the potential for the infringement of the right to be brought to trial within a reasonable time.

Numerous instances demonstrate how even modest attention to case management could have expedited matters significantly. Judge Rapoza, for example, introduced the practice of holding pre-trial conferences at the Special Panels. This “innovation” was widely acknowledged as having made a significant contribution to more efficient scheduling and to more expeditious completion of cases. It was also not until the appointment of Judge Rapoza as Judge Coordinator, in March 2004, that judges began to coordinate their vacations so that trials would not be repeatedly interrupted by their absences. One can only wonder why it took almost four years to adopt such basic administrative measures.

A few examples of the chronology of some of the earlier cases may give a clearer idea of the chaotic situation and its consequences. In some cases delays and scheduling problems occurred at the pre-trial stage, in others once the trial had begun, and in others both. For example, the Lino de Carvalho Case (No. 10/2001) was tried on 16–18 February 2004, before Judges Rapoza, Pereira, and Siegfried Blunk. As the early case number indicates, however, it began much earlier.

The accused was initially detained on 28 October 2000 (and was held in a Timorese jail for almost two years until pre-trial release in October 2002). He was only indicted almost six months later (25 April 2001) for murder. The Indictment was amended on 18 May 2001 so as to charge him with murder as a crime against humanity. The preliminary hearing was held on 19 and 30 November 2001, and the trial scheduled for 10 February 2002. The trial actually began on 19 February 2002, and hearings were held on three days in mid-March, when the trial was continued until 16 April. On that date, one judge was sick and the trial was postponed until 6 May. On that date it was postponed until 4 June, and again on 4 June to 4 July. On 5 June the defense filed a motion for release of the accused from detention, but that motion was not heard. On 4 July the trial was again postponed to 9 September, and on that date again to 4 November. The Judgment gives no reason for any of these postponements, though when they are at the request of the defense or because of illness this is usually noted. In this case the delays over May–August 2002 had to do with, among other things, problems scheduling the Lolotoe Case and with the vacations of the judges. After the postponement of the hearing that had been scheduled for 9 September, the defense again made a motion for release of the accused from custody. This motion was finally heard on 25 October, and on 28 October 2002 the accused was ordered to be released from custody. Presumably, if the first motion of 5 June had been heard in a timely manner, the accused could have been spared several months of pre-trial detention. On 29 October 2002, however, the trial was rescheduled for 24 March 2003. On that date it was postponed again until 2 June. Before that hearing could occur, however, the trial was, on 30 May, continued *sine die* because one of the international judges had completed his contract and left East Timor. This surely could have been anticipated. On 11 July the trial was rescheduled to 13 October, then to 28 October, and on 26 October to 5 December 2003. Before that hearing could occur, the case was reassigned to Judge Rapoza, who had recently arrived in East Timor. He presided over the trial on 16–18 February 2004, and it was completed without further continuance.

What was the result of all of these delays and the waste of the several days actually spent in trial before the first panel of judges? On 16 February 2004 the defendant appeared in Court and pled guilty to one count of the Indictment. As part of a plea-bargain, the

*Eventually case  
management  
within the Special  
Panels vastly  
improved and  
succeeded in  
genuine capacity  
building for the  
Timorese staff*

prosecution withdrew the other charges and on 17 February the Panel sentenced him to seven years imprisonment, with credit for the two years served in pre-trial detention.<sup>86</sup> The Serious Crimes process, it should be remembered, was intended to serve as a model, and help build capacity, for the Timorese justice system.

There is no question that the trials of two major priority cases (Los Palos and Lolotoe) in 2001–2003 placed great strains on the Special Panels. There is also no question, however, that more effective court administration and case management could have greatly enhanced the efficiency of proceedings. While these priority cases were the cause of numerous delays, they themselves were repeatedly delayed and took far longer than anticipated. This was, on the whole, due to poor case management. JSMP reported repeatedly on the delays in these two cases.<sup>87</sup> The titles of some of the JSMP reports on the Lolotoe Case give a flavor of the problems: “Lolotoe Trial Faces Further Delays” (28 November 2001); “More Delays Hamper Lolotoe Trial” (28 October 2002). The trial was finally completed on 5 April 2003.<sup>88</sup>

As noted, the reforms initiated by Judge Rapoza, as well as the recruitment of other new judges to the Special Panels in 2003–2004, greatly enhanced the efficiency of the Panels. Case management proved to be one area of the operation of the Special Panels where conditions not only vastly improved but also succeeded in genuine capacity building of Timorese staff. The success of the reorganization of this vital court function provides a number of lessons. First is the importance of effective management and leadership in recognizing problems and fighting on behalf of the Special Panels for the resources to address them. Second is the importance of the successful recruitment of qualified and motivated personnel with the appropriate professional experience. It is not the fault of previous SPSC court clerks, who were hired at the UNV level, that the system was so disorganized. It is rather the responsibility of the UN administrators who refused to hire professionals with the experience to organize a proper case and document management system.

