



# **TIMOR-LESTE: INTERACTION BETWEEN INTERNATIONAL AND NATIONAL RESPONSES TO THE MASS ATROCITIES**

**BY NATALIE ROSEN**

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# ABOUT DOMAC

**THE DOMAC PROJECT** focuses on the actual interaction between national and international courts involved in prosecuting individuals in mass atrocity situations. It explores what impact international procedures have on prosecution rates before national courts, their sentencing policies, award of reparations and procedural legal standards. It comprehensively examines the problems presented by the limited response of the international community to mass atrocity situations, and offers methods to improve coordination of national and international proceedings and better utilization of national courts, *inter alia*, through greater formal and informal avenues of cooperation, interaction and resource sharing between national and international courts.

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# EXECUTIVE SUMMARY

The Indonesian occupation of Timor-Leste, which lasted 24 years and ended in late 1999, was characterized by mass atrocities. In order to account for the serious crimes committed, the UN together with the government of Timor-Leste established the Special Panels for Serious Crimes (SPSC) within the District Court in Dili and another special appeal panel within the Court of Appeal. Each of these panels was comprised of two international judges and one East Timorese judge. In order to prosecute those crimes, a Serious Crimes Unit (SCU), comprised of both international and domestic personnel, was created within the Prosecutor's office.

This report examines such hybrid model of liability and aims at assessing to which degree the model was successful in achieving accountability and whether it managed to build local capacity to try serious crimes cases independently in the future. The period of assessment is divided to the serious crimes process that took place between the end of 1999 to May 2005; and from May 2005 on, following the closure of the Special Panels and the Serious Crimes Unit up until today.

It is commonly agreed today that although the serious crimes process achieved a certain level of accountability and capacity building, it fell short of meeting the challenges faced by this process. From the outset until the end of its operation in May 2005, the entire process was characterised by lack of sufficient resources both in personnel and in material equipment; only towards the end of the process there was some improvement that enable a practice that met minimum international standards. The level of defence, especially in the first two years, was low to a point that may call into question the legitimacy of convictions in certain cases; later on, with the creation of the Defence Lawyer Unit, the defence improved but remained relatively poor. The jurisprudence of the Special Panels and especially the Court of Appeal was the result of the policy of appointing judges with no specific qualifications in international criminal law; chronic mistakes in application of the law characterised their jurisprudence. Language barriers turned out to be one of the biggest problems that affected all the relevant entities throughout the entire years of the serious crimes process. The available resources simply could not meet the complex and thus costly language-related logistics that were required to make this model work.

Another challenge that was not met was the fact that at the end of the serious crimes process, more than 300 persons indicted by the SCU remained at large, presumed to be living in Indonesia. Lastly, the premature closure of the serious crimes process left hundreds of cases un-investigated or incomplete.

Following the end of the serious crimes process the Timorese domestic legal system was left to handle these cases on its own. Almost three years later, over which two cases only were brought forward to trial and no further investigation took place with relation to the outstanding SCU cases, the UN created the SCIT in order to complete the investigations in these cases. The mandate was limited to investigation function only; while the Office of the Prosecutor General (OPG) kept the complete discretion whether or not to file indictments. In 2010, a third case was brought to trial. These three cases, in which basic elements of crimes against humanity as well as other elements relating to the process and the law applicable to it, were omitted or misunderstood demonstrate clearly the lack of domestic capacity to deal with serious crimes cases independently. Added to this is the lack of available resources which in the case of the OPG, is reflected in the appointment of a single prosecutor to the 1999 serious crimes cases with no previous experience or qualifications in international criminal law. In addition, the lack of political will to collaborate with this process which started in 2003 in connection with *Wiranto Case* and became clear in 2005 with the establishment of the Commission of Truth and Friendship, moved to actual rejection of the process with the 2008 Presidential Pardons and the brutal intervention of the government in *Bere Case* in 2009.

The position forwarded in this report is that in order to effectively fight impunity for international crimes, any future hybrid model must be allocated with a much higher level of resources to fit the special needs of the legal system involved. Future hybrid model must divide more clearly the responsibilities of the parties to the process and the UN should have the overall responsibility to monitor the process and to take actions in solving problems. Future models must also apply rigorous recruitment criteria to assure the most compatible people are recruited. As to the current situation in Timor-Leste, the position of this report is that it is crucial to maintain and appropriately support the Serious Crimes Investigation Team until it completes all investigations and provides the OPG with all materials necessary to permit those cases to be prosecuted in the future. The UN and the international community must remain actively involved both in assuring adequate

recourses as well as pressuring Indonesia, to extradite suspects, and Timor-Leste, to revise the law of pardons.

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## LIST OF ABBREVIATIONS

APODETI.....	Timorese Popular Democratic Association
CAVR.....	Timor-Leste Commission for Reception, Truth and Reconciliation
CRP.....	Community Reconciliation Process
CTF.....	Commission of Truth and Friendship
DGSU.....	UNMIT's Democratic Governance Support Unit
DLU.....	Defence Lawyers' Unit
ETAN.....	East Timor and Indonesia Action Network
F-FDTL.....	Timor-Leste Defence Force
FALINTIL.....	Armed Forces for the National Liberation of East Timor (The armed wing of FRETILIN)
FRETILIN.....	Revolutionary Front for an Independent East Timor
HRTJS.....	UNMIT's Human Rights and Transitional Justice Section
ICTJ.....	International Center for Transitional Justice
ICTR.....	International Criminal Tribunal for Rwanda
ICTY.....	International Criminal Tribunal for the former Yugoslavia
INTERFET.....	United Nations International Force East Timor
JSMP.....	Judicial System Monitoring Programme
KPP HAM (Indonesian).....	Commission for Human Rights Violations in East Timor
OHCHR.....	Office of the High Commissioner for Human Rights
OPG.....	Office of the Prosecutor General
SCIT.....	Serious Crimes Investigation Team
SCU.....	Serious Crimes Unit
SPSC.....	Special Panels for Serious Crimes
TNI.....	Indonesian Armed Forces
UDT.....	Timorese Democratic Union Party
UNAMET.....	United Nations Mission in East Timor
UNDP.....	United Nations Development Programme
UNMISSET.....	United Nations Mission of Support in Timor-Leste
UNMIT.....	United Nations Integrated Mission in Timor-Leste
UNOTIL.....	United Nations Office in Timor Leste
UNPOL.....	United Nations Police
UNTAET.....	United Nations Transitional Administration for East Timor

# 1. INTRODUCTION – OBJECTIVE OF THE REPORT AND METHODOLOGY

In 1975 Indonesia occupied Timor-Leste<sup>1</sup> and annexed it to its territory. In the next 24 years the Indonesian forces carried out a widespread campaign of killing, torture, disappearance, political imprisonment and other abuses of human rights. In 1999, following the change in regime in Indonesia and international pressure, Indonesia announced its intention to hold a referendum to decide the future of Timor-Leste. In response to this announcement the East Timorese were subject to increased violence by pro-Indonesian militia groups. In the referendum held on 30 August 1999, 78 percent of the voters voted for independence. The announcement of the results led to a brutal campaign of violence perpetrated by Indonesian army and police and by armed pro-Indonesian militia. Indonesia withdrew its forces at the end of September 1999, following the arrival of an international peacekeeping force.

It has been estimated that from 1974 and throughout the Indonesian occupation of Timor-Leste, between 102,800 to 183,000 East Timorese civilians died in conflict-related circumstances, and that from January 1999 to 25 October 1999, at least 1,200 civilians, and perhaps as many as 1,500, were killed. In addition, over this 1999 period, thousands of people were subject to torture, ill-treatment and sexual violence, and 400,000 people were displaced from their homes.

On 25 October 1999, the UN Security Council established the United Nations Transitional Administration for East Timor (UNTAET) to administer the country before handing it over to an elected Timorese government. As part of its mandate, the UNTAET was empowered to exercise legislative and executive authority during the transition period and to support capacity-building for self-government.

UNTAET was also invested with the power of creating a judicial mechanism that could guarantee accountability for serious crimes under international law and subsequently, established the Special Panels for Serious Crimes (SPSC) within the District Court in Dili and another appeal panel within the Court of Appeal. The Special

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<sup>1</sup> Timor-Leste was formerly known by the names Portuguese-Timor (during Portuguese colonialism) and East-Timor (during Indonesian occupation).

Panels were invested with exclusive jurisdiction over certain serious criminal offences and featured a hybrid composition of East Timorese and international judges. In addition, UNTAET established the Serious Crimes Unit (SCU) within the Office of the Prosecutor General (OPG) which had the exclusive authority to investigate and prosecute serious crime cases relating to crimes committed between the years 1975 to 1999. These cases were to be prosecuted in the SPSC by international prosecutors working within the SCU.

The SPSC delivered its first judgment in January 2001. It continued adjudicating serious crime cases until May 2005, when the Security Council shut down both the Special Panels and the Serious Crimes Unit. During these years, the Special Panels and the Serious Crimes Unit were staffed by international and local staff. 55 trials took place before the Special Panels and 84 accused were convicted. From this point onwards, serious crimes cases were to be investigated and prosecuted directly by the Office of the Prosecutor General. In 2007, the UN Security Council established the Serious Crimes Investigation Team (SCIT) to continue investigations in the cases left by the SCU. The Team was invested with a limited authority to take investigative actions only, leaving the discretion whether or not to start investigations and/or to indict at the hands of the Prosecutor General. Since the closure of the Special Panels and until the end of 2010, only three serious crimes cases were brought forward to trial.

This report examines the hybrid model of accountability for serious crimes as implemented in Timor-Leste. The report aims at assessing to what extent such model succeeded in achieving accountability and the manner in which it impacted the local capacity of the Timorese justice system to try serious crime cases, both during the years in which the serious crimes process took place, i.e. from 2000 to May 2005, as well as during the years that have passed since then. The report examines the structure, functioning, available resources and jurisprudence as well as the interaction between the two partners to this process: the UN and Timor-Leste.

The second part of the report provides the background against which the serious crimes process was created, mainly, the Indonesian occupation, the referendum for independence, the atrocities committed over the entire period of occupation, the different commissions of inquiry created and the establishment of UNTAET. The third part discusses the serious crimes process, mainly the work of the Special Panels and Appeal Panel, the challenges faced by them and their jurisprudence, as well as the work of the Serious Crimes Unit, including its prosecution strategy, relation with CAVR and outreach

efforts. This part also discusses other problems of the serious crimes process, such as the quality of defence and the fact that most of the accused remained outside of the jurisdiction of the relevant bodies. The fourth part examines the law applicable to the serious crimes process. The fifth part, examines the serious crimes process from 2005, including the work of the Serious Crimes Investigation Team and its outreach activities. It also examines the applicable law after 2005 and discusses the political climate in Timor-Leste (and its impact on the serious crimes process). The last part of the report discusses the record of the relevant legal capacity building in the past decade, both during the years of the serious crimes process and over the years that have followed it.

This report is based on information provided in interviews with eight core professionals affiliated with the serious crimes process in Timor-Leste, as well as documentary materials such as the jurisprudence of the Special Panels for Serious Crimes and the Court of Appeal, UN documents, academic articles, NGO reports, news items etc. The interviews were conducted by the author in Timor-Leste in November 2010.

## 2. BACKGROUND

In the early 16<sup>th</sup> century, Portuguese and Dutch merchants and missionaries were the first European/Western to establish contact with the island of Timor. Later on, the Portuguese established themselves into the eastern part of Timor whilst the Dutch concentrated their influence in the western part of the island<sup>2</sup> and in 1916 the definitive border between the Dutch and Portuguese sides of Timor was drawn.<sup>3</sup> Portugal governed its territories in Timor with a combination of direct and indirect rule, managing the population as a whole through the traditional power structures, rather than by using colonial civil servants. During World War II, despite Portuguese neutrality in the conflict, and in response to Australian and Dutch military presence in the island, Japan occupied Timor-Leste from 1942 to 1945. At the end of World War II, Portugal resumed colonial authority over the eastern part of the island and in 1960, the UN General Assembly

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<sup>2</sup> Treaty of Lisbon, 1859.

<sup>3</sup> Hague Treaty, 1916.

declared Portuguese Timor to be a non-self-governing territory under the administration of Portugal to which Chapter XI of the UN Charter applied.<sup>4</sup>

## 2.1 INDONESIA'S OCCUPATION: 1975-1999

In April 1974, following a *coup d'état* in Lisbon, Portugal began a rapid decolonisation process which led to political tensions within the political parties in Timor-Leste that lead the Portuguese authorities to leave Dili and turned into a civil war between the Revolutionary Front for an Independent East Timor (FRETILIN) and the Timorese Democratic Union Party (UDT).<sup>5</sup> Following the victory of the Revolutionary Front for an Independent East Timor (FRETILIN) in late September 1975, Indonesian forces began incursions into Timor-Leste. On 28 November, 1975 FRETILIN unilaterally declared Timor-Leste an independent state; shortly thereafter, Indonesia responded by launching a full-scale military invasion.<sup>6</sup> On 12 December 1975, the United Nations General Assembly adopted Resolution 3485 (XXX) calling on Indonesia to withdraw from Timor-Leste without delay.<sup>7</sup> Ten days later, on 22 December 1975, the United Nations Security Council unanimously adopted Resolution 384 (1975) calling for an immediate Indonesian withdrawal.<sup>8</sup> Despite these calls, on 7 July 1976, Indonesia annexed Timor-Leste as its 27<sup>th</sup> province, and closed their new territory to outside observers. For the next 24 years, the territory's political status remained under internal and international dispute. Despite the fact that some states recognized Indonesian sovereignty, the United Nations never did so and continued to consider Portugal as the administering authority<sup>9</sup> and to pass resolutions calling for Timor-Leste's self-determination.<sup>10</sup>

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<sup>4</sup> UN General Assembly Resolution 1542 (XV) of 15 December 1960, Section 1(i).

<sup>5</sup> Whilst the Timorese Democratic Union Party (UDT) and the Revolutionary Front for an Independent East Timor (FRETILIN) advocated for Timor-Leste independence and formed a coalition dedicated to achieving independence, Timorese Popular Democratic Association (APODETI) supported Timor-Leste integration with Indonesia. In May 1975, tensions between UDT and FRETILIN lead UDT to withdraw from the pro-independence political coalition, and on 11 August 1975, UDT launched a *coup d'état* in Dili. This was followed by a civil war in which FRETILIN pushed UDT forces into Indonesian West Timor (West Timor became part of the new Republic of Indonesia upon Indonesian Independence in August 1945). See James Dunn, *Timor: A People Betrayed*, Sydney 1996, pp. 53-56, 62 and 84.

<sup>6</sup> Indonesia Department of Foreign Affairs, Decolonization in East Timor (Jakarta, Department of Information, Republic of Indonesia, 1977), p. 39.

<sup>7</sup> UN General Assembly Resolution 3485 (XXX) of 12 December 1975, A/RES/3485(XXX).

<sup>8</sup> UN Security Council Resolution 384 of 22 December 1975.

<sup>9</sup> Office of the High Commissioner for Human Rights, East Timor 1999 Crimes against Humanity, July 2003, p. 4.

<sup>10</sup> See UN Security Council Resolution 389 (1976) of 22 April 1976; UN General Assembly Resolution 31/53 of 1 December 1976 A/RES/31/53; UN General Assembly Resolution 32/34 of 28 November 1977 A/RES/32/34; UN General Assembly Resolution 33/39 of 13 December 1978 A/RES/33/39; UN General Assembly Resolution 34/40 of 21 November 1979 A/RES/34/40; UN General Assembly Resolution 35/27 of 11 November 1980 A/RES/35/27; UN

In the years following the Indonesian invasion, the Armed Forces for the National Liberation of East Timor (FALINTIL), then the armed wing of FRETILIN, continued armed resistance against the Indonesian forces. In the context of this conflict, the Indonesian forces carried out a widespread campaign of killing, torture, disappearance, political imprisonment and other abuses of human rights;<sup>11</sup> rape and sexual abuse of women were also common.<sup>12</sup> In addition, thousands of Timorese were transferred into camps, where they were subject to starvation.<sup>13</sup> It has been estimated that between 1974 and 1999 102,800 East Timorese civilians died, out of which, 18,600 were killed or disappeared and at least 84,200 died from displacement-related hunger and illness. According to this estimation, the death toll over this period could be as high as 183,000.<sup>14</sup>

During the 1980s, FRETILIN forces had dropped to a few hundred armed men and the resistance took mostly the shape of an unarmed civil resistance. In 1988, the reduced armed resistance lead the Indonesian government to open Timor-Leste borders, lift the travel ban on journalists and loosen restrictions on travel within the territory. In addition, many political prisoners were released. However, on 12 November 1991, the notorious *Santa Cruz* massacre occurred (Indonesian troops opening fire on 250 unarmed Timorese demonstrators). This resulted in a widespread condemnation of the Indonesian military and the beginning of a new period of Indonesian repression. The territory was closed again and the ban on foreign journalists was renewed. Suspected FRETILIN supporters were arrested and human right abuses increased.<sup>15</sup>

On 20 November 1992, FALINTIL leader Xanana Gusmão was captured by the Indonesian Armed Forces. In May 1993 he was sentenced to life imprisonment after being found guilty of rebellion, attempt to separate part of the territory of Indonesia and

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General Assembly Resolution 36/50 of 24 November 1981 A/RES/36/50; UN General Assembly Resolution 37/30 of 23 November 1982 A/RES/37/30.

<sup>11</sup> Amnesty International, *East Timor Violations of Human Rights: Extrajudicial Executions, "Disappearances", Torture and Political Imprisonment, 1975-1984*, London (1985), pp. 20-78; John G. Taylor, *The Indonesian Occupation of East Timor 1974–1989*, London (1990), pp. 100-110.

<sup>12</sup> Amnesty International, *Women in Indonesia & East Timor: Standing Against Repression*, New York, 1995.

<sup>13</sup> Dunn (n. 5), pp. 290-291.