## **WITNESS AND VICTIM PROTECTION AND SERVICES**

The Statute of the Special Panels provides: “The panels shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.”<sup>89</sup> Offering adequate protective measures to witnesses before, during, and after trial is essential in the setting of any tribunal operating in a post-conflict context. It is

<sup>86</sup> All of the dates and facts in regard to this trial are taken from the Judgment. I did not have access to the full case file.

<sup>87</sup> See, e.g., JSMP, “Los Palos Trial Adjourned for 2½ Weeks,” news release, 24 August 2001: “The trial against the ten accused in the Los Palos case was yesterday adjourned for two and a half weeks as two of the judges hearing the case are taking their holiday leave... . The length of the trial has left the new East Timorese judicial system with substantial problems, not least of which is the suspension of all other serious crimes hearings... . The imminent expiration of the contracts of international staff involved in the Los Palos case, including a public defender and one of the judges, has created additional procedural problems for the court.”

<sup>88</sup> JSMP, *The Lolotoe Case*, pp. 18–20. In the high-priority Lolotoe Case the Special Panels wound up adjourning for six months (May–October 2002) because of the inability to schedule sessions that all of the judges could attend. Reasons included consecutive vacations. In one three-month period the Special Panel sat for only two days.

<sup>89</sup> UNTAET 2000/15, Section 24.1. Section 24.2 provides that “procedures regarding the protection of witnesses shall be elaborated in an UNTAET directive.” This latter requirement was apparently never carried out.

important not only to protect the victims and witnesses from threat, coercion, or reprisal, but also to make sure that the tribunal can hear all of the available evidence, provide a forum for victims to recount their experiences, and assist in the quest for accountability. The acquittal of the accused on account of a dramatic change of pre-trial testimony by all six eyewitnesses in the Victor Manuel Alves Case provides a vivid example of the potential consequences of the failure to make protective measures available.<sup>90</sup> A complementary function involves counseling and related services for traumatized witnesses, who may have been the victims of severe sexual violence and/or torture and other inhumane treatment. At the Special Court for Sierra Leone, for example, the Witness and Victim Unit, headed by Saleem Vahidy, encompasses a large number of staff, housed in a separately secured compound within the secure compound of the Special Court itself. The Unit disposes over unmarked vehicles for the pickup and transportation of witnesses, safe houses located in Freetown, well-trained and armed security staff, separate entrances for witnesses into the courtroom with appropriate waiting rooms and so on. It can provide post-trial protective measures, counseling, ongoing financial assistance, and, if justified, permanent relocation to other countries. At trial, all witnesses at the Special Court testify anonymously unless they request otherwise, and other measures to protect anonymity are available upon request. A witness protection officer is in the courtroom at all times and is trained to intervene and provide support and counseling whenever he or she feels that the emotional strain on a witness is too great. The Special Court has also employed a full-time professional psychiatrist whose clinical specialization includes research on child witnesses traumatized through the violence associated with conflicts. Such functions are essential to protect the rights and well being of those who testify in the aftermath of conflicts such as those that occurred in East Timor or Sierra Leone. Not one of these resources was available to the witnesses at the Special Panels. It is also not clear to what extent witnesses were even adequately informed that they could request protective measures before, during, or after their testimony.

*‘Witness protection  
and security were  
not taken seriously’*

Sharon Lowery served as the head of the SCU Witness Protection Office from its inception in June 2001 through 2004. When she took up her duties, she had “no car, no staff, no interpreter.”<sup>91</sup> For the duration of her three-year tenure, she was, essentially, the entire witness protection program. She finally received one minibus as her total vehicle resources and then only in late 2002, one and a half years after assuming her position. Because she needed to use this vehicle for her work in Dili, she had no transportation resources available for witnesses to be brought in from the districts. After six requests to UNMISSET for three assistants, she finally received one local staff driver as her assistant to help coordinate witnesses. She still had to rely on UN police in the districts to get messages to villages when she was looking for witnesses, which “compromised confidentiality.” It was only in 2004 that she received access to another vehicle. As a result, during most of her tenure witnesses came to Dili on public transportation, or in SCU transportation. Witnesses traveling to Dili were not accompanied by witness protection staff, because there were none. While in Dili, she stated, witnesses were lodged in hotels, and later in the recreation house at the SCU. They *never* had any safe houses. The conclusion that the head of this unit for almost four years drew from her experience was that “[w]itness protection and security were

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<sup>90</sup> This case is discussed at length below in Part Three, Section 3.