<sup>14</sup> CAVR, *Chega! - The Report of the Commission for Reception, Truth, and Reconciliation Timor-Leste*, 2005, Executive Summary, pp. 44 and 73. Available at <http://www.cavr-timorleste.org/chegaFiles/1162273558-Chega!-Report-Executive-Summary.pdf> (accessed 22 December 2010).

<sup>15</sup> Human Rights Watch, *Indonesia/East Timor: Deteriorating Human Rights in East Timor*, February 1995 available at <http://www.hrw.org/reports/1995/Indonesi.htm> (accessed 25 January 2011).

illegal possession of firearms.<sup>16</sup> In August 1993, the sentence was commuted to 20 years by Indonesia's President Suharto.<sup>17</sup>

On 21 May 1998, following the resignation of Indonesia's long standing President Suharto, B.J. Habibie became the new President of Indonesia.

## 2.2 1999-REFERENDUM ON INDEPENDENCE

On 27 January 1999, as a result of sustained and mounting international pressure, President Habibie announced that his government plans to hold a referendum in which the people of Timor-Leste would chose between autonomy within Indonesia and independence. The announcement was followed by intensified violence in and around Timor-Leste.<sup>18</sup> In May 1999, a series of agreements were concluded between the United Nations, Indonesia and Portugal, pursuant to which the Indonesian government agreed, *inter alia*, to implement a fair and transparent referendum, which will be administrated by the United Nations Mission in East Timor (UNAMET), and to maintain public order and security before and during this referendum, which was scheduled to take place on 30 August 1999. However, despite the Indonesian government's promise to guarantee security, violence in Timor-Leste intensified in the period leading up to the referendum and suspected supporters of independence were subjected to persistent threats and acts of violence by pro-Indonesia militia groups.<sup>19</sup>

On 11 June 1999, the United Nations Security Council established the UNAMET with a mandate initially running up until 31 August 1999<sup>20</sup> and later extended to 30 September 1999<sup>21</sup> in order to organize and conduct the referendum on the future of Timor-Leste.<sup>22</sup>

On 30 August 1999, an estimated 98 percent of the eligible voters took part in the referendum and on 4 September 1999, the UN Secretary-General, Kofi Annan,

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<sup>16</sup> According to Indonesian Penal Code, Articles 106 and 108 and Emergency Law no. 12 of 1951.

<sup>17</sup> Amnesty International, East Timor Xanana Gusmão - A Briefing, August 1997. Gusmão was eventually released in 1999.

<sup>18</sup> Examples of such intensified violence are the Liquica church massacre (of 6 April 1999); The Cailaco killings (of 12 April 1999); and the Carrascalão house massacre (of 17 April 1999).

<sup>19</sup> Examples of such intensified violence are the killing of two students at Hera (of 20 May 1999); the arbitrary detention and rape in Lolotoe (of May-June 1999); the attack on UNAMET Maliana (of 19 June 1999); the attack on the humanitarian convoy (of 4 July 1999); and the murder of UNAMET staff members at Boboe Leten (August 30).

<sup>20</sup> UN Security Council Resolution 1246 of 11 June 1999, UN Doc. S/RES/1246.

<sup>21</sup> UN Security Council Resolution 1257 of 3 August 1999, UN Doc S/RES/1257.

<sup>22</sup> UN Security Council Resolution 1246 of 11 June 1999, UN Doc. S/RES/1246, Section 1.

announced that 78 percent of voters chose independence from Indonesia. The immediate reaction to this announcement was a brutal campaign of violence perpetrated by Indonesian army and police and by armed pro-Indonesian militia.<sup>23</sup> <sup>24</sup>

As the violence continued to escalate, the UNAMET mission was forced to evacuate its staff from Timor-Leste on 14 September 1999.<sup>25</sup> Eventually, due to international pressure the government of Indonesia agreed to withdraw its soldiers from Timor-Leste and to allow an international peacekeeping force to deploy in the area. Subsequently, on 15 September 1999, with the adoption of resolution 1264, the Security Council created the International Force for East Timor (INTERFET), a multinational force lead by Australia. The resolution, which invoked Chapter VII of the UN Charter, gave the INTERFET authority to use all necessary means to restore security in Timor-Leste.<sup>26</sup> The international force arrived to Timor-Leste on 20 September 1999 and by the end of that month the Indonesian forces had completely withdrawn from Timor-Leste.<sup>27</sup>

It has been estimated that between early January and late October 1999, at least 1,200 civilians, and perhaps as many as 1,500, were killed and thousands were subject to torture, ill-treatment and sexual violence. About 400,000 people – more than half the population – were displaced from their homes; 250,000 of them were forcibly deported to West Timor. Most of the population lost their property as the Indonesia and militia forces

<sup>23</sup> Report of the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions, the Special Rapporteur of the Commission on the question of torture and the Special Rapporteur of the Commission on violence against women, its causes and consequences, A/54/660, 10 December 1999, para. 19. (Hereinafter: Report of the Special Rapporteurs 1999) Available at <http://www.unhchr.ch/Huridocda/Huridocda.nsf/TestFrame/6fae6dad5614a51c80256865005b729a?Opendocument> (accessed 28 January 2011); UN Office of the High Commissioner for Human Rights, Report of the International Commission of Inquiry on East Timor to the Secretary-General, A/54/726, S/2000/59, January 2000, paras. 136-140 (Hereinafter: OHCHR Report of the International Commission of Inquiry on East Timor 2000) Available at [http://www.unhchr.ch/huridocda/huridocda.nsf/\(Symbol\)/A.54.726.+S.2000.59.En](http://www.unhchr.ch/huridocda/huridocda.nsf/(Symbol)/A.54.726.+S.2000.59.En) (accessed 28 January 2011); UN Office of the High Commissioner for Human Rights, East Timor 1999 Crimes against Humanity, July 2003, p. 4 (Hereinafter: OHCHR Report East Timor 1999 Crimes against Humanity 2003) Available at <http://www.etan.org/etanpdf/2006/CAVR/12-Annexe1-East-Timor-1999-GeoffreyRobinson.pdf> (accessed 28 January 2011).

<sup>24</sup> Examples of major human rights incidents are: forcible relocation and murder of refugees in Dili (of 5-6 September 1999); the Suai church massacre (of 6 September 1999); the Maliana police station massacre (of 8 September 1999); The Passabe and Maquelab massacres (of September-October 1999); the rape and murder of Ana Lemos (of 13 September 1999); The Battalion 745 rampage (of 20-21 September 1999); and the murder of Los Palos clergy (of 25 September 1999).

<sup>25</sup> OHCHR Report East Timor 1999 Crimes against Humanity 2003 (n. 23), pp. 24-25.

<sup>26</sup> UN Security Council Resolution 1264 of 15 September 1999, UN Doc S/RES/1264.

<sup>27</sup> OHCHR Report East Timor 1999 Crimes against Humanity 2003 (n. 23), p. 25.

burned towns to the ground and destroyed about seventy percent of the territory's infrastructure.<sup>28</sup>

On 25 October 1999, the UN Security Council established the United Nations Transitional Administration for East Timor (UNTAET) to administer the country before handing it over to an elected Timorese Government.<sup>29</sup> The UNTAET was endowed with an exceptionally wide mandate to administer the territory of Timor-Leste, to exercise legislative and executive authority during the transition period and to support capacity-building for self-government.<sup>30</sup>

### 3. TIMOR-LESTE'S TRANSITIONAL JUSTICE

#### 3.1 POST CONFLICT COMMISSIONS OF INQUIRY: UN INTERNATIONAL COMMISSION OF INQUIRY AND SPECIAL RAPPORTEURS' MISSION V. INDONESIAN COMMISSION FOR HUMAN RIGHTS

On 27 September 1999, on a special session convened due to the situation in Timor-Leste, the UN Commission on Human Rights adopted Resolution 1999/S-4/1 calling the Secretary-General to establish an international commission of inquiry in order to gather information on possible human rights and international humanitarian law violations that occurred since the referendum was announced in January 1999.<sup>31</sup> The UN Commission on Human Rights further decided to request several of its Special Rapporteurs to carry out missions to Timor-Leste.<sup>32</sup> In parallel, on 22 September 1999 the Indonesian National Commission on Human Rights established an independent Commission for Human Rights Violations in East Timor (KPP HAM).<sup>33</sup> KPP-HAM's mandate was to

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<sup>28</sup> OHCHR Report East Timor 1999 Crimes against Humanity 2003 (n. 23), pp. 40-44; See also Report of the Special Rapporteurs 1999 (n. 23), paras. 20, 38, and 71.

<sup>29</sup> UN Security Council Resolution 1272 of 25 October 1999, UN Doc S/RES/1272.

<sup>30</sup> UNTAET Regulation 1999/1 of 27 November 1999 UNTAET/REG/1999/1 "On the authority of the Transitional Administration in East Timor"; UNTAET Regulation 1999/2 of 2 December 1999 UNTAET/REG/1999/2 "On the establishment of a National Consultative Council"; UNTAET Regulation 1999/3 of 3 December 1999 UNTAET/REG/1999/3 "On the establishment of a Transitional Judicial Service Commission".

<sup>31</sup> UN Commission on Human Rights Resolution 1999/S-4/1, 27 September 1999, para 6.

<sup>32</sup> Ibid., para 7(a).

<sup>33</sup> Indonesia National Human Rights Commission Resolution No. 770/TUA/IX/99, which was revised on 22 October 1999 in Resolution No. 797/TUA/X/99.

gather facts, data and information concerning violations of human rights that occurred in Timor-Leste from January 1999 until the end of October 1999.<sup>34</sup>

On 10 December 1999, the three UN Special Rapporteurs who undertook a joint mission to Timor-Leste<sup>35</sup> presented their joint report to the General Assembly.<sup>36</sup> According to the Special Rapporteurs' report, Timor-Leste's judicial system was not up to the task of investigating and prosecuting the perpetrators of the serious crimes that had occurred; at the same time, they did not support the idea that the perpetrators should be subject for investigation and prosecution in Indonesia.<sup>37</sup> The Rapporteurs therefore recommended that if, within a few months, the Indonesian Government does not act to investigate TNI [the Indonesian Military] involvement in the 1999 atrocities, the Security Council should consider the establishment of an international criminal tribunal for this purpose.<sup>38</sup>

On 31 January 2000, both the International Commission of Inquiry and the Indonesian independent Commission for Human Rights Violations in East Timor (KPP HAM) released their reports on the events in Timor-Leste. Both reports confirmed the need for specific prosecution of those responsible for the atrocities committed; however, while the International Commission proposed an international mechanism,<sup>39</sup> acknowledging that "the organized opposition in East Timor to the Security Council decision requires specific international attention and response",<sup>40</sup> the Indonesian Commission called for national prosecutions within Indonesia.<sup>41</sup> Predictably, the Indonesian Government rejected the recommendations of the International Commission to establish an international human rights tribunal and was determined to address this

<sup>34</sup> East Timor and Indonesia Action Network (ETAN), Executive Summary Report on the investigation of human rights violations in East Timor, 31 January 2000, Available at <http://www.etan.org/news/2000a/3exec.htm> (accessed 28 January 2011).

<sup>35</sup> In accordance to UN Commission on Human Rights Resolution 1999/S-4/1, 27 September 1999 (n. 31).

<sup>36</sup> Report of the Special Rapporteurs 1999 (n. 23).

<sup>37</sup> "The record of impunity for human rights crimes committed by Indonesia's armed forces in East Timor over almost a quarter of a century cannot instil confidence in their ability to ensure a proper accounting. Nor, given the formal and informal influence wielded by the armed forces in Indonesia's political structure, can there, at this stage, be confidence that the new Government, acting in the best of faith, will be able to render that accounting." See Report of the Special Rapporteurs 1999 (n. 23), para 73.

<sup>38</sup> Report of the Special Rapporteurs 1999 (n. 23), para. 74 (6).

<sup>39</sup> OHCHR Report of the International Commission of Inquiry on East Timor 2000 (n. 23), paras. 152-153.

<sup>40</sup> OHCHR Report of the International Commission of Inquiry on East Timor 2000, para. 147 (n. 23)

<sup>41</sup> See ETAN, Executive Summary Report on the investigation of human rights violations in East Timor, 31 January 2000 (n. 34).

matter through Indonesia's own judicial mechanisms.<sup>42</sup> Indonesia's assurances that it would take action to bring to trial the perpetrators of crimes in Timor-Leste combined with the international community's reluctance to establish a costly new international tribunal (in the mould of the ICTR and ICTY), led the UN leadership to decide that prosecutions and trials should proceed only at the national level in both Indonesia and Timor-Leste.<sup>43</sup>

In April 2000, UNTAET and Indonesia signed a Memorandum of Understanding (MOU) regarding cooperation in legal, judicial, and human rights-related matters. The MOU provided for mutual assistance in obtaining evidence and statements and in executing arrest, search and seizure warrants. In addition, both entities agreed to facilitate the transfer of persons and access to information, to provide information and evidence, to enforce arrest warrants and to transfer all persons requested for the purposes of prosecution.<sup>44</sup>

### 3.2 INDONESIA'S AD HOC TRIBUNAL

Following the decision to pursue criminal proceedings within the national judicial system, Indonesia established an *ad hoc* Human Rights Tribunal to try international crimes committed by Indonesians in Timor-Leste.<sup>45</sup> However, the *ad hoc* tribunal's jurisdiction was limited to crimes occurring in the months of April and September 1999 and covered just three of Timor-Leste's 13 districts. The Tribunal commenced its work on 14 March 2002 and eventually tried only 18 perpetrators. It was widely denounced for failing to achieve accountability and to deliver justice.<sup>46</sup>

<sup>42</sup> Letter from the Minister for Foreign Affairs of Indonesia to UN Secretary-General of 26 January 2000. UN Doc. S/2000/65, A/54/727, 31 January 2000, Available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/S.2000.65.+A.54.727.En?OpenDocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/S.2000.65.+A.54.727.En?OpenDocument) (accessed 28 January 2011).

<sup>43</sup> Identical letters dated 31 January 2000 from the Secretary-General to the presidents of the General Assembly, the president of the Security Council and the chairperson of the Commission on Human Rights, 31 January 2000, UN Doc. A/54/726 and S/2000/59, available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.54.726.+S.2000.59.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.54.726.+S.2000.59.En) (accessed 28 January 2011).

<sup>44</sup> Memorandum of Understanding between the Republic of Indonesia and the United Nations Transitional Administration in East Timor Regarding Cooperation in Legal, Judicial, and Human Rights Related Matters, April 5-6, 2000, Sections 1.2, 2(c) and 9 (Hereinafter: MOU b/t Indonesia and UNTAET). Following the signing of this MOU, the SCU assisted the Indonesian investigators twice when the latter visited Timor-Leste to gather evidence. See Megan Hirst & Howard Varney, *Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor*, International Centre for Transitional Justice, Occasional Papers Series, June 2005, New York, p. 11. Available at <http://ictj.org/sites/default/files/ICTJ-TimorLeste-Justice-Abandoned-2005-English.pdf> (accessed 28 January 2011).

<sup>45</sup> The Government promulgated the Ad Hoc Human Rights Court within Law 26/2000; The Court was established in August 2001 following Presidential Decree No. 96/2001. See also Megan Hirst & Howard Varney, *Justice Abandoned?* (n. 44), p. 11.

<sup>46</sup> The prosecution did not pursue a coherent strategy and failed to present relevant and available evidence, and the judges were consistently intimidated by a large presence of TNI in the courtroom. Judgments misapplied legal

### 3.3 THE SPECIAL PANELS FOR SERIOUS CRIME AND THE SERIOUS CRIMES UNIT

In Timor-Leste, UNTAET executed its general judicial capacity-building mandate through the creation of a new court system consisting of six district courts and a court of appeal, all with jurisdiction over both criminal and civil cases. UNTAET was also empowered to create a mechanism to achieve accountability for serious crimes under international law<sup>47</sup> and subsequently established the Special Panels for Serious Crimes (SPSC).<sup>48</sup> The SPSC operated as hybrid tribunal, each Panel comprised of two international judges and one East Timorese judge; they were granted exclusive jurisdiction over alleged cases of genocide, war crimes, crimes against humanity and torture, as well as crimes of murder and sexual offences. With regard to the first four categories, the panels were invested with universal jurisdiction,<sup>49</sup> whilst with respect to murder and sexual offences, the Special Panels had exclusive jurisdiction only for offences committed in the period between 1 January 1999 and 25 October 1999.<sup>50</sup> In January 2001, the first Special Panel for Serious Crimes began operating within the Dili District Court. Its first judgment was

principles and standards. Eventually, only six accused were convicted in the first instance but all six had their convictions overturned on appeal. See David Cohen, Intended to fail : the trials before the ad hoc human rights court in Jakarta, International Center for Transitional Justice, August 2003, available at <http://socrates.berkeley.edu/~warcrime/Papers/IntendedtoFail.pdf> (accessed 28 January 2011); Caitlin Reiger and Marieke Wierda, The Serious Crimes Process in Timor-Leste: In Retrospect, International Center for Transitional Justice March 2006, p. 6, available at <http://ictj.org/sites/default/files/ICTJ-TimorLeste-Criminal-Process-2006-English.pdf> (accessed 25 January 2011); Report of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999, 26 May 2005, UN Doc. S/2005/458 July 2005, paras 14-19 (Hereinafter: COE Report 2005), available at <http://www.etan.org/etanpdf/pdf3/N0542617.pdf> (accessed 25 January 2011); JSMP, The Future of Serious Crimes, June 2005. available at [http://www.jsmp.minihub.org/Reports/Other%20Reports/Melbourne%20Symposium/Tiago%20Speech/THE%20FUTURE%20OF%20SERIOUS%20CRIMES\[1\].by%20Tiago%20Sarmento.pdf](http://www.jsmp.minihub.org/Reports/Other%20Reports/Melbourne%20Symposium/Tiago%20Speech/THE%20FUTURE%20OF%20SERIOUS%20CRIMES[1].by%20Tiago%20Sarmento.pdf); See also "Amnesty International's Comments on the Law on Human Rights Courts (Law No.26/2000)" according to which "Amnesty International is concerned that the limitation of territorial jurisdiction is inconsistent with international law since it does not provide for the exercise of universal jurisdiction over persons suspected of crimes under international law who are found in Indonesian territory, or for suspects in such cases to be extradited to another state which is able and willing to prosecute alleged perpetrators. As a state party to the Geneva Conventions of 1949 and to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Indonesia is obliged to exercise universal jurisdiction. In relation to the crimes over which the Human Rights Courts have jurisdiction, which according to Law No.26/2000 are genocide and crimes against humanity (Article 7), Amnesty International recommends that the Human Rights Courts are also given jurisdiction over war crimes". Available at <http://www.amnesty.org/en/library/asset/ASA21/005/2001/en/5cf4a521-dc3f-11dd-a4f4-6f07ed3e68c6/asa210052001en.pdf> (accessed 20 January 2011).

<sup>47</sup> UNTAET Regulation 2000/11 of 6 March 2000 UNTAET/REG/2000/11 "On the Organization of Courts in East Timor", Section 10.

<sup>48</sup> UNTAET Regulation 2000/11 of 6 March 2000 (n. 47), Sections 10.3 and 15.5; UNTAET Regulation 2000/15 of 6 June 2000 UNTAET/REG/2000/15 "On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences".

<sup>49</sup> UNTAET Regulation 2000/15 of 6 June 2000 (n. 48), Sections 2.1-2.2. For the purpose of the present regulation, "universal jurisdiction" means jurisdiction irrespective of whether: (a) the serious criminal offence at issue was committed within the territory of East Timor; (b) the serious criminal offence was committed by an East Timorese citizen; or (c) the victim of the serious criminal offence was an East Timorese citizen.

<sup>50</sup> UNTAET Regulation 2000/15 of 6 June 2000 (n. 48), Section 2.3.

delivered on 25 January 2001.<sup>51</sup> By the end of 2001, the Special Panel had held 12 trials that involved 21 defendants. Later on, two additional Special Panels were established in the Dili District Court - one in November 2001<sup>52</sup> and the other during the second half of 2004.<sup>53</sup> The additional Special Panels enabled to conduct more trials simultaneously by different panels.

Appeals on decisions of the Special Panels were to be submitted to the Court of Appeal in Dili.<sup>54</sup> In such cases, the Court of Appeal would sit in a panel composed of two international judges and one Timorese.<sup>55</sup> Appeals on decisions of the Appeal Court were to be submitted to the Supreme Court however, the Supreme Court was never formed and therefore the Court of Appeal served as a court of last resort. As will be elaborated below, from late 2001 to June 2003, the Court of Appeal could not hear appeals on decisions of the Special Panels due to a shortage in international judges.

In June 2000, UNTAET established the public prosecution service for Timor-Leste, which was composed of the Office of the Prosecutor General (OPG) and District Prosecutors offices. The OPG was based in Dili and comprised of two units, each headed by an international Deputy Prosecutor General - one dealing with ordinary crimes and the other with serious crimes.<sup>56</sup> The Serious Crimes Unit (SCU) was provided with exclusive authority to investigate and prosecute serious crimes before the SPSC.<sup>57</sup> The SCU was funded by the UN<sup>58</sup> and was staffed by UN international and national

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<sup>51</sup> Case no. 2000/1 The Prosecutor v. Joao Fernandes, Judgement of 25 January 2001.

<sup>52</sup> COE Report 2005 (n. 46), para. 129.

<sup>53</sup> David Cohen, Indifference and Accountability, The United Nations and the Politics of International Justice in East Timor, East-West Center Special Reports, p. 9, available at <http://scholarspace.manoa.hawaii.edu/bitstream/10125/3528/1/sr009.pdf> (accessed 20 January 2011).

<sup>54</sup> UNTAET Regulation 2000/11 of 6 March 2000 (n. 47), Section 14.2.

<sup>55</sup> UNTAET Regulation 2000/11 of 6 March 2000 (n. 47), Section 15.

<sup>56</sup> Pursuance to UN Security Council Resolution 1272 (1999) of 25 October 1999 (n. 29). UNTAET Regulation 2000/16 of 6 June 2000 UNTAET/REG/2000/16 "On the Organization of the Public Prosecution Service in East Timor", Section 14.

<sup>57</sup> UNTAET Regulation 2000/16 of 6 June 2000 (n. 56), Section 14.1. See Office of the General Prosecutor of the Republic Timor-Leste. Serious Crime Unit, available at <http://www.ocf.berkeley.edu/~changmin/Serious%20Crimes%20Unit%20Files/default.html> (accessed 28 January 2011).

<sup>58</sup> UNTAET Regulation 2000/16 of 6 June 2000 (n. 56), Section 2.

staff.<sup>59</sup> The Unit was divided into four regional teams which covered all 13 districts of Timor-Leste.<sup>60</sup>

The initial mandates of the SPSC and the SCU were for a one year period (starting in 2000); however, these mandates were extended several times and eventually they operated until May 2005.

### **3.4 THE COMMISSION FOR RECEPTION, TRUTH AND RECONCILIATION**

In parallel to the public prosecution service, UNTAET set up the Timor-Leste Commission for Reception, Truth and Reconciliation (CAVR - the Portuguese acronym).<sup>61</sup> The Commission was an independent, statutory authority lead by seven East Timorese Commissioners that was created as a complementary mechanism to the SCU. Accordingly, the mandate of the Commission was to focus on the broader patterns of violations which took place during the period between 1974 and 1999.<sup>62</sup> The Commission's mandate also provided it with the duty of referring cases of serious human rights violations to the OPG with recommendations for prosecution when appropriate<sup>63</sup> as well as facilitating the reception and reintegration of minor offenders who have harmed their communities through facilitating community-based mechanisms.<sup>64</sup> The Commission was meant, therefore, to address only cases involving minor offences,<sup>65</sup> whereas the OPG, which remained paramount in matters relating to the Community Reconciliation Process (CRP), continued to have exclusive authority to investigate and prosecute serious crimes.<sup>66</sup> The OPG soon delegated the latter responsibility to the SCU. In June 2002, a Memorandum of Understanding was signed between the OGP and

<sup>59</sup> Although UNTAET Regulation provides for both local and international prosecutors, during the first period only international prosecutors occupy this position and only later on, local training prosecutors joined the SCU. See UNTAET Regulation 2000/16 of 6 June 2000 (n. 56), Section 6.1.

<sup>60</sup> Serious Crimes Unit Update X/03, 22 December 2003. Available at [http://www.ocf.berkeley.edu/~changmin/Serious%20Crimes%20Unit%20Files/all\\_documents/SCU%20Updates/SCU%20Update-English%2022%20DECEMBER%202003.pdf](http://www.ocf.berkeley.edu/~changmin/Serious%20Crimes%20Unit%20Files/all_documents/SCU%20Updates/SCU%20Update-English%2022%20DECEMBER%202003.pdf) (accessed 28 January 2011).

<sup>61</sup> UNTAET Regulation 2001/10 of 13 July 2001 UNTEAT/REG/2001/10 "On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor."

<sup>62</sup> UNTAET Regulation 2001/10 of 13 July 2001 (n. 61), Sections 3 (c) and 13 (1).

<sup>63</sup> UNTAET Regulation 2001/10 of 13 July 2001 (n. 61), Section 3.1(e).

<sup>64</sup> UNTAET Regulation 2001/10 of 13 July 2001 (n. 61), Sections 3.1(g) and (h). In addition, the Commission's mandate included assisting in restoring the dignity of victims (Section 3.1(f)), and identifying practices and policies that should be addressed to prevent future human rights violations and to promote human rights (Section 3.1(d) and (i)).

<sup>65</sup> UNTAET Regulation 2001/10 of 13 July 2001 (n. 61), Schedule 1.(1) and (4).

<sup>66</sup> UNTAET Regulation 2001/10 of 13 July 2001 (n. 61), Section 22.2.

the Commission detailing the required process and interaction between the CAVR and the OGP.<sup>67</sup>

During the CAVR years of operation,<sup>68</sup> the Commission received 1,541 applications for CRP resulting in the successful reception and reintegration of 1,371 minor offenders. In addition, the OPG (through the SCU) decided to exercise jurisdiction with relation to additional 85 suspects;<sup>69</sup> however, it appears that none of the latter cases have been investigated, let alone prosecuted.<sup>70</sup>

The CAVR produced its final 2,500 pages report in October 2005. The report, covering the period of 1974 to 1999, was based on the testimonies of thousands of victims and witnesses. It included detailed recommendations and substantial findings of responsibility against Indonesian security forces and Timorese pro-Indonesia militia groups; a recommendation that the mandate of the Serious Crimes Unit (closed in May 2005) be renewed and its resources increased to allow the investigation and prosecution of pre-1999 crimes; and a recommendation that the Security Council be prepared to institute an International Tribunal should other measures fail to deliver a sufficient measure of justice.<sup>71</sup> Despite the good working relations between the CAVR and the SCU many problems characterised this model of judicial collaboration, as will be further elaborated below.

### **3.5 THE SERIOUS CRIMES PROCESS AFTER INDEPENDENCE AND THE CLOSURE OF THE SPECIAL PANELS FOR SERIOUS CRIMES AND SERIOUS CRIMES UNIT**

Timor-Leste became an independent country on 20 May 2002. On the same day, UNTAET was succeeded by the United Nations Mission of Support in Timor-Leste (UNMIS) established by UN Security Council Resolution 1410 (2002),<sup>72</sup> to provide assistance to core administrative structures required for the practicability and political

<sup>67</sup> ‘Memorandum of Understanding Between the Office of the General Prosecutor (OGP) and the Commission for Reception, Truth and Reconciliation (CAVR) Regarding the Working relationship and Exchange of Information between the Two Institutions’, 4 June 2002.

<sup>68</sup> Early 2002 to October 2005.

<sup>69</sup> Chega! Executive Summary (n. 14), pp. 23, 27.

<sup>70</sup> UN Security Council Progress report of the Secretary-General on the United Nations Mission of Support in East Timor (for the period from 10 November 2004 to 16 February 2005), 18 February 2005, para. 31. Available at [http://www.laohamutuk.org/reports/UN/UNDocs/2005/SGRept05\\_099.pdf](http://www.laohamutuk.org/reports/UN/UNDocs/2005/SGRept05_099.pdf) (accessed 25 January 2011).

<sup>71</sup> Chega! Executive Summary (n. 14), paras 7.1.1-7.1.4 and 7.2.1, pp. 185-187.

<sup>72</sup> UN Security Council Resolution 1410 of 17 May 2002 UN Doc S/RES/1410.

stability of Timor-Leste. The SCU continued to operate within the state's prosecution service and the new constitution of Timor-Leste provided that the SPSC would continue to operate as long as strictly necessary to conclude the cases under investigation.<sup>73</sup> In September 2002, the UNMISSET created a Defence Lawyers' Unit (DLU) to coordinate and conduct the defence for suspects indicted by the SCU appearing before the SPSC. The DLU operated as an independent and self-contained entity staffed by UN employees.<sup>74</sup> UNMISSET was to withdraw from Timor-Leste entirely in May 2004, but while extending the UNMISSET mandate for another year,<sup>75</sup> the Secretary-General dramatically reduced its size from almost 3000 civilian and military personnel to 700.<sup>76</sup> On 20 May 2005, the UNMISSET completed its mandate and, in accordance with Security Council Resolutions 1543 (2004) and 1573 (2004), the SPSC and the SCU prematurely terminated their work.<sup>77</sup>

By the time of their closure, the SPSC had conducted 55 trials, trying a total of 87 defendants (all, but one, being of Timorese origin). The trials resulted in 84 convictions and 3 acquittals. In 13 cases, the charges against the defendants were either withdrawn by the SCU or dismissed by the SPSC. In one case, it was ruled that the defendant is unfit to stand trial. The Special Panels were requested to grant 290 arrest warrants and issued 285.<sup>78</sup> 27 appeals have been submitted and decided, leading to the upholding of 26 convictions and the reversing of one acquittal.<sup>79</sup>

As for the SCU, by the time of its closure, it had recorded reports of 1,339 murders committed in Timor-Leste in 1999 and had completed investigations with relation to 684 murders. The SCU had filed 95 indictments with the Special Panels,

<sup>73</sup> UN Security Council Resolution 1410 of 17 May 2002, para. 3 (a); Constitution of the Democratic Republic of Timor-Leste, Section 163 (1).

<sup>74</sup> Following amendments pursuant to UNTEAT Regulation 2001/25, these provisions became sections 9.1 and 9.2.

<sup>75</sup> Security Council Resolution 1543 of 14 May 2004, UN Doc S/RES/1543 (2004), para 8.

<sup>76</sup> Susan Harris Rimmer and Juli Effi Tomaras, *Aftermath Timor Leste: reconciling competing notions of justice*, 2007, available at <http://www.aph.gov.au/library/intguide/law/timorleste.htm> (accessed 25 January 2011).

<sup>77</sup> UN Security Council Resolution 1543 of 14 May 2004 (n. 75); UN Security Council Resolution 1573 of 16 November 2004, UN Doc S/RES/1573 (2004). The SCU was to complete their investigations by November 2004 and to conclude all other activities by no later than 20 May 2005.

<sup>78</sup> COE Reports 2005 (n. 46), para. 120; JSMP, *The Future of Serious Crimes* (n. 46). Of the three cases resulting in acquittal at trial, one was overturned on appeal. The Case No. 1a/2004 Prosecutor v. Josep Nahak it was decided that the accused is unfit to stand a trial due to is abnormal behaviour.

<sup>79</sup> 26 appeals concerned a conviction and one concerned an acquittal.

charging a total of 391 defendants and relating to 572 murders.<sup>80</sup> Among these defendants, 12 were already tried by the *ad hoc* Indonesian Court. However, the closure of the Unit was premature as 186 pending investigations of murder and additional 469 uninvestigated cases remained to be attended.<sup>81</sup> All the SCU case files were removed to the Office of the Prosecutor General (OPG) and were then assimilated with the rest of the cases that fell under the responsibility of the Office which assumed direct responsibility for completing the investigations as well as prosecuting perpetrators.<sup>82</sup>

On 21 May 2005, the United Nations Office in Timor Leste (UNOTIL)<sup>83</sup> commenced a one year mandate intended to support the development of critical State institutions.<sup>84</sup> However, at the end of April 2006, an internal crisis erupted in Timor-Leste: Protests over discrimination and poor conditions within the Timor-Leste Defence Force (F-FDTL) led to the dismissal of half the force, leading in turn to rising confrontation between the dismissed troops and the Government aggravated by underlying political, social and ethnic tensions that resulted in widespread violence and the collapse of the security forces. Upon request of the Timorese government, an international peacekeeping force was sent to Timor-Leste and the UNOTIL mandate was extended until 25 August 2006.<sup>85</sup>

### 3.6 THE UN COMMISSION OF EXPERTS

On 26 May 2005, a UN-appointed Commission of Experts submitted a report to the UN Secretary-General reviewing the prosecution of the serious violations of human rights

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<sup>80</sup> UN Security Council Progress report of the Secretary-General on the United Nations Mission of Support in East Timor (n. 70), para. 31.

<sup>81</sup> Report of the Secretary-General on Justice and Reconciliation for Timor-Leste, UN Doc. S/2006/580, July 26, 2006, para. 9, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/446/74/PDF/N0644674.pdf?OpenElement> (accessed 31 January 2011).

<sup>82</sup> Interview with Ms. Josée D'Aoust, Legal Coordination Officer and Deputy of Serious Crimes Investigation Team (4 November 2010).

<sup>83</sup> UN Security Council Resolution 1599 of 28 April 2005, UN Doc S/RES/1599 (2005).

<sup>84</sup> As well as support further development of the police and the Border Patrol Unit; and provide training in observance of democratic governance and human rights. See UN Security Council Resolution 1599 of 28 April 2005, UN Doc S/RES/1599 (2005).

<sup>85</sup> UN Security Council Resolution 1677 of 12 May 2006, UN Doc S/RES/1677 (2006) extended the mandate until 20 June 2006; UN Security Council Resolution 1690 of 20 June 2006, UN Doc S/RES.1690 (2006) extended the mandate until 20 August 2006; and UN Security Council Resolution 1703 of 18 August 2006, UN Doc S/RES/1703 (2006) extended the mandate until 25 August 2006. In addition, upon request of the Timor-Leste government, a UN Independent Special Commission of Inquiry for Timor-Leste was established under the auspices of the United Nations High Commissioner for Human Rights. The Special Commission published its report on 2 October 2006. available at <http://www.ohchr.org/Documents/Countries/COITimorLeste.pdf> (accessed 20 December 2010).

which occurred in Timor-Leste in 1999.<sup>86</sup> In their report, the experts concluded that “it would be impractical to expect that the prosecutorial authorities, the Special Panels and the defence counsels of Timor-Leste would have the capacity, in the foreseeable future, to undertake the investigation, prosecution, adjudication and defence of serious crimes cases in accordance with international standards”.<sup>87</sup> The experts therefore recommended that the SCU, the Special Panels and the DLU continue to operate until such time as the investigations, indictments and prosecutions of those who are alleged to have committed serious crimes are completed. As an alternative, the experts recommended the establishment of a new judicial mechanism to continue the investigation and prosecution of serious crimes that would be structured in such a way that Timor-Leste retain sovereignty over the justice process, permit institutional and capacity building and allow the international community to assist in this process through funding, providing human resources and/or facilitating institution-building.<sup>88</sup> Lastly, the Commission recommended that if, within six months, Indonesia would fail to show it was serious about prosecuting high-level perpetrators, it would urge the UN Security Council to establish an international tribunal.<sup>89</sup>

### 3.7 THE COMMISSION OF TRUTH AND FRIENDSHIP

Despite the UN Commission of Experts recommendations for continuation of the serious crimes process, the approach of the Timorese government increasingly favoured reconciliation over the prosecution of past crimes. Accordingly, in August 2005, the governments of Indonesia and Timor-Leste set up a mutual Commission of Truth and Friendship (CTF). This controversial Commission was agreed upon in December 2004 by the presidents of Timor-Leste and Indonesia and in March 2005 the ‘Terms of Reference for The Commission of Truth and Friendship’ were signed.<sup>90</sup> According to the Preamble of the Terms of Reference, “Indonesia and Timor-Leste have opted to seek

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<sup>86</sup> The commission of experts was appointed by the Secretary General in 18 February 2005 following a request by the Security Council. See COE Report 2005 (n. 46). The Secretary-General subsequently submitted the COE report to the Security Council on 15 July 2005.