<sup>91</sup> Interview with Sharon Lowery, Freetown, Sierra Leone, 13 April 2005.

not taken seriously.” “Witnesses were exposed,” she stated, adding that adequate witness security was never put in place.<sup>92</sup>

When asked if she knew of specific cases where witnesses had been given reason to fear reprisals, she stated that she had had five cases where the witnesses expressed their fear of reprisals to her on the basis of threats from accused perpetrators or their relatives about their upcoming testimony. Because of the lack of effective protective measures in the communities, accused often contacted witnesses and talked to them about the case. In 2004 she had to deal with two such cases. Accused who had been released also often came to Court and could have access to witnesses there. Moreover, she explained, the witness waiting room at the Special Panels was next to the cell where the accused were held before and after the hearings. Because of the close proximity, accused were able to talk with the witnesses. She stated that she complained about this problem but never received a response.<sup>93</sup> Lowery’s account of witness protection problems at the Special Panels is consistent with information conveyed to me by the Judge Coordinator in an earlier interview.<sup>94</sup>

Two prosecutors who served from 2001–2005 stated that there were often problems associated with this practice of using public transportation or the lack of anonymity and protection provided with UN transportation. Because the witnesses were coming in from their communities for the trial, they often rode in the same minibus as other witnesses or with the accused, who had returned to his community on conditional release. This occurred even in the case of a sexual violence victim who, unescorted, rode to Dili in the same small bus as the man accused of having raped her.<sup>95</sup> Both prosecutors expressed the opinion that there was no witness protection program worthy of the name. They explained how witnesses were picked up in their communities by the SCU, in vehicles marked as “UN,” and then brought to Dili. There was no anonymity whatsoever about the pickup. Their view was that “it was widely felt in the SCU that there was ongoing intimidation of witnesses.”<sup>96</sup> SPSC Judge Brigitte Schmid also explained how in one of her cases it came out that the only eyewitness changed his testimony after he was visited by the accused.<sup>97</sup>

According to Sharon Lowery, there was no professional counselor or psychologist for witnesses. There was also no program to provide such services to traumatized witnesses or victims of sexual violence who testified. Lowery repeatedly asked for such resources but her requests were always denied.<sup>98</sup> The failure of UNTAET/UNMISSET to provide vehicles, adequate staff, adequate security and isolation of witnesses at court, or professional

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<sup>92</sup> Ibid.

<sup>93</sup> The UN *Commission of Experts Report* deals at length with inadequate protective measures at the Ad Hoc Human Rights Court in Jakarta but fails to address similar problems in the Dili trials.

<sup>94</sup> Interview, 30 August 2004.

<sup>95</sup> UNTAET 2000/15, Section 24.1 also provides that in implementing protective measures, “the panels shall have regard to all relevant factors, including age, gender, health and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.”

<sup>96</sup> Interviews with Prosecutors Shyamala Alagendra and Wambui Ngunya, Freetown, Sierra Leone, 12–13 May 2005.

<sup>97</sup> Interview with Judge Brigitte Schmid, 17 February 2005. Prosecutors Alagendra and Ngunya also cited evidence that a key witness had been intimidated by the accused in the Francisco Pereira Case. The Florencio Tacaqui Case (No. 20/2000) discusses various kinds of interference with witnesses at a number of points in the Judgment of 12 September 2004.

<sup>98</sup> Interview with Sharon Lowery, 13 May 2005, Freetown, Sierra Leone.

counseling in the case of traumatized witnesses finds no other explanation than indifference towards the needs of victims and witnesses who may have risked reprisal or intimidation in coming to the Special Panels to testify. Further, no program existed to provide protective measures after trial should there be such need. In this area there is little doubt that the Serious Crimes process failed to meet the international standards defined by the practices of other UN administered tribunals.

## COMMUNITY OUTREACH

This section will only briefly consider the function of outreach, the process by which a hybrid or international tribunal seeks to make its trials accessible and meaningful to the victims and to the population of the country in whose name it seeks justice. The hope is to use outreach programs to contribute to community demands for justice and to processes of reconciliation and reconstruction in the aftermath of conflict. Longuinhos Monteiro, the Prosecutor General of East Timor, expressed this idea for the Timorese context in 2003 in a speech where he claimed that the prospect of more trials “will help those families of victims and their communities come to terms with their losses knowing that perpetrators have been brought to justice.”<sup>99</sup>

The Public Affairs and outreach functions rested entirely upon the shoulders of one SCU staff person, employed at the UNV level despite the enormous workload and responsibility attached to this job. This person was responsible for all press and public relations for the SCU. On top of this job, which basically required them to be in Dili, they were responsible for all outreach efforts. Naturally, it is the latter which inevitably suffered due to the daily demands of the former. Both the first occupant of this position, Mark Harris, and his successor, Julia Alinho, made significant efforts to implement outreach initiatives. The lack of resources at their disposal for this purpose necessarily limited the scope of their efforts and, consequently, their effectiveness.<sup>100</sup>