<sup>87</sup> COE Report 2005 (n. 46), Annex I, para. 21.

<sup>88</sup> COE Report 2005 (n. 46), Annex II, paras. 503-513. See also paras. 364-367. The COE made a number of other recommendations, including a referral to the International Criminal Court. See COE Report, paras. 407-458.

<sup>89</sup> COE Report 2005 (n. 46), Annex I, paras. 28-29.

<sup>90</sup> Terms of Reference for The Commission of Truth and Friendship established by The Republic of Indonesia and The Democratic Republic of Timor-Leste, 10 March 2005. Available at <http://www.etan.org/et2005/march/06/10tor.htm>. (accessed 20 December 2010) The commission was composed of ten commissioners, five from Timor-Leste and five from Indonesia and was funded by both countries.

truth and promote friendship as a new and unique approach rather than the prosecutorial process".<sup>91</sup> The Commission's mandate was to reveal the "conclusive truth" regarding the events that occurred in the period leading up to and immediately following the Timor-Leste's referendum of August 1999, based on the review of documents produced by the KPP-HAM, the CAVR, the Indonesian *ad hoc* human rights court, and the serious crimes process.<sup>92</sup> The Commission was granted the power to recommend amnesties however, it was precluded from recommending further prosecutions.<sup>93</sup> The CTF was to operate for a year, however, the mandate was extended twice.

The establishment of the Commission was followed by a strong wave of opposition both internationally<sup>94</sup> and locally.<sup>95</sup> Human rights groups, in particular, regarded the CTF as a politically motivated tool that was created in order to undermine the calls for the establishment of a new international tribunal and does not provide any mechanism to deal with serious crimes.<sup>96</sup> Despite the opposition, the Timorese Foreign Minister at the time, José Ramos-Horta, continued to express the view that the CTF aimed to be "an alternative to the prosecutorial system".<sup>97</sup>

<sup>91</sup> Terms of Reference for The Commission of Truth and Friendship (n. 90), Article 10. The Article further states: "True justice can be served with truth and acknowledgement of responsibility. The prosecutorial system of justice can certainly achieve one objective, which is to punish the perpetrators; but it might not necessarily lead to the truth and promote reconciliation".

<sup>92</sup> Terms of Reference for The Commission of Truth and Friendship (n. 90), Articles 12, 14(a) and 14(a)(i).

<sup>93</sup> Terms of Reference for The Commission of Truth and Friendship (n. 90), Articles 14(c)(i) and 13(c). On background on the CTF and an assessment of its establishment, mandate, and public hearings, see Megan Hirst, "Too Much Friendship, Too Little Truth: Monitoring Report on the Commission of Truth and Friendship in Indonesia and Timor-Leste," ICTJ, January 2008. Available at <http://www.ictj.org/images/content/7/7772.pdf> (accessed 20 December 2010) For an assessment of the final report of the CTF, see Megan Hirst, "An Unfinished Truth: An Analysis of the Commission on Truth and Friendship's Final Report on the 1999 Atrocities in East Timor," ICTJ, March 2009. Available at <http://www.ictj.org/static/Asia/Timor/UnfinishedTruthHirst.pdf> (accessed 20 December 2010).

<sup>94</sup> The Commission of Experts expressed its "grave reservations regarding certain areas of the [CTF] terms of reference. Under the circumstances, the Commission cannot advise that the international community provide financial and/or advisory support unless the two Governments reconsider the terms of reference, and the Secretary-General is satisfied that the CTF conform to international standards, in particular to principles 6 to 18 of the updated Set of Principles to Combat Impunity relevant to truth commissions." See COE Report 2005 (n. 46), Annex II, para. 355.

<sup>95</sup> Kompas, Rights groups oppose Truth and Friendship Commission, 3 August 2005, available at [http://www.asia-pacific-solidarity.net/southeastasia/indonesia/indoleft/2005/kompas\\_ngosopposeformationofktp\\_030805.htm](http://www.asia-pacific-solidarity.net/southeastasia/indonesia/indoleft/2005/kompas_ngosopposeformationofktp_030805.htm) (accessed 20 December 2010); Australian Associated Press, Indonesia, Timor unveil truth commission, 1 August 2005 and SBS Dateline, Getting away with murder, 24 August 2005, both available at [http://asia-pacific-solidarity.net/southeastasia/easttimor/netnews/2005/end\\_08v4.htm#Indonesia,\\_Timor\\_unveil\\_truth\\_commission](http://asia-pacific-solidarity.net/southeastasia/easttimor/netnews/2005/end_08v4.htm#Indonesia,_Timor_unveil_truth_commission) (accessed 20 December 2010) mentioning 10,000 people demonstrated for a week in Dili against the Commission of Truth and Friendship.

<sup>96</sup> Kompas, Rights groups oppose Truth and Friendship Commission, 3 August 2005 (n. 95).

<sup>97</sup> In an interview to Radio Australia, Ramos-Horta said "The Truth Commission is to be an alternative to the prosecutorial system (which) have failed in regard to the ad hoc tribunal in Indonesia. It has failed in regard to serious crime in Timor in the sense that military people, who might be involved, who allegedly have been involved in the ballot, they have not spoken. So because they believe that the Truth and Friendship Commission will not lead to persecution, they might step forward and be honest, cooperate fully by telling the truth on their actions in the violence in '99." See Radio Australia, Truth commission will not prosecute guilty, August 5, 2005. Available at: [http://asia-pacific-solidarity.net/southeastasia/easttimor/netnews/2005/end\\_08v4.htm#Indonesia,\\_Timor\\_unveil\\_truth\\_commission](http://asia-pacific-solidarity.net/southeastasia/easttimor/netnews/2005/end_08v4.htm#Indonesia,_Timor_unveil_truth_commission)

Ultimately, the CTF released its report in July 2008. Despite the initial concerns regarding the CTF work, the Commission reached the harsh conclusions that crimes against humanity occurred in Timor-Leste in 1999 and attributed institutional responsibility of the pro-Indonesian militia groups, Indonesian military, police, and government for these crimes.<sup>98</sup> In addition, the Commission did not recommend amnesties despite having the mandate to do so. Following the publication of report both governments released a joint statement conveying "deep regret to all parties and victims, who directly or indirectly suffered physical and psychological wounds after serious human rights violations."<sup>99</sup> Both governments did not take further actions upon the findings of the report in order to investigate and prosecute those responsible for the crimes.

### 3.8 THE SERIOUS CRIMES INVESTIGATION TEAM

On 26 July 2006, the UN Secretary General published a report recommending that the Security Council endorse the creation of an international assistance program for Timor-Leste that will be used, among other things, to establish an international investigative team within the OPG which will resume the investigative functions of the SCU with a view to completing investigations into serious crimes committed in 1999 and to

[solidarity.net/southeastasia/easttimor/netnews/2005/end\\_08v4.htm#Horta: Security Council will reject rights court](http://solidarity.net/southeastasia/easttimor/netnews/2005/end_08v4.htm#Horta: Security Council will reject rights court) (accessed 20 December 2010). In another interview Ramos-Horta said: "There are other priorities, other urgent tasks ahead of us in East Timor. We want justice, but to achieve justice we are not going to go through an international tribunal, we are going to work with Indonesians, as we are doing now on the truth and friendship, so that together we find the truth of what happened in 1999, so that Indonesian military officers and those involved in the violence, they can cooperate, step forward and apologise to the victims". SBS Dateline, Getting away with murder, 24 August 2005 (n. 95).

<sup>98</sup> Final Report of the Commission of Truth and Friendship (CTF), "Per Memoriam ad Spem" ("From Remembering Comes Hope"), available at [http://socrates.berkeley.edu/~warcrime/East\\_Timor\\_and\\_Indonesia/Reports/PER%20MEMORIAM%20AD%20SPEM%20Eng\\_ver.pdf](http://socrates.berkeley.edu/~warcrime/East_Timor_and_Indonesia/Reports/PER%20MEMORIAM%20AD%20SPEM%20Eng_ver.pdf) (accessed 28 January 2011): "[...] institutional responsibility arises from participation or acquiescence by state institutions in criminal or unlawful conduct....The context in which the patterns of cooperation between militias and TNI operated involves a continuing practice, going back to long before 1999, of collaboration between militias, civilian defense groups, and TNI local garrisons, whose membership often overlapped. The patterns of cooperation involved not only planning and co-perpetration in operations, but also the provision of various kinds of material support. Developing out of the historical context of ongoing cooperation and close inter-relation between these organizations, in 1999 at the operation level these institutions all acted together in the pursuit of the common goal of defeating the pro-independence movement. The evidence showed unequivocally that these groups regularly employed violence to achieve their goals and that the violence resulted in the categories of gross human rights listed above. Their joint operations were often conducted under the direction of Indonesian military and civilian authorities. In other cases, even where Indonesian officers or officials may not have planned or directed the operation, the evidence shows that they knew of, acquiesced in, or approved of the operations." p. 288.

<sup>99</sup> Reuters, Indonesia, East Timor leaders regret vote bloodshed, 15 July 2008, available at <http://www.reuters.com/article/2008/07/15/us-indonesia-timor-idUSJAK5503420080715> (accessed 20 December 2010).

strengthen the capacity of national justice sector institutions to prosecute the serious crimes committed in 1999.<sup>100</sup>

On 25 August 2006, the Security Council established the United Nations Integrated Mission in Timor-Leste (UNMIT) to replace the UNOTIL with the mandate to support the Government and relevant institutions.<sup>101</sup> The UNMIT was also given a mandate to assist in implementing the above recommendations to establish the serious crimes investigation team.<sup>102</sup> UNMIT initial mandate was for a period of six months however, it was extended few times whereas the current mandate runs until 26 February 2011.<sup>103</sup>

Subsequently, the Serious Crimes Investigation Team (SCIT) was created in January 2007, but it only started working in February 2008 after an agreement between the UNMIT and Timor-Leste Government was signed.<sup>104</sup> Unlike the SCU, the SCIT mandate was limited to investigation tasks only, whereas the discretion of whether or not to prosecute a perpetrator continued to lie in the hands of the OPG (which assumed this direct responsibility after the closure of the SCU in 2005). This difference proved to be crucial to the future of serious crimes prosecutions as further discussed below.

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<sup>100</sup> Report of the Secretary-General on Justice and Reconciliation for Timor-Leste (n. 81), para. 39 (d) (iii).

<sup>101</sup> “[w]ith a view to consolidating stability, enhancing a culture of democratic governance, and facilitating political dialogue among Timorese stakeholders, in their efforts to bring about a process of national reconciliation and to foster social cohesion”. See UN Security Council Resolution 1704 of 25 August 2006, UN Doc S/RES/1704 (2006), Section 4(a).

<sup>102</sup> UN Security Council Resolution 1704 of 25 August 2006 (n. 101), Section 4(i) detailing UNMIT mandate “[t]o assist in the implementation of the relevant recommendations in the Secretary-General’s report on Justice and Reconciliation, including to assist the Office of the Prosecutor-General of Timor-Leste, through the provision of a team of experienced investigative personnel, to resume investigative functions of the former Serious Crimes Unit, with a view to completing investigations into outstanding cases of serious human rights violations committed in the country in 1999.”

<sup>103</sup> UN Security Council Resolution 1745 of 22 February 2007, UN Doc S/RES/1745 (2007) extended the mandate until 26 February 2008; UN Security Council Resolution 1802 of 25 February 2008, UN Doc S/RES/1802 (2008) extended the mandate until 26 February 2009; UN Security Council Resolution 1867 of 26 February 2009, UN Doc S/RES/1867 (2009) extended the mandate until 26 February 2010; UN Security Council Resolution 1912 of 26 February 2010, UN Doc S/RES/1912 (2010) extended the mandate until 26 February 2011.

<sup>104</sup> Agreement between the United Nations and the Democratic Republic of Timor-Leste concerning assistance to the Office of the Prosecutor-General of Timor-Leste, 12 February 2008 available at <http://www.laohamutuk.org/reports/UN/UNMIT/UNMIT-SCIT-PGFeb08.pdf> (accessed 20 December 2010).

## 4. ANALYSIS OF THE SERIOUS CRIMES PROCESS UP TO 2005

### 4.1 THE SPECIAL PANELS FOR SERIOUS CRIMES

#### **Appointment of Judges, Language Barriers and Lack of Resources**

The structure of the Special Panels for Serious Crimes, each Panel composed of one Timorese judge and two international judges, turned out to be especially challenging in the case of Timor-Leste as the inherent communication and language difficulties that characterize most hybrid structures were intensified due to a serious lack of funding and indifference on the part of the relevant decision makers. More disturbing perhaps was the fact that many of these problems were pointed out by judges in the Special Panels, NGOs and commentators since the commencement of the Special Panels and throughout the years of their operation, but remained untreated.

When UNTAET assumed the transitional administration of Timor-Leste, there were no Timorese judges left in the country. As a result, UNTAET invited young Timorese to apply for the positions of judges under the new justice system. Those who were appointed as judges in the SPSC obtained their legal education in Indonesia and were newly graduates, lawyers or civil servants with little previous legal experience; none had previously served as a judge.<sup>105</sup> When asked about their initial appointment, some of the judges indicated that they had no special ambition to become judges, but regarded their acceptance of the government's invitation to apply for judicial positions as act of patriotism.<sup>106</sup>

Following selection, the new judges were sent to Darwin, Australia, for an 11 day workshop. The workshop included legal sessions on different topics, including human rights law; however, no sessions were dedicated to international criminal law or to the role and performance of a judge.<sup>107</sup> Soon after their return to Timor-Leste the new judges

<sup>105</sup> Interviews with Judge Jacinta Correia da Costa (3 November 2010); Judge Maria Natercia Gusmao Pereira (4 November 2010) and Judge Deolindo dos Santos (5 November 2010). The only Timorese judge who had prior judicial experience was the President of the Court of Appeal, Judge Ximenes, who was previously a judge in Portugal. However, Judge Ximenes who holds two nationalities (Timorese and Portuguese) serve as an International judge. See Caitlin Reiger and Marieke Wierda, *The Serious Crimes Process in Timor-Leste: In Retrospect* (n. 46), p. 15.

<sup>106</sup> Interview with Judge Maria Natercia Gusmao Pereira (4 November 2010).

<sup>107</sup> Interviews with Judge Jacinta Correia da Costa (3 November 2010) and Judge Maria Natercia Gusmao Pereira (4 November 2010).

started working in the Special Panels for Serious Crimes. The international judges were meant to serve as their mentors to complement their gaps in knowledge and experience. However, it soon became apparent that this would not be an easy task. Although the Special Panels' official working languages (up to 2002) were English, Portuguese, Bahasa Indonesia and Tetum, the international judges only spoke English or Portuguese whereas most of the Timorese judges spoke only Bahasa Indonesia and Tetum.<sup>108</sup> The need for interpreters was therefore evident and crucial, however there were no competent interpreters at hand, as will be further elaborated below.

The international judges were initially appointed by the UNTAET; later on, the UN short listed the candidates and the official appointment was made by the Superior Council of the Judiciary, headed by the President of the Court of Appeal. Their recruitment was conducted according to the standard UN recruitment process for such missions, which does not involve the advertising of specific vacancies.<sup>109</sup> Despite the requirement set out in Section 23.3 of UNTAET Regulation 2000/15, the appointed international judges did not necessarily have experience in applying international criminal law or humanitarian law.<sup>110</sup> As can be expected, this had a strong impact on the jurisprudence produced by the Panels, as discussed below.

According to the general policy<sup>111</sup>, implemented by Timor-Leste's Minister of Justice, only Portuguese speaking candidates and only candidates from civil law jurisdictions could be appointed as international judges.<sup>112</sup> In addition, the posts of the Special Panel Judges were rated between P3 and P5 level on the UN salary scale, which entails substantially less pay and prestige than the Under-Secretary General level posts offered in the ICTY, ICTR and the Special Court for Sierra Leone.<sup>113</sup> The relatively modest terms of employment combined with the policy of appointing only Portuguese speaking judges, resulted in a shortage of qualified candidates to serve as judges in the

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<sup>108</sup> As Portuguese was a forbidden language during the Indonesian occupation, the young generation of professionals, as the vast majority of Timor-Leste's population, did not speak this language. In addition, very few had knowledge of English. In any event, even in the cases where such knowledge existed it was very basic knowledge and not at a level to communicate professionally. Interview with Judge Deolindo dos Santos (5 November 2010).

<sup>109</sup> Interview with a UN official (4 Nov 2010).

<sup>110</sup> Caitlin Reiger and Marieke Wierda, The Serious Crimes Process in Timor-Leste: In Retrospect (n. 46), p. 15; JSMP, Justice in Practice: Human Rights in Court Administration, November 2001, p. 10, available at [http://www.jsmp.minihub.org/Reports/J SMP%20-%20Justice%20in%20Practice\(e\).pdf](http://www.jsmp.minihub.org/Reports/J SMP%20-%20Justice%20in%20Practice(e).pdf) (accessed 20 December 2010).

<sup>111</sup> This policy was also implemented with respect to judges in ordinary courts.

<sup>112</sup> Caitlin Reiger and Marieke Wierda, The Serious Crimes Process in Timor-Leste: In Retrospect (n. 46), p. 14.

<sup>113</sup> Ibid.

SPSC. Indeed, many of the international judges who served in the Special Panels throughout the years had previous experience as judges only in lower jurisdiction courts or even non-criminal courts.<sup>114</sup> In addition, the shortage of qualified candidates reached such a level that for more than a year and a half there were insufficient international judges to maintain the Appeal Panels and therefore from late 2001 to June 2003, no appeals on Special Panel decisions could be heard<sup>115</sup> - a state of affairs that violated the rights of the involved defendants.<sup>116</sup>

Moreover, even when qualified candidates were identified, their appointment usually lasted for a few months only, as the UN hiring policy has been characterized by short term contracts. This had the impact of a constant search after candidates and resulted in delays in the Special Panels' operation.<sup>117</sup> In 2003, for example, few partly heard trials had to be restarted as judges finished their employment and left the Panel.<sup>118</sup>

As for language, the language barrier characterized the entire process of serious crimes adjudication: Not only was it that each side of the proceedings spoke a different language, different languages were also spoken within the Court, the Prosecution Office and the Defence. In many cases, the accused, victims and witnesses, could only speak certain Timorese languages (other than Tetum). Accordingly, up to independence in 2002, the SPSC had four official working languages. The language of the proceedings was usually decided by the president of each of the Special Panels, which in most cases was one of the international judges;<sup>119</sup> the decisions of the SPSC were supposed to be translated into all four languages but in practice in most cases they were not. Following independence in 2002, as the Constitution declared Tetum and Portuguese to be Timor-Leste official languages, despite the fact that the vast majority of the Timorese population could not read or speak Portuguese;<sup>120</sup> the working languages of the SPSC

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<sup>114</sup> Ibid.

<sup>115</sup> With the exception of one month during this period in which the special panel of the Court of Appeal did work and heard one appeal. See Megan Hirst & Varney, *Justice Abandoned?* (n. 44) p. 9. See also David Cohen, Indifference and Accountability (n. 53), pp. 82-83.

<sup>116</sup> See JSMP, Right to Appeal in East Timor, October 2002. For instance, in the case of *Augustos Tavares* the hearing on appeal was scheduled after a period of three and a half years. See Case no. 2/2001, *Prosecutor v. Augustos Tavares* Judgment of 28 September 2001; Appeal Court decision of 24 November 2004.

<sup>117</sup> COE Report 2005 (n. 46), para. 129.

<sup>118</sup> Amnesty International and JSMP, "Justice for Timor-Leste: The Way Forward," April 14, 2004, at 13.

<sup>119</sup> Interviews with Judge Jacinta Correia da Costa (3 November 2010); Judge Maria Natercia Gusmao Pereira (4 November 2010).

<sup>120</sup> David Cohen, Indifference and Accountability (n. 53), p. 100. Cohen refers to 90-95 percent of the Timorese population that could not read or speak Portuguese.

were to be restricted to the two official languages, however, the English language continued to be used and judgments continued to be written also in English up until the end of the Special Panels mandate.<sup>121</sup>. Since legal Tetum was not developed enough, and as the international judges did not speak this language, its actual practice by the Special Panels was limited,<sup>122</sup> however, the judgments were also translated to Tetum.<sup>123</sup>

In the Court of Appeal the working languages were at first English, Bahasa Indonesian and Portuguese, and following independence Portuguese only.<sup>124</sup> According to Judge Jacinta Correia da Costa who served as the Timorese Judge in the Appeal Panel, translations to Tetum did not exist. As a result, she started at some point to write her decisions in Tetum as well in order to develop the legal Tetum.<sup>125</sup>

It should be mentioned that translation to 15 other local languages spoken in Timor-Leste was not provided in any of these proceedings.<sup>126</sup>

Quite often and especially in the first years, a mutual language spoken by all three judges could not be found and the judges had to be assisted closely by interpreters and translations. However, interpreters were not always sufficient in numbers and usually not very competent (none of the interpreters used in the SPSC and in the Court of Appeal were professional legal translators, nor did they have previous court room experience).<sup>127</sup><sup>128</sup> In addition, as the translators were not familiar with all four working

<sup>121</sup> See case No. 1/2001 *The Deputy Prosecutor General for Serious Crimes v. Francisco Pedro*, Judgement of 14 April 2005. The original judgment was written in English and was ordered to be translated to Tetum, while the English version remained authoritative.

<sup>122</sup> See case No. 1/2001 *The Deputy Prosecutor General for Serious Crimes v. Francisco Pedro*, Judgement of 14 April 2005. The original judgment was written in English and was ordered to be translated to Tetum, while the English version remained authoritative.

<sup>123</sup> Interviews with Judge Maria Natercia Gusmao Pereira (4 November 2010) and Judge Deolindo dos Santos (5 November 2010).

<sup>124</sup> Interview with Judge Jacinta Correia da Costa (3 November 2010).

<sup>125</sup> Interview with Judge Jacinta Correia da Costa (3 November 2010). Judge Jacinta Correia da Costa served as judge in the Special Panels in the first six months of their operations, following which she was appointed to the Appeal Panels where she served until the end of its operation.

<sup>126</sup> This created a difficulty that in some cases might amount to a breach of the accused rights where statements were taken in language which is not the mother language of the witness and thus unclear. See for example Case No. 12a/2002, *Prosecutor v. Inacio Oliveira et al*, Judgment of 23 February 2004, p. 4.

<sup>127</sup> David Cohen, Indifference and Accountability (n. 53), pp. 21, 27. See also Caitlin Reiger and Marieke Wierda, The Serious Crimes Process in Timor-Leste: In Retrospect (n. 46), p. 15. In addition, delays in hearing due to lack of interpreters were quite common. See for example, Case No. 1/2000 *Prosecutor General v. Joao Fernandes*, Appeal Judgement of Judge Fredrick Egonda-Ntende, p. 2.

<sup>128</sup> According to a UN official, the lack of competent translators and interpreters resulted from the unavailability of choices rather than from poor recruitment as in 1999 there were no professional translators and interpreters with knowledge of Tetum (or other regional languages). According to the latter, even finding non-professionals with working knowledge of Tetum and knowledge of a second language (English/Portuguese) was a challenge. Interview with a UN official (4 Nov 2010).

languages (and not with the other 15 local languages spoken in Timor-Leste), a chain of translation had to be put in place: The original text was translated to a second language by a certain translator, the translated text was then translated by a different translator to a third language, which was then translated to the fourth language by another different translator. Such practice not only increased the length of proceedings but may have resulted in inaccurate transcripts of court proceedings and statements.<sup>129</sup> Indeed, when asked about this matter, a few judges commented that there were constant difficulties in effective communication between members of the bench, as judges could not communicate well with each other and could not read each others' decisions due to the poor quality of the translation services.<sup>130</sup> In one case, for example, the appeal judge could not read the Special Panels' judgment, as translation was not provided to him.<sup>131</sup> Judge da Costa added that in some cases the judgment received different meaning when translated; as a result, despite the fact that she only started learning Portuguese in 2000, she preferred to write her judgments in Portuguese. "They had a lot of grammar mistakes, but at least I could be sure that they said what I meant" she said.<sup>132</sup>

The communication difficulties between the judges remained throughout the life of the SPSC, although they were mitigated over the years as the national judges, on their own private initiative, gradually learned Portuguese and were thus better able to communicate in that language.<sup>133</sup> Only in 2005, three years after Portuguese became one of two official languages of the state and was practiced almost exclusively as the legal language of Timor-Leste, the judges were provided with Portuguese lessons as part of the training programme at the Judicial Training Center.<sup>134</sup> In any event and despite such communication problems, the national judges indicated that they gained

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<sup>129</sup> David Cohen, Indifference and Accountability (n. 53), pp. 26-27. See also COE Report 2005 (n. 46), paras. 127-128; and JSMP Trial Report: The General Prosecutor v. Joni Marques and 9 Others (the Los Palos Case), March 2002, pp. 25-27, available at [http://www.jsmp.minihub.org/Reports/JSMP%20-%20Los%20Palos%20\(e\).pdf](http://www.jsmp.minihub.org/Reports/JSMP%20-%20Los%20Palos%20(e).pdf) (accessed 20 December 2010).

<sup>130</sup> Interviews with Judge Jacinta Correia da Costa (3 November 2010); Judge Maria Natercia Gusmao Pereira (4 November 2010) and Judge Deolindo dos Santos (5 November 2010).

<sup>131</sup> International Appeal Judge, Fredrick Egonda-Ntende, commented in one of the cases that: "The majority of this court, if I understand there [misspelling in the origin] position correctly, (*that position is set out in Portuguese, a language I do not understand and for which no translation is provided*)..." See Case No. 2/2000 *Prosecutor v. Julio Fernandes*, Appeal, Separate Opinion of Judge Fredrick Egonda-Ntende, para. 36.

<sup>132</sup> Interview with Judge Jacinta Correia da Costa (3 November 2010).

<sup>133</sup> Interviews with Judge Jacinta Correia da Costa (3 November 2010); Judge Maria Natercia Gusmao Pereira (4 November 2010) and Judge Deolindo dos Santos (5 November 2010).

<sup>134</sup> Ibid.

valuable knowledge from the experience of the international judges in how to conduct court hearings, write judgments and construct their arguments.<sup>135</sup>

The lack of competent translators was not the only problem faced by the Special Panels with relation to resources. For most of the SPSC years of operations, only one courtroom existed and therefore simultaneous hearings could not take place. A second courtroom was only made available during the last year of SPSC operations.<sup>136</sup> From the very beginning, basic equipment and supporting personnel required to the operation of any court were missing. Hence, when the Special Panels were established, judges were not provided with basic text books relating to international criminal law and the practice of the international criminal tribunals, and had to borrow or copy these books from colleagues or NGOs.<sup>137</sup> Until 2002, there was no library, computers were scarce and there was no access to any online electronic library or database.<sup>138</sup> Later on, a few computers were supplied and access to the internet was established; still, it was only in 2004 that each judge had his or her own computer.<sup>139</sup>

Supporting staff was also limited or non-existent. For long periods of time, there was no legal research assistance to the Special Panels' judges who had to conduct research themselves while relying on very limited legal sources. In addition, the Special Panels did not have any secretarial support to assist the judges in managing the Special Panels hearings calendar,<sup>140</sup> file management, typing or writing courts transcript.<sup>141</sup> The judges simply had to do themselves the entire work related to adjudication, sometimes even clerking the court hearings.<sup>142</sup> Only in late 2001, video/audio recording equipment was introduced in the SPSC; however, it was not until late 2002 that transcriptions of

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<sup>135</sup> Ibid. Indeed, in an interview with a UN official the latter commented that the Special Panel judges' level of performance in relation to management of hearings, legal analysis and drafting decisions is more advanced in comparison to their fellow East Timorese judges serving in ordinary courts. Interview with a UN official, 4 Nov 2010.

<sup>136</sup> Interview with a UN official (4 Nov 2010).

<sup>137</sup> Ibid. See also JSMP, Justice in Practice: Human Rights in Court Administration (n. 110), p. 10.

<sup>138</sup> According to JSMP, at the beginning, the judges had to use UN internet-cafes in order to conduct legal research or to contact international colleagues on matters of law. See JSMP, Justice in Practice: Human Rights in Court Administration (n. 110), pp. 10-11.

<sup>139</sup> Interviews with Judge Jacinta Correia da Costa (3 November 2010); Judge Maria Natercia Gusmao Pereira (4 November 2010) and Judge Deolindo dos Santos (5 November 2010).

<sup>140</sup> Rescheduling hearings due to clashing dates or other inconveniences was a common practice in the Special Panels.

<sup>141</sup> Interviews with Judge Maria Natercia Gusmao Pereira (4 November 2010) and Judge Deolindo dos Santos (5 November 2010). See also JSMP, Justice in Practice: Human Rights in Court Administration (n. 110), pp. 8, 10-11.

<sup>142</sup> Interviews with Judge Jacinta Correia da Costa (3 November 2010); Judge Maria Natercia Gusmao Pereira (4 November 2010) and Judge Deolindo dos Santos (5 November 2010).

such recordings started to be prepared. Even then, only a few transcribers were appointed to the job and none were professional translators and/or with legal background.<sup>143</sup> Indeed, the poor background of the latter resulted more than once in uncompleted court transcripts.<sup>144</sup>

Only from 2003, following the appointment of an administrative coordinator, and especially following the appointment of a Judge Coordinator, Judge Philip Rapoza, in 2004, there was an improvements in the management and coordination of trials.<sup>145</sup> Simultaneous translation system was introduced to the Special Panels and the Court of Appeal<sup>146</sup> and a professional clerk was hired to the Special Panels.<sup>147</sup> The first two international legal researchers were hired to assist the judges in the Special Panels in 2003, and in 2004 a third one was appointed. In the Court of Appeal however, the judges had to conduct their own research throughout the entire period of operation as well as to type their own judgments as no researchers or secretarial assistance were provided to them.<sup>148</sup> In March 2005, in an international symposium, Judge Rapoza had commented on these late improvements that he believes "that the serious crimes process has achieved a level of functioning that permits us, perhaps for the first time, to do the job given to us five years ago".<sup>149</sup>

### Jurisprudence of the Special Panels and the Court of Appeal

The jurisprudence of the Special Panels and the Court of Appeal is no less troubling<sup>150</sup> than the entire operation of the serious crimes process and reflects the consequences of appointing many inexperienced judges and more crucially, judges with no special training or experience in international criminal law. Apart from a few exceptions, the manner and practice in which international judges were appointed missed the entire rationale of appointing international judges in the first place, that is to insert experienced-specialists

<sup>143</sup> David Cohen, Indifference and Accountability (n. 53), p. 28.

<sup>144</sup> See Case No. 12a/2002, *Prosecutor v. Inacio Oliveira et al*, Judgment of 23 February 2004, pp. 4-5. The 2005 Commission of Experts noted in this regard that "the absence of legal support and infrastructure such as international law clerks and a law library are reflected in the quality of decisions and judgments, although there has been an overall improvement since the inception of the Special Panels". See COE Report 2005 (n. 46), para. 127.

<sup>145</sup> COE Report 2005 (n. 46), paras. 123 and 130.

<sup>146</sup> David Cohen, Indifference and Accountability (n. 53), pp. 20, 22.

<sup>147</sup> COE Report 2005 (n. 46), p. 33, fn. 31.

<sup>148</sup> Interview with Judge Jacinta Correia da Costa (3 November 2010).

<sup>149</sup> Judge Phillip Rapoza, The Serious Crimes Process in Timor-Leste; Accomplishments, Challenges and Lessons Learned, International Symposium on UN peacekeeping Operations in Post Conflict, March 2005.

<sup>150</sup> For an elaborated discussion see David Cohen, Indifference and Accountability (n. 53), pp. 42-88.

support to the local legal system in order to enable proceedings at a certain level as well as to train the local judges.

The judgments are characterized by inconsistencies and non-uniformity both in style and in content. These problems continued throughout the years of operation with a slight improvement towards the end of the period. The decisions vary so much in style that even the sections forming the structure of the judgment are not similar. Many decisions fail to comply with minimal standards of a reasoned judgment. They do not provide sufficient procedural background and therefore many decisions fail to describe the complete sequence of the case (for example, details regarding the detention of the accused, the reasons for postponement of hearings or annulment of arrest warrants).<sup>151</sup> In addition, many decisions lack a proper discussion of the evidence of the case and the reasons for considering one piece of evidence as credible while disqualifying the other. In some cases, the factual findings made by the Special Panels were not even based on testimony given before the court.<sup>152</sup> Discussion of the law, the elements of the crimes and the application of these standards to the facts of the case are also frequently missing. In the first cases mainly, the Special Panels adjudicated without reference to comparative jurisprudence, be it Indonesian or international.<sup>153</sup> In one case, for example, the Special Panel settled for a general reference to “Indonesian jurisprudence” or “interpretation of other countries” to support its conclusion.<sup>154</sup> Some of these practices were improved over the course of time, especially towards the end of operations; however, the progress itself was quite inconsistent.

As for the rights of the accused, it appears that, more than once, the Special Panels admitted problematic guilty pleas where it seemed that the accused might not

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<sup>151</sup> For example, see Case No. 3/2000 *Prosecutor v. Carlos Soares Carmone*, Judgement of 25 April 2001, the Court of Appeal annulled, without explanation, the arrest warrant and ordered a review of the detention of the accused. The judgment does not provide any information regarding the results of such review and does not even indicate if the said review took place. In Case No. 2/2001 *Prosecutor v. Augusto Asameta Tavares*, Judgment of 28 September 2001, the Judgment does not provide any explanation why offences which were listed in the indictment were dropped.

<sup>152</sup> For example, see criticism by of Judge Fredrick Egonda-Ntende in Case No. 2/2000 *Prosecutor v. Julio Fernandes*, Appeal Judgment of 29 October 2001, Separate Opinion of Judge Fredrick Egonda-Ntende, para. 13.

<sup>153</sup> See Case No. 3/2000 *Prosecutor v. Carlos Soares Carmone*, Judgement of 25 April 2001; Case No. 8/2000 *The Prosecutor v. Mateus Tilman*, Judgment of 24 August 2001; 2/2001 *Prosecutor v. Augusto Asameta Tavares*, Judgement of 28 September 2001; Case No. 3/2001 *Prosecutor v. Jose Valente*, Judgment of 19 June 2001; Case No. 8/2001 *Prosecutor v. Francisco Dos Santos Laku*, Judgment of 25 July 2001.

<sup>154</sup> Case No. 2/2000 *Prosecutor v. Julio Fernandes*, Judgment of 1 March 2000, p. 7. When discussing the elements of murder the Special Panel conclude that “according to Indonesian jurisprudence and the interpretation of murder in different countries” a long-term planning of a murder is not necessarily required. The Special Panel did not provide any further reference or source of that information. Such a manner was criticized by Appeal Judge. See *Prosecutor v. Julio Fernandes*, Appeal Judgment of 29 October 2001, Separate Opinion of Judge Fredrick Egonda-Ntende, para. 34.

have fully understood the consequences of his admission of guilt or was not aware of his right to remain silent,<sup>155</sup> or may have accepted guilt despite the availability of possible defences.<sup>156</sup> In addition, on a few occasions, the Special Panels agreed not to question Prosecution witnesses and were satisfied with the submission of written statements,<sup>157</sup> disregarding the Transitional Code of Criminal Procedure according to which witnesses shall be heard directly by the Court.<sup>158</sup> In *Armando dos Santos Case*<sup>159</sup> and *Manuel Goncalves Bere Case*,<sup>160</sup> the Court of Appeal convicted the accused of a crime they were not charged with in the indictment and the defendants were not given the opportunity to defend themselves against the new charge.