Alinho occupied a dingy, cramped office at the SCU. When asked about her support staff and resources she gestured to her office and said, “This is all there is.” She explained that though she attempted to undertake community initiatives whenever possible, given her lack of staff, funding, and resources her efforts were necessarily constrained. Outreach had been recognized as within the SCU’s purview from early on in the process. For example, it is mentioned in an SCU Fact Sheet of July 2002, which notes that outreach programs have been put on in seven communities across East Timor.<sup>101</sup> Mark Harris was committed to such efforts during his two-year tenure as the Public Affairs Officer for the SCU, but like his successor, he had to juggle outreach with the many other duties of his job. Sporadic community initiatives were undertaken, but without the staff and support necessary for even a very modest sustained effort. When convenient, UNMISSET was also able to shift responsibility by stating that outreach was the responsibility of Timorese institutions.<sup>102</sup>

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<sup>99</sup> Prosecutor General Longuinhos Monteiro, speaking at the inauguration of new SCU prosecutors. Quoted in an SCU news release of 7 July 2003.

<sup>100</sup> Interview with Julia Alinho, 18 February 2005.

<sup>101</sup> SCU Fact Sheet, July 2002.

<sup>102</sup> Interview with Carl DeFaria, 18 February 2005.

The occasion of the close of the Serious Crimes Unit gave rise to its most ambitious and sustained outreach effort. DPGSC DeFaria recognized the importance of explaining the reasons for the closure of the unit and its consequences, and put a great deal of his time into this effort. The SCU held town meetings in 12 communities from 15 March to 9 May 2005.<sup>103</sup> The stated purpose of these meetings was “[t]o inform the communities about the end of the Serious Crimes Unit mandate.”<sup>104</sup> The meetings were supposed to be a joint effort of the Serious Crimes Unit and the Office of the Prosecutor General, but Monteiro attended only the first one.<sup>105</sup> It is paradoxical that the only major outreach effort was aimed at explaining the premature closure of the SCU to the communities of East Timor. “Too little, too late,” it nonetheless showed the capacity of the UN operation to engage in outreach when it deemed it necessary.<sup>106</sup>

### **EQUALITY OF ARMS AND RIGHT TO AN ADEQUATE DEFENSE**

“Equality of arms” is a concept linked to the broader right to a fair trial. It refers to a rough parity in the resources available to defense and prosecution. The core idea is that the rights of the accused to mount an effective defense and to a fair trial may be compromised if the resources available to the two parties are grossly disproportionate or if the defense simply lacks the resources to counter the case of the prosecution. Equality of arms has been raised by the defense as a concern at all of the international and hybrid tribunals.<sup>107</sup> Quoting the language of the International Covenant on Civil and Political Rights (ICCPR), the Appeals Chamber of the ICTY has ruled that “[a]t a minimum, ‘a fair trial must entitle the accused to adequate time and facilities for his defence’ under conditions which do not place him at a substantial disadvantage as regards his opponent.”<sup>108</sup> The entitlement to “adequate time and facilities for the preparation of his or her defence” is also a right guaranteed to every accused in trials before the Special Panels.<sup>109</sup> Equality of arms does not necessarily mean exact parity in all resources, as the prosecution typically faces a more extensive investigative task and bears the burden of proof, whereas the defense need only raise reasonable doubt about the prosecution’s case.<sup>110</sup> The defense must, however, have the means necessary to accomplish this task.

In the case of the Serious Crimes process, *all* units involved in the process suffered from severe resource constraints that negatively affected their performance. It is against this backdrop of relative dearth that equality of arms in the Serious Crimes trials must be understood.

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<sup>103</sup> Community meetings had sometimes been held earlier, when the SCU informed a community of the filing of an Indictment. See, e.g., SCU, *Serious Crimes Unit Update*, 21 April 2003. These were initiatives undertaken by DPGSC Siri Frigaard.

<sup>104</sup> Undated SCU memo by Julia Alhinho, provided by the memo’s author.

<sup>105</sup> Interview with Carl DeFaria, 29 April 2005. See also DeFaria, “ET’s Quest for Justice.”

<sup>106</sup> On the “too little, too late” phenomenon in international justice, see Linton, *Putting Things into Perspective*.

<sup>107</sup> See, e.g., the ICTR Rutaganda and Kayishema Appeals Judgment, paras. 63–74.

<sup>108</sup> Kordic and Cerkez Appeals Judgment, para. 175. The language quoted within this passage comes from the International Covenant on Civil and Political Rights, Section 14.3b.

<sup>109</sup> UNTAET 2000/30, Section 6d. This provision is based upon ICCPR Section 14.3b, which was binding upon the Special Panels.

<sup>110</sup> This is the standard of proof at the international tribunals and at other hybrid tribunals, and at the Special Panels since Case No. 2/2000. The Special Panels made a specific ruling on the applicability of this standard as the required burden of proof in the Joni Marques Case, 9/2000, p. 349.

*The improvements made by the creation of the DLU did not make up for previous failings*

As a preliminary touchstone one might take the reports of the UNMISSET Transition Working Groups on the Serious Crimes Process. Drafted in early 2005 it offers a sober assessment of the situation in regard to equality of arms. It states that the performance of the Defense Lawyers Unit had “improved to the point where ‘equality of arms’ between the prosecution and defense is *now attainable*” (emphasis added).<sup>111</sup> On the consequences of the implied inequality of arms over the previous years of trials the report is silent.

In assessing equality of arms it is appropriate to consider first the period before the creation of the DLU and then the period after the Unit was established. This is the case because the Unit was created in response to a recognition of the very severe shortcomings of the defense function. One point must be emphasized: The improvements made through the creation of the DLU did not make up for the previous failings. If accused prior to the creation of the DLU did not enjoy a competent and adequate defense then one of their most basic rights was violated. Such a failing demands a remedy *for those individuals convicted under such circumstances*, not merely an improvement in the system for future trials.

This report has already noted the lack of resources available to the Timorese and international defense counsel who represented accused in a large number of murder and crimes against humanities cases prior to the creation of the Defense Lawyers Unit. The fact that defense lawyers did not call a single witness in the first 14 cases strongly suggests that an adequate case was not made on behalf of those accused. All of those trials resulted in convictions. Some of them will be analyzed more closely in the next section, but a few generalizations are relevant here in also pointing to the inadequacy of the defense.

First, the trials were extremely short considering the gravity of the charges. For example, in Case No. 2/2000, Julio Fernandes was charged with murder in connection with the 1999 violence. At his preliminary hearing (leaving aside previous stages) he clearly had not been properly counseled by his defense attorney. He made a statement to the Court that both acknowledged his guilt and disagreed with the charges against him. The Court found that this was not a guilty plea because “it was clear that there had not been sufficient consultation with the defense.”<sup>112</sup> This is a recurring theme in the trials of 2000–2001 during which defendants repeatedly made ill-advised, incoherent, and damaging statements at their preliminary hearing or at the commencement of trial, while at the same time pleading “not guilty.” At the trial of Julio Fernandes this statement was used against him and was read out to the Court by one of the judges. The trial itself took only one day to complete. The Indictment was read, the accused was questioned by the judges, and the prosecution called three witnesses. The defense then consented to the prosecution introducing pre-trial statements by seven other witnesses, without requiring them to appear. The defense thus gave up the opportunity to cross-examine more than two-thirds of the prosecution’s witnesses. This may have been irrelevant because, from the Judgment’s description of the proceedings, it does not appear that the defense attempted to make any case at all. The prosecution and defense made their closing arguments and the trial was adjourned until announcement of the decision. All of this was completed in one day.

The Julio Fernandes Case is not an exception, but is, rather, representative of many trials from the first two years of the Special Panels. Case No. 3/2000, a prosecution brought

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<sup>111</sup> UNMISSET, *Reports of the Transition Working Groups* (Dili: UNMISSET, 2005), p. 61.

<sup>112</sup> Case No. 2/2000, Judgment, p. 2.

against Carlos Soares Carmone, involved similar problems at the preliminary hearing. The trial was completed in one day, 13 February 2001. As to the defense case, the Judgment merely notes, “The Defense did not present any witnesses or evidence.”<sup>113</sup> In the trial of Yoseph Leki (Case No. 5/2000), the trial lasted two days, the second of which was only a partial day devoted to the closing arguments of the parties. Again, “[t]he Defense did not present any witnesses or evidence.” During the trial the defense did appear to make what the Court characterized as a “request for evidence,” but it was rejected because it “came ill-timed and therefore was dismissed during the trial hearing.” This hardly indicates a defense counsel in control of his case. Subsequent cases mostly follow this pattern of taking two to three days, with testimony and evidence on the first (and sometimes a second day as well), followed by a shorter session for closing arguments.<sup>114</sup> These are all homicide cases that typically produce lengthy prison sentences. The defense did not produce witnesses or evidence.

While the defense did not produce witnesses or evidence in these cases, in many of them they did make an argument on behalf of their clients. The argument was variously expressed as duress, coercion, or superior orders. The defense counsel, however, appear to have had little understanding of the requirements for these defenses (or, in the case of superior orders, whether it was in fact a defense as opposed to a grounds for mitigation). The jurisprudence of these cases dealing with duress and superior orders has been expertly examined in an important article by Caitlin Reiger and Suzannah Linton.<sup>115</sup> What is important for our purposes is the way in which these issues were handled by defense counsel.