The Court of Appeal has also been criticized for failing to understand the functions and limitations of an appeal chamber and for frequently substituting its evaluation of the evidence for that of the Special Panels – acting contrary to international practice and the norms of most of national legal systems.<sup>161</sup>

The failure to use comparative jurisprudence, which is especially important in international criminal law where the law has been developed in large part through the jurisprudence of the international criminal tribunals, resulted in significant errors of law regarding fundamental doctrines of international criminal law. In the *Los Palos Case*, the first judgment on crimes against humanity, the Special Panel required that crimes against humanity have a nexus to an armed conflict.<sup>162</sup> Another example for insufficient understanding of international law as well as a faulty “escape” to domestic law can be

<sup>155</sup> For example, see Case No. 2/2001 *Prosecutor v. Augusto Asameta Tavares*, Judgment of 28 September 2001, where the accused pleaded not guilty but then gave an inconsistent and confused statement which eventually contained the only evidence that might relate him to the offence. The Panels accepted that statement and he was convicted.

<sup>156</sup> See Case No. 6/2001 *Prosecutor v. Augusto dos Santos*, Judgment of 14 May 2002. The accused was charged with murder and pleaded guilty however, the court disregarded further information found in his statement according to which he was ordered by his superior to beat or to kill the victim; that he was scared; and that he acted not on his free will. See paras. 27-28.

<sup>157</sup> See Case No. 2/2000 *Prosecutor v. Julio Fernandes*, Appeal, Separate Opinion of Judge Fredrick Egonda-Ntende, paras 43-44; See also Case No. 3/2001 *Prosecutor v. Jose Valente*, Judgment of 19 June 2001, p. 3.

<sup>158</sup> Transitional Code of Criminal Procedure, Section 36.1 reads: “witnesses shall be heard directly by the Court, unless for good cause the Court determines that a different procedure may be used. Any procedure for the presentation of witness testimony must take account of the rights of all parties to a fair hearing.”

<sup>159</sup> Case No. 16/2001 *Prosecutor v. Armando dos Santos*, Judgement of 9 September 2002, Appeal Judgment of 15 July 2003.

<sup>160</sup> Case No. 10/2000 *Prosecutor v. Manuel Goncalves Bere*, Judgment of 15 May 2001, Appeal Judgment of 16 October 2003. Timorese Judge Jacinta Correia da Costa dissented again.

<sup>161</sup> David Cohen, Indifference and Accountability (n. 53), p. 53. Referring to Case No. 12/2000 *The Prosecutor v. Carlos Soares*, Judgment of 31 May 2001.

<sup>162</sup> Case No. 9/2000 *Prosecutor v. Joni Marques and others*, Judgment of 11 December 2001, para. 684. See also JSMP Trial Report: The General Prosecutor v. Joni Marques (n. 129).

found in *Armando dos Santos* Case where both the Special Panel and the Court of Appeal made a few fundamental errors.<sup>163</sup> The Special Panels confused murder as a crime against humanity with murder under the Indonesian Penal Code and considered elements (e.g. premeditation) which have no relevance to murder as crime against humanity.<sup>164</sup> When the case was appealed, the Court of Appeal in its majority decision,<sup>165</sup> disregarded its previous decisions, and declared that the applicable law referred to in UNTAET Regulation 1999/1 (“law applicable in East Timor prior to 25 October 1999”) is Portuguese law and not Indonesian law.<sup>166</sup> The Court of Appeal then declared the UNTAET Regulation 2000/15 (which it regarded as the constitution of the Court) to be invalid, since it charges crimes based on retroactive legislation. Subsequently, and based on a flaw in the Portuguese Penal Code, the Court of Appeal convicted *Armando dos Santos* of the nonexistent crime against humanity in the form of genocide. *Dos Santos* was subsequently sentenced for 22 years imprisonment.<sup>167</sup> The same interpretation of the applicable law was given in the *Manuel Goncalves Bere* Case<sup>168</sup> despite a law that was passed meanwhile by the Timorese Parliament, which clarified that the subsidiary law applicable in Timor-Leste with force from 20 May 2002 onwards is Indonesian law.<sup>169</sup>

<sup>163</sup> Case No. 16/2001 *Prosecutor v. Armando dos Santos*, Judgement of 9 September 2002, Appeal Judgment of 15 July 2003.

<sup>164</sup> The Court of Appeal made the same mistake in Case No. 6/2002 *Deputy Prosecutor General v. Paulino de Jesus*, Appeal Decision of 4 November 2004. See also JSMP, The Paulino de Jesus Decisions, April 2005, available at [http://www.jsmp.minihub.org/Reports/jspreports/Paulino%20De%20Jesus/paulino%20de%20jesus%20report%20\(e\).pdf](http://www.jsmp.minihub.org/Reports/jspreports/Paulino%20De%20Jesus/paulino%20de%20jesus%20report%20(e).pdf) (accessed 20 December 2010).

<sup>165</sup> Timorese Judge Jacinta Correia da Costa, delivered a dissenting opinion according to which the correct interpretation should be that Indonesian Law is the subsidiary law in Timor-Leste.

<sup>166</sup> The rationale was that as Indonesia Occupation was illegitimate, the application of Indonesia law was null and therefore the applicable law prior to 25 October 1999 was Portuguese law.

<sup>167</sup> The Court of Appeal did not conduct any discussion about the definition and elements of the crime of genocide and no attempt was made to apply the elements to the facts of the case. In addition, the Court applied the genocide to a political group, regardless of the definition of genocide in both the UNTAET Regulation 2000/15, Article 4, as well as in the Genocide Convention (which binds Timor-Leste), according to which genocide can only be committed in regard to “national, ethnical, racial or religious group”.

<sup>168</sup> Case No. 10/2000 *Prosecutor v. Manuel Goncalves Bere*, Appeal Judgment of 16 October 2003. Timorese Judge Jacinta Correia da Costa dissented again.

<sup>169</sup> Law No. 10/2003 Interpretation of Section 1 of Law No. 2/2002, of 7 August, and Sources of Law, 6 October 2003. See also JSMP Press Release, “East Timorese Parliament passes new legislation on the Applicable Subsidiary”, 1 October 2003.

The Special Panels also seemed to lack a clear and coherent understanding of different theories of criminality; for example, basing decisions on command responsibility where the appropriate theory should have been joint criminal enterprise.<sup>170</sup>

In terms of standard of evidence, the Special Panels applied a low standard while admitting reports into evidence without requiring any further evidence in order to prove the chapeau element of crimes against humanity, i.e. the widespread or systematic nature of the attack.<sup>171</sup> This practice standard was employed throughout the entire serious crimes process. Moreover, in the cases of *Joseph Leki* and *Francisco Dos Santos Laku*, the Special Panels made a finding of facts relating to the widespread and systematic nature of the attack without any evidence being submitted, relying on “what even the humblest and most candid man in the world can assess.”<sup>172</sup> In the same vein, the Special Panels also stated without relying on firm evidence that an armed conflict existed in Timor-Leste at least for some months before and after the popular consultation on 30 August 1999.<sup>173</sup>

As for the sentencing policy, the Special Panels implemented a lenient policy. With a few exceptions,<sup>174</sup> those convicted by the Special Panels received sentences ranging from 6 to 15 years.<sup>175</sup> The Special Panels usually explained its lenient sentences as aimed to “avoid impunity and thereby to promote national reconciliation and the

<sup>170</sup> See further discussion in Suzannah Linton, East Timor and Accountability for Serious Crimes, in M. Cherif Bassiouni, International criminal Law, Third Edition, pp. 263-264. See also Suzannah Linton and Caitlin Reger, The Evolving Jurisprudence and Practice of East Timor’s Panels for Serious Crimes on Admissions of Guilt, Duress and Superior Orders, 4 Y.B. Int’l Humanitarian L. 167.

<sup>171</sup> The first case to introduce this practice was Case No. 9/2000, *The Prosecutor v. Joni Marques et al.*, Judgment of 11 December 2001. The reports are: UNAMET Report on the destruction of East Timor since 4 September 1999, 11 September 1999; Report of the Security Council Mission to Jakarta and Dili, 8 to 12 September 1999, 14 September 1999, S/1999/976, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/262/20/PDF/N9926220.pdf?OpenElement> (accessed 28 January 2011); Report of the High Commissioner for Human Rights on the human rights situation in East Timor, 23-24 September 1999, E/CN.4/S-4/CRP.1, available at [http://www.unhchr.ch/Huridocda/Huridocda.nsf/\(Symbol\)/E.CN.4.S-4.CRP.1.En?OpenDocument](http://www.unhchr.ch/Huridocda/Huridocda.nsf/(Symbol)/E.CN.4.S-4.CRP.1.En?OpenDocument) (accessed 28 January 2011); Report of the Special Rapporteur 1999 (n. 23); OHCHR Report of the International Commission of Inquiry on East Timor 2000 (N. 23); The Indonesian Commission on Human Rights Violations in East Timor (KPP-HAM), 31 January 2000, executive summary is available at <http://www.etan.org/news/2000a/3exec.htm> (accessed 28 January 2011).

<sup>172</sup> Case No. 5/2000 *Prosecutor v. Joseph Leki*, Judgment of 11 June 2001, p. 7; Case No. 8/2001 *Prosecutor v. Francisco Dos Santos Laku*, Judgment of 25 July 2001, pp. 10-11.

<sup>173</sup> Case No. 9/2000 *Prosecutor v. Joni Marques and others*, Judgment of 11 December 2001, para. 681.

<sup>174</sup> Such in the Los Palos case were some of the accused were sentenced to 33 years.

<sup>175</sup> According to DOMAC data, the average length of all sentences is 9.1 years’ imprisonment; the average sentence for defendants convicted of crimes against humanity is 9.68 years’ imprisonment; and the average sentence for defendants convicted of non-international crimes (24 sentences) is 7.76 years’ imprisonment.

restoration of peace".<sup>176</sup> In one of the first decisions of the Court of Appeal such a policy was criticised by one of the judges stating that reconciliation is not a direct task of the courts although this may be the secondary effect of the accountability process; and that the Courts' duty is to determine sentence according to law, and not according to the Court's enunciated policy.<sup>177</sup> Notwithstanding this criticism, the Special Panels continued to apply the aforementioned considerations with relation to their sentencing policy.

## Competency Examination

In January 2005 language barriers almost caused the suspension of all Timorese judges sitting in serious crimes cases. In mid 2004, all 22 Timorese judges, including the four judges appointed to adjudicate the serious crimes cases in the Special Panels and Court of Appeal, took an exam of "basic competency" (based on Indonesian Codes and UNTAET regulations) to qualify them for permanent appointment as judges.<sup>178</sup> According to the results which were published in late January 2005, all judges failed the examination.<sup>179</sup> After four years of operation of the Special Panels, this could have been an indication of a failure in capacity building however it appears that language barriers and errors played a significant part in the examination and its evaluation; consequently, the results alleging failure of the judges may need to be taken with reservations.<sup>180</sup>

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<sup>176</sup> See also *The Prosecutor v. Yoseph Leki*, Case No. 5/2000, Judgement of 11 June 2001, p.11 according to which the objective to prosecute 1999 perpetrators "is to avoid impunity and thereby to promote national reconciliation and the restoration of peace". Case No. 8/2000 *The Prosecutor v. Mateus Tilman*, Judgment of 24 August 2001, para. 69; 2/2001 *Prosecutor v. Augusto Asameta Tavares*, Judgement of 28 September 2001, para. 63; Case No. 3/2001 *Prosecutor v. Jose Valente*, Judgment of 19 June 2001, p. 12.

<sup>177</sup> Case No. 2/2000 *The Prosecutor v. Julio Fernandes*, Appeal Judgment of Judge Fredrick Egonda-Ntende, 29 October 2001, para. 26: "Reconciliation, the stated aim of the court below in determining the appropriate sentence in this case, is not a direct role of the courts. That is a role best left to the political arena, i.e. the legislative and executive arms of government together with civil society. The duty of the courts is to administer justice according to law, to determine sentence according to law, and not according to courts enunciated policy. It may be that one of the secondary effects of accountability provided by the justice system is to promote reconciliation in the long run."

<sup>178</sup> Up to this point all judges were on a probation status pending passing this exam.

<sup>179</sup> All public prosecutor and defence lawyers were required to take this exam as well and all failed. See David Cohen, Indifference and Accountability (n. 53), p. 94.

<sup>180</sup> The exam was written by Judge Claudio Ximenes, President of the Court of Appeal, in Tetum and Portuguese and the examinees could choose their preferred language to reply; all chose to do so in Tetum language. The exam answer-sheets were then translated to Portuguese as they were graded by Judicial Evaluation Commission composed of Portuguese speaking judges. David Cohen who compared the two versions of the examination concluded that "the examination was rife with translation errors, typographical errors and serious editorial mistakes. In 26 questions... there are more than 30 such mistakes, many of them serious enough to interfere with the ability of the examinee to answer correctly". The fact that there were so many errors in translation of the exam led to a concern regarding the accuracy of translation of the answers as well and scepticism of the results of the entire exam. See David Cohen, Indifference and Accountability (n. 53), p. 98. For a comprehensive discussion on this matter as well as a detailed analysis of the errors see pp. 93-99 and the appendix to Cohen's article. Cohen also severely criticise the role of Judge Claudio Ximenes, President of the Court of Appeal, as the head of the system and the mentor of some of these judges. Cohen also argues that the results were determined by language politics more than the content. Lastly, Cohen

Following the publication of results, all judges were required to participate in a two and a half year training programme at the Judicial Training Centre and only upon successful completion of this training they could resume their judicial functions. Notwithstanding, immediately after the results were published, the Superior Council of the Judiciary voted to allow three judges of the serious crimes cases to continue serving until the end of the serious crimes process.<sup>181</sup>

## 4.2 THE SERIOUS CRIMES UNIT

### Staff, Language Barriers and Lack of Resource

Staffing levels at the SCU have varied over time and were characterised by frequent turnover resulting from (but not only) the UN hiring policy which was characterized by short term contracts of two to six months.<sup>182</sup> In December 2003, the Unit consisted of 111 staff members composed of 38 UN international staff, including prosecutors, case managers, investigators, forensic specialists and translators, 10 UN Police investigators and 35 UN national staff, including translators and mortuary staff. The Unit also had 10 East Timorese trainee prosecutors, case managers, information technology and data coding staff and 18 East Timorese Police (PNTL) trainee investigators working in teams with International UN staff at SCU.<sup>183</sup> It should be noted that, at first, local staff were only filling up posts of translators; only in 2002, with the appointment of a Ms. Siri Friggad to the new Deputy General Prosecutor for Serious Crimes (DPGSC), the Unit began to employ local prosecutors and support staff to be trained by the international staff of the SCU.<sup>184</sup>

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correctly comment that the jurisprudence of the Special Panel, and especially that of the Court of Appeal, reveals that the judges which Ximenes referred to as so incompetent, actually understood and applied the law much better than the international judges including Ximenes himself.

<sup>181</sup> David Cohen, Indifference and Accountability (n. 53), pp. 96-7. Again, Cohen correctly criticise this move; amazed how the Superior Council of the Judiciary who believed these judges to be so unfit could allow them to continue adjudicating.

<sup>182</sup> The post of the DGPSC, for example, was replaced five times during the SCU's period of operation. See JSMP, Digest of the jurisprudence of the Special Panels for Serious Crimes, April 2007, p. 8 available at [http://www.jsmp.minihub.org/Reports/2007/SPSC/SERIOUS%20CRIMES%20DIGEST%20\(Megan\)%20250407.pdf](http://www.jsmp.minihub.org/Reports/2007/SPSC/SERIOUS%20CRIMES%20DIGEST%20(Megan)%20250407.pdf) (accessed 22 December 2010).

<sup>183</sup> Serious Crimes Unit Update X/0 3 (n. 60).

<sup>184</sup> COE Report 2005 (n. 46), para. 114.

The background of the SCU staff was varied however as opposed to the judges in the Special Panels, which mostly came from civil law jurisdiction, most of the SCU prosecutors came from common law jurisdictions.<sup>185</sup>

In addition, language barriers existed also here. The Prosecution's working language was English and consequently, there was a significant reliance within the SCU on translation services. Nevertheless, although clearly insufficient,<sup>186</sup> up until 2002 the SCU had only three translators. This figure may explain the reason why the documents submitted to the court by the SCU were not always translated to all languages; it is unclear how a decision to translate to a certain language (other than English) was made. In 2002, following the appointment of Ms. Siri Friggad as the DPGSC, the number of translators increased to 42. However, like with the Special Panels, none of those were professional legal translators.<sup>187</sup>

The SCU was also under-resourced. It had no sufficient equipment, such as vehicles for field investigations or cameras.<sup>188</sup> In addition, the Unit was missing basic administrative support, such as file and data management systems.<sup>189</sup> The lack of secretarial support is also inferred from the common practice of submitting to the court handwritten documents such as handwritten statements.<sup>190</sup> In general, the Unit was criticized for its bad management during the first two years of operation; many improvements were however adopted thereafter.<sup>191</sup> In addition, as the Unit itself had a short-term mandate that was renewed each year, this may have resulted in lack of long term organization and planning; the frequent staff turnover also prevented the creation of

<sup>185</sup> Interview with a UN official (4 Nov 2010). According to the UN official, this resulted in numerous situations in which the Prosecution raised procedural questions completely foreign to the (civil law) judges, while the judges took decisions which the (common law) prosecutors considered ill-founded.

<sup>186</sup> See for example, Case No. 8/2000 *The Prosecutor v. Mateus Tilman*, Judgment of 24 August 2001, p. 2, where during the preliminary hearing the accused said he did not understand the indictment since it was not translated to Bahasa Indonesia or to Tetum. The court then ordered to translate the judgment. Similarly, the prosecution submitted their closing statements in English only. See also Case No. 2/2001 *Prosecutor v. Augusto Asameta Tavares*, Judgement of 28 September 2001, para. 11; Case No. 3/2001 *Prosecutor v. Jose Valente*, Judgment of 19 June 2001, p. 1, where SCU presented before the Special Panel a written indictment (in English and Indonesian). However, the Indonesian version included one charge of murder, whilst the English version included two charges, namely murder and attempted murder against the Defendant.