First, duress, superior orders, and the like are sophisticated, complex, and jurisprudentially fraught doctrines. There is wide variation in the approaches of national legal systems to them and their treatment in contemporary international humanitarian law can best be described as “emergent.”<sup>116</sup> The defense counsel at the Special Panels do not appear to have had an understanding from the conceptual and doctrinal perspective of how to make such a case effectively for the accused. Second, in the World War II jurisprudence on these doctrines it is clear that they only have a chance of succeeding in very rare instances when there is overwhelming and compelling evidence independent of the testimony of the accused. Since the defense in these cases did not introduce any evidence or witnesses they were unlikely to succeed. Third, these “defenses” often came out as issues in an unplanned and ill-advised manner, sometimes blurted out by the accused in an incoherent way at the preliminary hearing or at trial. They were often embedded in equally confused and ill-advised partial or complete admissions of guilt. Allegations of duress or superior orders do not appear to have been strategically developed by counsel and they continued to be used even after they had

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<sup>113</sup> Case No. 3/2000, Judgment, p. 2.

<sup>114</sup> See, e.g., Augustino de Costa Case, No. 7/2000; Mateus Tilman Case, No. 8/2000; Manuel Goncalves Bere Case, No. 10/2000. Each of these was held in two sessions (one only for closing arguments) and in all of them the defense presented no evidence or witnesses. The Carlos Soares Case, No. 12/2000, took three days (one for closing arguments), as did a number of others. Again, the defense brought forward no witnesses or evidence. The accused was sentenced to 15 years, 6 months imprisonment.

<sup>115</sup> Suzannah Linton and Caitlin Reiger, “The Evolving Jurisprudence of East Timor’s Panel for Serious Crimes on Admissions of Guilt, Duress, and Superior Orders,” *Yearbook of International Humanitarian Law* (The Hague, T.M.C. Asser Institute, 2002) pp. 167–213.

<sup>116</sup> The defenses of superior orders and duress were considered by the ICTY Appeals Chamber in the Erdemovic Appeals Judgment, evidencing a deep division in the Court over the interpretation of these defenses. See especially the dissenting opinion of Judge Antonio Cassese.

failed in case after case. One is often left with the impression that they represented a defense of desperation by a defense that had not prepared a case. Fourth, one can only wonder how defendants could have been so ill-counseled by their public defenders that they made ill-prepared and damaging statements that drastically reduced their chances of acquittal but which did not function as guilty pleas. The latter, strategically deployed and coupled with a strong argument of mitigating circumstances, might have served to substantially reduce the sentence of the accused, as such guilty pleas were regularly taken into account in this manner by the judges of the Special Panels in arriving at a sentence. Defense counsel seem to have failed utterly in explaining to their clients the difference between a plea of innocent and guilty, the consequences of this choice, and the way in which they should comport themselves, particularly in regard to the right to remain silent.

It is clear that up to the creation of the Defense Lawyers Unit by UNMISSET in September 2002, equality of arms did not obtain in the Serious Crimes process. To what extent did the creation of the Defense Lawyers Unit resolve these problems? According to DPGSC Carl DeFaria's account of investigative resources, while preparing its cases in 2002–2003, the SCU had regional offices in various districts and employed "approximately 12 International Investigators, 26 UNPOL [UN Police] Investigators, and 6–10 PNTL (National Police TL) Investigator trainees . . . . The UNPOLs had been brought in for their expertise in certain areas of investigation, which was lacking, such as crime scene, forensic pathology . . ." <sup>117</sup> Coupled to the investigative process, the Serious Crimes Unit employed eight international prosecutors, leading four prosecution teams, each comprising "[t]wo International Prosecutors, One [*sic*] UNV Legal Officer, two/three International Investigators, One [*sic*] East Timorese Trainee-Prosecutor and two/three PNTL officers . . ." <sup>118</sup> In this context the SCU represented an investigative "Goliath" in comparison with the paltry resources of the Defense Lawyers Unit, which, in April 2004, encompassed two UNV investigators and no other investigative support staff. It also lacked the kind of resources enjoyed by the prosecution in regard to "expert consultants on issues such as forensics, psychiatry, toxicology . . . and is thus limited in its ability to advance special defenses or rebut scientific evidence adduced by the prosecution." <sup>119</sup>

While concentrating on resources, the Report of the UN Commission of Experts studiously avoids evaluating the effectiveness and performance of the Defense Lawyers Unit in the courtroom. Their conclusion refrains from any overall evaluation of equality of arms issues. <sup>120</sup>

Such an evaluation is far more difficult than for the pre-DLU period. Although the quantitative aspects of relative resources can be discussed, the impact of the discrepancy in the courtroom is harder to assess. Under the DLU regime defense witnesses are more frequently called, but there are still a disturbing number of cases where they are not. Further, there is no question that there was a substantial overall improvement in courtroom performance. The problem, as noted above, was that there was a very wide range of abilities and experience in the DLU. Some DLU lawyers were making their first court appearances at the Special Panels. While most accused may have received at least minimally competent

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<sup>117</sup> DeFaria, "ET's Quest for Justice," p. 2. Precise monthly statistics on staffing can be found in the SCU's monthly *Serious Crimes Unit Updates*.

<sup>118</sup> DeFaria, "ET's Quest for Justice," p. 2.

<sup>119</sup> UN *Commission of Experts Report*, p. 32.

<sup>120</sup> UN *Commission of Experts Report*, pp. 32–33.

counsel, their case may have been handicapped by lack of investigative resources. Two investigators for nine defense counsel means inevitably that the resource is spread very thin. The SCU had a ratio of more than three investigators for each prosecutor during the same period, and their prosecutors on the whole were far more experienced. According to its head, the DLU only began to function fully (“crawled to a start”) in April 2003.<sup>121</sup> By this time, the appointment of new international judges and other incipient reform measures had begun to have an impact in the courtroom.

In order to address equality of arms issues beyond the question of resources, I asked all interviewees who had participated in or observed the trials about this problem. Their responses were both interesting and troubling, particularly because a number of them framed the equality of arms question in connection with the high conviction rate already noted. That is, they considered the equality of arms issue not just one of resources and performance, but also as reflecting a systemic problem of fairness. Let us consider their views, beginning, as is appropriate in this case, with the defense.

In his presentation to the session on the Future of the Serious Crimes Process at the UN Symposium in Dili at the end of April 2005, the head of the Defense Lawyers Unit expressed his frustration.

Clients often have no choice but to enter into a plea agreement. Plea agreements occur in the context of high conviction rates. A client is almost certain of being convicted once an Indictment is filed. If he agrees to plea bargain, he can get away with a very low sentence, but if he fights for his rights and innocence he can be sure of a very high sentence even if he proves his innocence by circumstantial evidence or proves that the prosecution case is riddled with inconsistencies. Furthermore if a client goes to trial and gets a low sentence the sentence will be increased on Appeal if the prosecutor disagrees with it. *It has become a highly coercive technique to elicit a plea of guilt* and avoid trial and get a lesser sentence (emphasis added).<sup>122</sup>

There is no question about the increasing frequency of plea agreements in the period after the announcement of the completion strategy for 20 May 2005.<sup>123</sup> It is also apparent from a review of sentencing considerations in the Judgments that defendants who pled “guilty” typically received far lighter sentences than did those who pled “not guilty” and were convicted of the same offenses.<sup>124</sup> Alan Gutman of the Defense Lawyers Unit also opined that bargaining had become an increasingly serious problem because of the pressure to finish cases. He claimed that in 2004 about 75 percent of the cases were plea-bargained under the impact of a plea-bargaining schedule promulgated by the DPGSC which established a

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<sup>121</sup> Ramavarma Thamburan, “The Defense Lawyers Unit,” (text of speech circulated at the UN Symposium panel “Future of Serious Crimes,” 28 April 2005), p. 1.

<sup>122</sup> Thamburan, “The Defense Lawyers Unit,” pp. 2–3.

<sup>123</sup> Plea agreements did, of course, occur before this date. See, e.g., the account of the plea agreement in the Joao Sarmiento Case in SCU, *Serious Crimes Unit Information Release*, 12 August 2003.

<sup>124</sup> Under UNTAET regulations, even where there has been a guilty plea the Court must proceed with a review of the evidence and decide whether or not to approve the plea. Plea agreement cases thus also produce Judgments, which evaluate the plea against the evidence and consider the mitigating and aggravating factors in arriving at the sentence (which is normally the sentence proposed by the prosecution under plea agreement). In such cases the guilty plea (as a supposed expression of remorse and contrition) is taken as a strong mitigating factor.

formula for sentences based upon plea agreements as opposed to those which were not.<sup>125</sup> Defense counsel, he stated, feared the consequences for their clients if they did not cooperate. In the Aparicio Guterres Case (discussed in Part Three, Section 4), he stated that he was admonished in court by one of the judges that Security Council Resolution 1543 (mandating completion of all trials by 20 May 2005) did not allow for such lengthy questioning.

One DLU lawyer complained about equality of arms in regard to resources and qualifications, but stated that the underlying problem was structural. He pointed to the affect of the UN policy of giving only three- to six-month contracts and the institutional culture of lack of independence that this practice tends to produce. In his opinion, this constrained some defense counsel to consider the interests of the institution in contexts where countervailing interests of their client might have been at stake.<sup>126</sup> As he put it, “The system as a whole is designed to produce convictions.” DLU lawyer Alan Gutman stated that when he, or others, raised questions about problems or low levels of practice in the Serious Crimes process, participants in a personnel review committee on which he sat would sometimes respond by saying, “We are not the ICTY.”<sup>127</sup>

Two prosecutors and two legal officers in the SCU also expressed similar concerns.<sup>128</sup> One indicated that it was widely recognized that there were serious problems concerning whether or not defense counsel had fully informed and properly advised the accused in regard to guilty pleas or admissions. One of them said that when she expressed this concern to a DLU lawyer in the context of a particular guilty plea, he told her, “You don’t understand that with some of these people it is better that they don’t understand.” She concluded that there was “a pervasive sense in the system that here it is East Timor, we don’t have enough resources, so international standards are either not possible or don’t apply.” She also stated that although many of the Indictments were weak and many witnesses gave testimony that was not relevant, some prosecutors felt that they could nonetheless rely on convictions being handed down by the judges.