<sup>187</sup> David Cohen, Indifference and Accountability (n. 53), pp. 23-24.

<sup>188</sup> David Cohen, Indifference and Accountability (n. 53), p. 23.

<sup>189</sup> David Cohen, Indifference and Accountability (n. 53), pp. 24-25.

<sup>190</sup> See for example, Case No. 8/2000 *The Prosecutor v. Mateus Tilman*, Judgment of 24 August 2001, p. 1; Case No. 1/2001, *Deputy Prosecutor General v. Francisco Pedro Geger*, Judgment of 14 April 2005, para. 4.

<sup>191</sup> David Cohen, Indifference and Accountability (n. 53), p. 23.

“organizational memory.”<sup>192</sup> Despite inadequate personnel and resources, and hundreds of murder cases yet to be investigated, it was decided in 2004 to downsize the Unit and by February 2005, it was left with only 74 staff members,<sup>193</sup> which made the task of completing all pending trials until May 2005 even more difficult. However, as the Unit reached its closure, 37 additional translators were hired to assist in the handover process (only then file and data management systems as well as standard translation database were introduced).<sup>194</sup>

Despite the provision under UNTAET 2000/15 regarding witness protection,<sup>195</sup> no such measures were taken in the Special Panels. Although, a witness support team existed within the SCU, it included one person only and her support to the witnesses amounted to liaising witness transportation to court hearings.<sup>196</sup>

## Prosecution Strategy

At the beginning of the serious crimes process the UNTAET failed to define a clear mandate of the SCU and its prosecution strategy. Still, in response to both time and resource constraints, the SCU identified ten priority cases of Crimes against Humanity or murders of multiple victims involving 202 accused.<sup>197</sup> The cases were selected on the basis of the number and type of victims, the seriousness of the crimes, their political significance, and the availability of evidence.<sup>198</sup> Only in early 2002, with the appointment of the new DPGSC, a prosecution strategy was decided upon. From this time on, additional investigations were made into widespread patterns of serious violence focusing on those who had organised, ordered and aided in the planning and execution of the crimes;<sup>199</sup> this was so despite the fact that most of

<sup>192</sup> David Cohen, Indifference and Accountability (n. 53), pp. 24. 13.

<sup>193</sup> Serious Crimes Unit Update, 4 February 2004, Available at [http://www.ocf.berkeley.edu/~changmin/Serious%20Crimes%20Unit%20Files/all\\_documents/SCU%20Updates/SCU%20Update-English%20February%202005.pdf](http://www.ocf.berkeley.edu/~changmin/Serious%20Crimes%20Unit%20Files/all_documents/SCU%20Updates/SCU%20Update-English%20February%202005.pdf) (accessed 22 December 2010).

<sup>194</sup> David Cohen, Indifference and Accountability (n. 53), pp. 24-25.

<sup>195</sup> UNTAET Regulation 2000/15 of 6 June 2000 (n. 48), Sections 24.1 and 24.2.

<sup>196</sup> David Cohen, Indifference and Accountability (n. 53), p. 32.

<sup>197</sup> Serious Crimes Unit Update, 21 February 2003. Available at <http://www.etan.org/et2003/february/23-28/21series.htm> (accessed 22 December 2010); The cases are: 1) The Los Palos Case 21-25 September 1999; 2) The Lolotoe Case 2 May-16 September 1999; 3) The Liquica Church Massacre 6 April 1999; 4) The Attack on the House of Manuel Carrascalao 17 April 1999; 5) The Passabe and Makaleb Massacres September-October 1999; 6) TNI Battalion 745 September 1999; 7) The Cailaco Killings. March-April 1999; 8) The Suai Church massacre; 9) The September Attacks on Bishop Belo's compound and the Dili Diocese; 10) The Maliana Police Station killing September 1999.

<sup>198</sup> Megan Hirst & Howard Varney, *Justice Abandoned?* (n. 44), p. 7.

<sup>199</sup> Serious Crimes Unit Update, 21 February 2003 (n. 197).

these perpetrators were outside of the Special Panels jurisdiction and were likely to remain there. The most notable of these indictments was served in February 2003 against *General Wiranto*, the former Indonesian Minister of Defence and commander of the armed forces, who was identified also by the KPP HAM report (but was not served with an indictment by the Indonesian authorities), and against six other senior TNI members and the former governor of Timor-Leste. These eight individuals were charged with Crimes against Humanity of murder, deportation and persecution and an arrest warrant was issued against General *Wiranto*.<sup>200</sup>

Notwithstanding the fact that the SPSC were empowered to bring to justice those responsible for perpetrating serious crimes committed in Timor-Leste during the entire period of the occupation, as well as in 1999,<sup>201</sup> the SCU focused on the violence of 1999,<sup>202</sup> whereas the decision whether to criminally investigate events that transpired prior to 1999 was left for the discretion of Timor-Leste authorities. Significantly, most of the SCU indictments dealt with East Timorese pro-Indonesia militia members.

The majority of indictments filed in the first year to the operation of the SCU involved ordinary murder charges under the Indonesian Criminal Code rather than charges of crimes against humanity or war crimes.<sup>203</sup> Following a report published in February 2001, in which the UN OHCHR claimed that “a serious lack of resources, both human and material, has hampered the investigative work of the SCU”<sup>204</sup> it was argued

<sup>200</sup> Case No 5/2003 *Prosecutor v General Wiranto et al.* Indonesia responded to the indictment against Wiranto by attacking the UN for bringing what it described as a politically motivated case. Consequently, the president of Timor-Leste made a public statement in expressing his regret over the indictment and asserting the importance of good relations between Timor-Leste and Indonesia. UNMISSET in reply, declared that the indictment had been issued by the prosecution service of Timor-Leste and not by the UN—despite the fact that all senior staff working on the indictments were UN professionals under the supervision of the UN’s deputy prosecutor general for serious crimes. See UN News Center, “Timor-Leste, Not UN, Indicts Indonesian General for War Crimes”, 26 February 2003. Shortly thereafter the Timorese government publicly declared that the indictment was the work of the UN, completing the mutual disavowal of responsibility for the serious crimes process. See Jakarta Post, “E. Timor Denies Indicting RI Generals,” 28 February 2003. General Wiranto remained in Indonesia and has not been brought to trial. He continued to pursue his political career in Indonesia and was a candidate in the 2009 presidential elections. According to Megan Hirst & Howard Varney, *Justice Abandoned?* (n. 44), pp. 10-11, this case was a breaking point in the relations between Timor-Leste and the UN and from that point on there was no political will on part of Timor-Leste to charge serious crimes relating to 1999 and instead there was a growing support on the amnesties and reconciliation. As a result of this crisis it was reported that the OPG refused to forward the arrest warrant against Wiranto to the INTERPOL as well as any subsequent arrest warrant. See COE Report 2005 (n. 46) paras. 73-74.

<sup>201</sup> UNTAET Regulation 2000/15 of 6 June 2000 (n. 48).

<sup>202</sup> The SCU began an investigation of the Santa Cruz massacre of 1991, but abandoned it at an early stage. Otherwise, the only investigations into pre-1999 violence concerned events late in 1998 that were closely associated with the violence of 1999.

<sup>203</sup> Although the first indictments charging crimes against humanity were filed already in November and December 2000, they had to be amended several times before proceeding with the charges of crimes against humanity.

<sup>204</sup> Report of the High Commissioner for Human Rights on the Situation of Human Rights in East Timor, 6 February 2001, UN. Doc. E/CN.4/2001/37, para. 13. Available at

that this predicament had led the SCU to charge the accused with lesser offences under the Indonesian Criminal Code which were easier to prove in comparison to crimes against humanity which contains the additional contextual element of “widespread or systematic attack directed against any civilian population with knowledge of the attack”.<sup>205</sup> Interestingly, examination of the SPSC jurisprudence shows that the convictions for crimes against humanity usually relied on various reports (of bodies within the UN and of the Indonesian Commission on Human Rights) to prove the required contextual element and that these reports were already published November 2000 when the SCU filed its first indictments,<sup>206</sup> and therefore could be similarly relied upon from the beginning had the SCU decided to indict crimes against humanity. Considering this fact, the motivation to settle for charging ordinary crimes becomes more ambiguous. The answer might be found in the proposition that at least in several cases that seemed to be *prima facie* cases of crimes against humanity of murder, the SCU charged the accused with a lesser offence of murder under the Indonesian Criminal Code, in order to obtain ‘quick justice’.<sup>207</sup>

Another distinctive feature of the SCU prosecution strategy is that throughout its entire period of operation, the SCU has never indicted even a single individual for war crimes.<sup>208</sup> One explanation of this practice was that the SCU regarded prosecuting charges of war crimes as unnecessary in cases where crimes against humanity or crimes under domestic law could be charged.<sup>209</sup> It was also suggested that the factual basis of the events that occurred in 1999 clearly demonstrating the widespread and systematic nature of the attack against the civilian population whereas charging war crimes, while possible, required the prosecution to prove the existence of an armed conflict and the nexus between the armed conflict and the crime committed – a

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<http://www.unhcr.org/refworld/country,,UNCHR,COUNTRYREP,TMP,4562d8cf2,3ae6b13b18,0.html> (accessed 22 December 2010).

<sup>205</sup> UNTAET Regulation 2000/15 of 6 June 2000 (n. 48), Section 5.1. See also Suzannah Linton, “Cambodia, East Timor, and Sierra Leone: Experiments in International Justice,” *Criminal Law Forum* 12:185, 2001, p. 215.

<sup>206</sup> See Case No. 9/2000, *The Prosecutor v. Joni Marques et al.*, Judgment of 11 December 2001. For the reports see *supra* n. 171.

<sup>207</sup> JSMP, The Paulino de Jesus Decisions (n. 164), p. 6. Referring as an example to Case No. 1/2000 *General Prosecutor v. Joao Fernandes*, Judgment of 25 January 2000, p. 3, para. 5. Indeed the dissenting opinion of Judge Maria Pereira argued that the accused should have been charged with crimes against humanity rather than ordinary murder.

<sup>208</sup> For a list of the SCU indictments see <http://socrates.berkeley.edu/~warcrime/ET-special-panels-docs.htm>.

<sup>209</sup> Megan Hirst & Howard Varney, *Justice Abandoned?* (n. 44), p. 7.

relationship which was at times less than clear.<sup>210</sup> Another explanation was that the prosecutors were reluctant to gather and adduce the evidence necessary to demonstrate that an armed conflict took place in Timor-Leste in 1999<sup>211</sup> however, considering the high level of conflict intensity it is questionable that there was a real obstacle to prove that an armed conflict indeed occurred.

Facing the termination of the SCU mandate, a decision was made not to serve new indictments, even against those who were in Timor-Leste and could now be brought to trial, and to focus instead only on completing the pending cases.<sup>212</sup>

## Relations with CAVR

As mentioned above, the Commission for Reception, Truth and Reconciliation was meant to address minor offenders, while referring serious crimes cases to the OPG. However, contradictory or vague provisions within the UNTAET Regulation 2001/10, as well as limited resources, resulted in collaboration of a complex nature.

The wording of the Regulation specified that "in no circumstances" the Commission shall deal with serious criminal offences; however, a subsequent directive opened the door for the Commission to deal with more serious cases, if necessary.<sup>213</sup> In reality, many cases remained untouched as they were not suitable to be dealt with by the Community Reconciliation Process (CRP) but, on the other hand, were not serious enough to be afforded priority by the SCU. An example of contradicting provisions is found with relation to situations where evidence of serious crime came up during CRP hearing; while one provision indicate that no CRP could be carried on or continued

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<sup>210</sup> Interview with Ms. Josée D'Aoust, Legal Coordination Officer and Deputy of Serious Crimes Investigation Team (4 November 2010). Ms. D'Aoust also worked in SCU between February and November 2001. Ms. D'Aoust made a distinction between the crimes committed 1975-1998 and the crimes committed during the period of 1999. The former could be described as crimes committed during an armed conflict between armed forces struggling to liberate their country from occupation and the armed forces in place, where the nexus between the crimes committed and the conflict is clearer, whereas the latter considering the May 1999 Agreement and the decision of FALINTIL not to engage in combat until the referendum process had been completed, related to the referendum and aimed at intimidating and persecuting supporters of independence not to exercise their rights and following the referendum, to punish them, to destroy the country and to kill independent supporters.

<sup>211</sup> Megan Hirst & Howard Varney, *Justice Abandoned?* (n. 44), p. 7.

<sup>212</sup> David Cohen, Indifference and Accountability (n. 53), p. 14. See also Megan Hirst & Howard Varney, *Justice Abandoned?* (n. 44), p. 18.

<sup>213</sup> UNTAET Directive 2002/9 On Amending the Criteria for Determining Whether Offence Appropriately Dealt with in a Community Reconciliation Process of 18 May 2002, UNTAET/DIR/2002/9. The Directive amended the schedule 1 (4) by deleting the words, "In no circumstances shall a serious criminal offence be deal with" and substituting the words, "In principle, serious criminal offences, in particular, murder, torture and sexual offences, shall not be dealt with".

without the OPG's express permission, other provisions stipulate that if the CRP Statements Committee has not received the OPG notification, the Commission shall facilitate a CRP.<sup>214</sup> Indeed, these contradictory provisions were manifested in the practice of the Commission where on several occasions permission was given for hearings to proceed, despite clear linkages to serious crimes.<sup>215</sup>

In practice, the Commission was planned to prepare and facilitate reconciliation hearings within three months.<sup>216</sup> Before starting the community reconciliation, the Commission was required to submit to the OPG all applications by persons wishing to proceed through a CRP along with a copy of the CRP Statement Committee assessment. The OPG then had up to 28 days<sup>217</sup> to decide whether it will exercise its "exclusive" jurisdiction or will give the CAVR permission to proceed with CRP.<sup>218</sup> As mentioned above, the OPG had delegated this responsibility to the SCU. The CRP applications and summaries were written in Bahasa Indonesian or Tetum, and needed to be translated for the SCU international prosecutors. Full statements were translated usually only in cases where there was some indication of serious crimes; otherwise only translations of summaries were provided.<sup>219</sup> It should be emphasized that despite the fact that the SCU's responsibility to review all the CRP applications added hundreds of cases to the already overburdened caseload of the Unit, the latter was not provided with supplementary resources to deal with their new duties.<sup>220</sup> In addition, as the SCU was divided into four regional teams and the CRP applications were allocated to the SCU prosecutors on the basis of the location where the offences occurred; consequently, some prosecutors had more cases to attend to than others.<sup>221</sup>

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<sup>214</sup> UNTAET Regulation 2001/10 of 13 July 2001 (n. 61), Section 24.7. Likewise, according to Section 27.6 where a Community Reconciliation Process has been adjourned due to evidence of serious crime and the OPG does not respond within 14 days of being informed of the adjournment, the Commission could, "where it considers it appropriate", continue with the hearing.

<sup>215</sup> See UNPD, The Community Reconciliation Process of the Commission for Reception, Truth and Reconciliation, April 2004, pp. 35-37, available at <http://www.cavr-timorleste.org/Analysis/Laporan%20Piers%20tentang%20CRP.pdf> (accessed 22 December 2010).

<sup>216</sup> Ibid, p. 35.

<sup>217</sup> UNTAET Regulation 2001/10 of 13 July 2001 (n. 61), Section 24.8 allow extending the initial 14 days period by additional 14 days.

<sup>218</sup> UNTAET Regulation 2001/10 of 13 July 2001 (n. 61), Sections 24.5-24.8.

<sup>219</sup> UNPD, The Community Reconciliation Process of the Commission for Reception, Truth and Reconciliation (n. 215), p. 35.

<sup>220</sup> Ibid.

<sup>221</sup> Ibid.

Obviously, the process of translation together with the time required for the applications to be reviewed by SCU, delayed the overall process and made it difficult for the Commission to comply with the three month timeline for finalizing applications for the Community Reconciliation Process. In addition, these delays added to the growing backlog of hearings of such applications.

A total of 1,371 applications, amounting to nearly 90 percent of all applications received, proceeded nonetheless to completion. The remaining 10 percent were cases where the applicant did not attend the scheduled hearing, the hearing was adjourned or the OGP did not consent to them proceeding by CRP.<sup>222</sup>

### Outreach Efforts

The SCU was also in charge of community outreach which aimed at making the serious crimes trials accessible to the victims and Timor-Leste's populations on behalf of which such process was conducted.<sup>223</sup> The hope was that such involvement will contribute to the community's demands for justice.<sup>224</sup> However, despite the gravity of work that outreach efforts demanded, only one person was assigned for this job while also being responsible for the SCU's press and public relations.

The SCU outreach efforts were usually regarded as a failure.<sup>225</sup> Still, considering the very limited resources allocated for this activity, it is notable that outreach operations did manage to reach several communities around Timor-Leste.<sup>226</sup> For example, in 2005, towards the termination of the serious crimes process, outreach meetings were conducted in twelve communities around Timor-Leste, in order to explain the reasons for the end of the process and its consequences.<sup>227</sup>

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<sup>222</sup> Chega! Executive Summary (n. 14), p. 23.

<sup>223</sup> David Cohen, Indifference and Accountability (n. 53), p. 34.

<sup>224</sup> Ibid. Citing the Deputy General for Serious Crimes, 2003.

<sup>225</sup> David Cohen, Indifference and Accountability (n. 53), p. 34-35. See also Suzannah Linton, New approaches to international justice in Cambodia and East Timor, ICRC, March 2002, Vol 84, No. 845, 93. p. 112.

<sup>226</sup> SCU Fact Sheet, July 2002.

<sup>227</sup> SCU Update, 21 April 2005.