Such views are troubling, but even more disturbing is that some or all of these concerns were shared by some of the Special Panels judges.<sup>129</sup>

Judge Siegfried Blunk and Judge Brigitte Schmid of Germany expressed concerns about the lack of cooperation by defense counsel in the effort to meet the 20 May 2005 deadline for completion of trials.<sup>130</sup> They both expressed specific frustration about extended cross-examinations and objections. One of them explicitly stated, “Defense counsel should realize that they are part of the UN effort.”<sup>131</sup> This judge’s opinion was that they were all part of one team and that defense counsel must also work for the team to get the cases done on time.

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<sup>125</sup> Interview with Alan Gutman, 30 September 2004.

<sup>126</sup> This Defense Lawyers Unit (DLU) lawyer preferred to remain anonymous. Interview, 18 February 2005.

<sup>127</sup> The official name of the personnel committee was: Panel for the Recruitment Review for Posts at the OSRSG, Review of Special Post Allowance (SPA), Review of Staff for Movement to Higher Level Posts and Comparative Review Committee for the Draw Down Plan.

<sup>128</sup> Interviews, 19 February 2005.

<sup>129</sup> Because of the sensitivity of some of the remarks made in these interviews with the judges, and because of the potential for reprisal in some cases, although all of the dates and quotations are accurate I give the gender of all of the informants who requested anonymity as masculine.

<sup>130</sup> Interview, 27 March 2005.

<sup>131</sup> *Ibid.*

Judge Francesco Florit opined that creation of the DLU had made a big difference, but there nonetheless remained a “huge variety in the quality of defense counsel.” He also expressed very serious concerns about the trial process as a whole, explaining how, as of the date of the interview, there had been only three acquittals, one of which was reversed. “This indicates,” he stated, “something is wrong with the system.” He explained further that he was very troubled by both the lack of acquittals and the low level of the defendants, “the very lowest of the militia.” International justice, he said, “should be about getting the big fish,” but they (the Court) have betrayed this mission because they only get the little ones. Expressing his frustration increasingly frankly, he concluded, “We did not come here just to rubberstamp a machine that produces guilty verdicts!”<sup>132</sup>

Another SPSC judge stated that despite considerable improvement, serious problems nonetheless remained in the trial process. He stated that some of the judges were not willing “to hear both sides.” He then added, “They do not have an open mind about the defense.” These judges, he continued, think that the “defendant is militia” and thus is guilty. “They ignore the presumption of innocence” and use their power in an arbitrary manner.<sup>133</sup>

Judge Samith de Silva expressed his concerns differently, and focused on problems in the evaluation of evidence and credibility.<sup>134</sup> Apart from problems in the investigative process, he thought that there were more serious questions about the way in which evidence was evaluated in some SPSC decisions. In particular, he stated, there had too often not been a careful examination of the credibility of prosecution witnesses. Other issues, in his view, included the use of problematic pre-trial statements and forensic evidence, of which he stated, “The forensic process here has had its lapses.” He concluded his reflections by stating that there remained a serious issue of whether justice was rendered to the accused. He expressed his concern about a justice process in which “[t]he biggest organization in the world is trying the poorest people in the world.” He stated that he kept in his office a picture of the humble hut of one of the accused to remind himself of the human consequences of the SPSC verdicts.

In conclusion, as to equality of arms in the narrow sense, one must agree with Judge Rapoza’s assessment that only late in the process had the DLU evolved in such a way that it could perform in a credible enough manner to meet minimum international standards.<sup>135</sup> From a broader perspective, however, very serious questions remain. When so many of the judges express doubts about central aspects of the proceedings, ranging from their basic fairness to the competence of the defense, integrity of investigations, excessively high conviction rates, and lack of impartiality or possible predispositions to convict, there is cause for concern. The fact that some of the judges would express these concerns as openly as they did indicates the degree of frustration that so many of the participants in these trials clearly felt. When coupled with the documented shortcomings of the defense function in 2001–2002, concerns can only be heightened. For these reasons it is especially important to examine with care the Judgments by which the 84 convictions are justified and to inquire as to whether they support the concerns raised above. This will be the task of the next part of this report.

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<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Interview, 1 April 2005.

<sup>135</sup> Speech at the UN Symposium in Dili, 28 April 2005. Judge Rapoza also stated that the DLU has evolved to an extent so that “it is *now* possible to speak of equality of arms” (emphasis added).