## 4.3 ADDITIONAL PROBLEMS FACES BY THE SERIOUS CRIMES PROCESS

### Quality of Defence

Until 2002, when the Defence Lawyers Unit was established, the defence was conducted almost exclusively by Timorese lawyers who acted before the ordinary courts and usually had very little or no previous experience in litigation, together with few NGO funded international lawyers that did not necessarily have relevant experience.<sup>228</sup> Indication of such lack of experience is that in the first 14 trials no defence witnesses were summoned. It has consequently been argued that the level of defence the accused received was so flawed that it might raise doubts as to the fairness of the convictions in these trials and has the potential to undermine the entire process.<sup>229</sup> However, despite the fact that concerns regarding the quality of defence were heard from the beginning by all parties to the process, only in September 2002, after a third of the trials were finalized,<sup>230</sup> a Defence Lawyers Unit (DLU) was established and staffed by international defence lawyers.

The Defence working language varied according to the defence lawyer's background while the accused usually spoke Tetum, other local language or Bahasa Indonesia.<sup>231</sup> As in the case of the SPSC judges and the SCU, the defence had to rely heavily on interpreters and translations that were not of good quality.<sup>232</sup> Moreover, interpretations to other local languages were not provided and sometimes even interpretations in the Court's official languages was lacking. In one case for example, the judgments were provided in Portuguese, regardless the fact that the accused, his defence lawyer as well as the prosecutor did not understand this language and no translation was provided.<sup>233</sup> Needless to say that the fact that the accused could not

<sup>228</sup> Megan Hirst & Howard Varney, *Justice Abandoned?* (n. 44), p. 20. For example, in Case No. 9/2000, *The Prosecutor v. Joni Marques et al.*, Judgment of 11 December 2001 the Timorese lawyers were newly graduate with no previous experience prior to 2000 and the three international lawyers who were recruited to serve as mentors to the Timorese lawyers had no previous experience in criminal law, one was a civil servant and only the third had some relevant knowledge. See JSMP Trial Report: The General Prosecutor v. Joni Marques (n. 129), pp. 23-24.

<sup>229</sup> See the former Deputy Prosecutor General for Serious Crimes, Ms Siri Frigaad <http://www.etan.org/et2002b/june/23-30/28special.htm> (accessed 22 December 2010).

<sup>230</sup> David Cohen, Indifference and Accountability (n. 53), p. 14.

<sup>231</sup> David Cohen, Indifference and Accountability (n. 53), p. 21.

<sup>232</sup> David Cohen, Indifference and Accountability (n. 53), p. 11. For this matter see also fn. 128 above.

<sup>233</sup> See JSMP comment on Case No 2/2000 *Prosecutor General v. Julio Fernandes*, Appeal Judgment of 29 October 2001 "Court of Appeal reduces FALINTIL member's sentence to 5 years", 29 October 2001. JSMP further commented that "Despite the fact that three court interpreters were present in the courtroom, the President of the

follow entirely the proceedings against him violated one of his fundamental rights (to understand the proceeding conducted against him).

The creation of the DLU improved the situation in the sense that more experienced international lawyers were recruited; but the Unit still suffered from lack of resources and sufficient qualified personnel.<sup>234</sup> Under the DLU, more defence witnesses were called, but this was not always the case: Until the end of the Special Panels mandate there were occasions in which the defence did not call any defence witness and did not introduce a single piece of evidence. In addition, more than once, the Defence allowed the accused to make a partial admission of guilt<sup>235</sup> or further statements against his right to remain silent.<sup>236</sup> On one occasion, for example, the Defence agreed not to question Prosecution witnesses and settled for submission of statements (instead of questioning/cross examining in court),<sup>237</sup> disregarding the Transitional Code of Criminal Procedure according to which witnesses shall be heard directly by the Court.<sup>238</sup> Another indication of the low quality of defence is the lack of communication between defence lawyers and the accused where elementary things such as a reading of the indictment to the accused<sup>239</sup> and providing him with legal consultation<sup>240</sup> were absent. Probably the strongest indication of the low level of quality of the Defence is deduced from the high rate of convictions that characterized the serious crime process in Timor-Leste.<sup>241</sup>

Court of Appeal decided to give an improvised verbal summary of the decision in Tetum for the benefit of Fernandes, and a summary of the main legal points in English".

<sup>234</sup> In the first three month the unit composed of only one lawyer. The number then increased to three and by April 2004 there were six international defence lawyers. In May 2005 the number stood on seven. See Megan Hirst & Howard Varney, *Justice Abandoned?* (n. 44), p. 20.

<sup>235</sup> Case No. 3/2001, p. 2 the defendant admitted guilty but not according to the charge of murder included in the indictment, but guilty of manslaughter. The Special Panels disregarded the guilty plea as it did not "correspond with the facts alleged in the indictment".

<sup>236</sup> Case No. 2/2001 *Prosecutor v. Augusto Asameta Tavares*. The accused pleaded not guilty but then provided a statement that eventually was the only evidence linking him directly to the offence.

<sup>237</sup> Case No. 2/2000 *Prosecutor General v. Julio Fernandes*, Appeal Judgment of 29 October 2001, Separate Opinion of Judge Fredrick Egonda-Ntende, paras. 43-44.

<sup>238</sup> Transitional Code of Criminal Procedure, Section 36.1.

<sup>239</sup> Case No. 3/2000 *Prosecutor v. Carlos Soares Carmone*, Judgement of 25 April 2001, pp. 1-2. During the preliminary hearing the accused (who was represented by no less than three lawyers) made a statement that he had not read the indictment, that the indictment had not been read to him and that he did not understand the charges against him.

<sup>240</sup> See Case No. 2/2000, *Prosecutor v. Julio Fernandes*, p. 2.

<sup>241</sup> 84 out of 87 accused were convicted.

### Perpetrators outside of Jurisdiction

One of the primary criticisms of the serious crimes process in Timor-Leste is the fact that only 87 out of the 391 accused were brought to trial while the rest, including the most responsible perpetrators, remained at large outside Timor-Leste, presumably in Indonesia.<sup>242</sup> The Timorese authorities usually pointed the finger at the Indonesian authorities. Notwithstanding Indonesia obligations under the Memorandum of Understanding signed in April 2000, it refused to cooperate with SCU investigations or to transfer any of the accused to the custody of Timor-Leste authorities.<sup>243</sup> However, it should be noted that following the crisis relating to General Wiranto's indictment and arrest warrant in 2003, during which the Prosecutor General refused to submit the arrest warrant to the INTERPOL, no subsequent arrest warrants were forwarded by the Timor-Leste Prosecutor General Office to the INTERPOL.<sup>244</sup> Therefore, it may be argued that at least to some extent the Timor-Leste authorities contributed to the situation where perpetrators remained outside of its jurisdiction.<sup>245</sup>

## 4.4 APPLICABLE LAW

According to UNTAET Regulation 2000/15 Section 3, the Special Panels applied the UNTAET regulations, complemented by "the laws applied in East Timor prior to 25 October 1999" (which were generally understood to be Indonesian law),<sup>246</sup> as well as applicable treaties and recognized principles and norms of international law, including the established principles of the international law of armed conflict.<sup>247</sup>

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<sup>242</sup> Report of the Secretary-General on Justice and Reconciliation for Timor-Leste (n. 81), para. 9. Other sources refer to 391 defendants who were indicted by the SCU. See Megan Hirst & Howard Varney, *Justice Abandoned?* (n. 44), p. 8.

<sup>243</sup> Indonesia claimed that the MOU was not ratified by its Parliament and is therefore not binding Indonesian authorities. In addition, Indonesia also claimed that the MOU applied only to the period of the transitional administration of UNTAET and that it ceased to have any effect as of May 20, 2002. See Megan Hirst & Howard Varney, *Justice Abandoned?* (n. 44), p. 16. In addition, according to Amnesty International, the Indonesian government refused to cooperate with the UN Special Panels on the basis that it did not recognize the UN Security Council mandate to try Indonesian citizens in Timor-Leste. See Amnesty International, *We Cry for Justice Impunity Persists 10 Years on in Timor-Leste*, August 2009, p. 13.

<sup>244</sup> COE Report 2005 (n. 46), paras. 73-74.

<sup>245</sup> In an interview with Mr. Vicente Fernandes e Brito, the Deputy Prosecutor General (4 November 2010) Mr. Fernandes e Brito confirmed that no arrest warrants were requested since 2005 and there are no attempts to pressure the INTERPOL to activate the existing arrest warrants.

<sup>246</sup> In 2003, the Court of Appeal declared that the subsidiary law is Portuguese law and not Indonesian law. As a result, in October 2003, the Parliament passed law 10/2003 to clarify the issue and declared that the subsidiary law is Indonesian law.

<sup>247</sup> UNTAET Regulation 2000/15 of 6 June 2000 (n. 48), Section 3; UNTAET Regulation 1999/1 of 27 November 1999 (n. 30) Sections 2 and 3.

The Special Panels were granted exclusive jurisdiction over crimes of genocide, war crimes, crimes against humanity and torture, as well as over crimes of murder and sexual offences.<sup>248</sup> With regard to the first four categories, the jurisdiction of the SPSC was universal and temporally unlimited,<sup>249</sup> whilst with respect to murder and sexual offences, the panels had exclusive jurisdiction only for offences committed in the period between 1 January 1999 and 25 October 1999.<sup>250</sup> Those crimes have been defined in UNTAET Regulation 2000/15, Part II. As for genocide, war crimes, and crimes against humanity, the Regulation adopted almost entirely the provisions of the Rome Statute of the International Criminal Court.<sup>251</sup> With respect to torture, the UNTAET Regulation 2000/15 provides two definitions of torture, dependent on whether it is classed as a crime against humanity or an autonomous crime.<sup>252</sup> The Regulation's definitions reflects both the Rome Statute<sup>253</sup> and the Convention against Torture<sup>254</sup> however they are broader than the Convention against Torture in that they are not restricted to acts inflicted by or with involvement of a public official or other person acting in official capacity. As for crimes of murder and sexual offences the Regulation refers to the Indonesian Penal Code.<sup>255</sup> For the applicable provisions in respect of the serious crimes (including murder and sexual offences), the Regulation also enunciates the relevant general principles of international criminal law dealing with criminal responsibility and defences, including rules on forms of participation in crimes which attract liability,<sup>256</sup> the circumstances which do and do not exclude responsibility,<sup>257</sup> the rules for ascertaining

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<sup>248</sup> UNTAET Regulation 2000/15 of 6 June 2000 (n. 48), Section 1.3.

<sup>249</sup> UNTAET Regulation 2000/15 of 6 June 2000 (n. 48), Sections 2.1-2.2.

<sup>250</sup> UNTAET Regulation 2000/15 of 6 June 2000 (n. 48), Section 2.3.

<sup>251</sup> One difference between the definitions contained in UNTAET Regulation 2000/15 and the Rome Statute is that the UNTAET Regulation's definition of a crime against humanity does not include the specific definition of "attack directed against any civilian population" that is given in article 7(2)(a) of the Rome Statute and which imports additional substantive requirements into the chapeau elements of that crime.

<sup>252</sup> UNTAET Regulation 2000/15 of 6 June 2000 (n. 48), Sections 5.2(d) and 7.1. This led to confusion by the Special Panels more than one. See JSMP, Torture and Transitional Justice in Timor Leste, April 2005. Available at [http://www.jsmp.minihub.org/Reports/jsmpreports/Report%202005/April%202005/JSMP\\_Torture%20and%20Transitional%20Justice%20\(e\).pdf](http://www.jsmp.minihub.org/Reports/jsmpreports/Report%202005/April%202005/JSMP_Torture%20and%20Transitional%20Justice%20(e).pdf) (accessed 22 December 2010).

<sup>253</sup> Rome Statute, Article 7 (2)(e).

<sup>254</sup> UN Convention against Torture, Article 1.1.

<sup>255</sup> The Indonesian Criminal Code (*Kitab Undang-Undang Hukum Acara Pidana* or "KUHAP").

<sup>256</sup> UNTAET Regulation 2000/15 of 6 June 2000 (n. 48), Sections 14 and 16 as per command responsibility.

<sup>257</sup> UNTAET Regulation 2000/15 of 6 June 2000 (n. 48), Sections 19-21.

the *mens rea* requirements of a crime,<sup>258</sup> and other general principles of criminal law such as *ne bis in idem*,<sup>259</sup> *nullum crimen sine lege* and *nulla poena sine lege*.<sup>260</sup>

Following Timor-Leste's independence on 20 May 2002, the applicable laws in Timor-Leste were preserved under Section 1 of Law 2/2002 Interpretation of the Applicable Law on 19 May 2002 and Section 165 of Timor-Leste's Constitution.<sup>261</sup> In any event, international law became part of the domestic law of Timor-Leste, and any laws that were inconsistent with ratified and published international treaties became invalid.<sup>262</sup>

As for procedural law, on 25 September 2000, UNTAET promulgated the "Transitional Rules of Criminal Procedure",<sup>263</sup> based on a combination of common law, civil law and the International Criminal Court rules.<sup>264</sup>

## 5. ANALYSIS OF THE SERIOUS CRIMES PROCESS FROM 2005

### 5.1 THE HALT OF THE SERIOUS CRIMES PROCESS WITH THREE EXCEPTIONS: MANUEL MAIA, ALBERTO DE SILVA MALI AND DOMINGOS MAU BUTI CASES

In May 2005 the SCU mandate ended.<sup>265</sup> As no other UN body was authorized to take over the SCU cases,<sup>266</sup> the latter became assimilated with the ordinary crimes cases within the OPG<sup>267</sup> with no special attention or resources being allocated for that matter. From now on, the direct responsibility for completing the investigations as well as

<sup>258</sup> UNTAET Regulation 2000/15 of 6 June 2000 (n. 48), Section 18.

<sup>259</sup> UNTAET Regulation 2000/15 of 6 June 2000 (n. 48), Section 11, later replaced by section 4 of UNTAET Regulation 2000/30 of 25 September 2000 UNTAET/REG/2000/30 "On Transitional Rules of Criminal Procedure."

<sup>260</sup> UNTAET Regulation 2000/15 of 6 June 2000 (n. 48), Sections 12-13.

<sup>261</sup> See also Law 10/2003, Section 1.

<sup>262</sup> Democratic Republic of Timor-Leste Constitution, Section 9.

<sup>263</sup> UNTAET Regulation 2000/30 of 25 September 2000 (n. 259), as modified by UNTAET Regulation 2001/25 of 14 September 2001 UNTAET/REG/2001/25 "On the Amendment of UNTAET Regulation 2000/11 On the Organisation of the Courts in East Timor and UNTAET Regulation 2000/30 On the Transitional Rules of Criminal Procedure." Later on this was replaced by RDTL Decree Law 13/2005 Approving the Criminal Procedure Code.

<sup>264</sup> Suzannah Linton, "Cambodia, East Timor, and Sierra Leone: Experiments in International Justice," (n. 205), p. 211. See also Caitlin Reiger and Marieke Wierda, The Serious Crimes Process in Timor-Leste: In Retrospect (n. 46) pp. 24-25.

<sup>265</sup> UN Security Council Resolution 1543 of 14 May 2004 (n. 75); UN Security Council Resolution 1573 of 16 November 2004 (n. 77).

<sup>266</sup> Despite the recommendations of the Report of the Commission of Experts (n. 46), paras 503 to 513.

<sup>267</sup> In accordance with UNTAET Regulation 2000/16 of 6 June 2000 (n. 56), Sections 5.1 and 14.

prosecuting perpetrators was at the hands of Timor-Leste OPG.<sup>268</sup> As part of the SCU's preparation for handing over its files to national authorities, critical documents have been translated, a comprehensive database of documents was created and detailed instructions were provided in respect of indictments which did not proceed to trial (in the event that these cases are prosecuted in the future).<sup>269</sup> However, the files were kept in boxes in the offices of the SCU and were transferred to the OPG only in October 2005.<sup>270</sup>

After the closure of the SPSC and the SCU, international judicial personnel continued to operate alongside the Timorese personnel, as prosecutors, defense lawyers and judges. However, the latter were now hired on the basis of possessing Portuguese language skills and practical legal experience in Portuguese speaking jurisdictions rather than on the basis expertise in international criminal law or practice.<sup>271</sup> As they were recruited to work and adjudicate cases involving ordinary crimes, in most cases they were not trained and were inexperienced in serious crimes cases.<sup>272</sup> Therefore, despite the fact that Special Panels could still be created as international judges were still sitting on Timor Leste's courts, the recruited international judges as well as the rest of the international staff usually had no specialisation in International Criminal Law.

It appears that from May 2005 to February 2008 (the time when the SCIT was *de facto* empowered to carry on the investigations) apart from a few exceptional cases, the OPG did not continue investigating and indicting the SCU cases; nor did it initiate new investigations relating to serious crimes during that period of time.<sup>273</sup>

The first exception is *Manuel Maia Case* in which an indictment charging *Maia* with crimes against humanity of murder, forcible transfer of a population and persecution

<sup>268</sup> Interview with Ms. Josée D'Aoust, Legal Coordination Officer and Deputy of Serious Crimes Investigation Team (4 November 2010).

<sup>269</sup> JSMP, The Future of Serious Crimes (n. 46), p. 5.

<sup>270</sup> David Cohen, Indifference and Accountability (n. 53), p. 93.

<sup>271</sup> International Center for Transitional Justice (ICTJ), Impunity in Timor-Leste: Can the Serious Crimes Investigation Team Make a Difference?, June 2010, p. 21. Available at [http://www.ictj.org/static/Publications/ICTJ-JSMP\\_TL\\_SCIT\\_pb2010\\_Eng.pdf](http://www.ictj.org/static/Publications/ICTJ-JSMP_TL_SCIT_pb2010_Eng.pdf) (accessed 25 January 2011).

<sup>272</sup> Phillip Rapoza, "Hybrid Criminal Tribunals and the Concept of Ownership: Who Owns the Process?", 21 AM. U. Int'l L. Rev. (2006) 525, p. 538. Former international judge Rapoza had commented on this matter that "these judges, whatever their other merits may be, were not recruited to hear the kinds of serious crimes cases that they will now face. In any event, it is highly doubtful that in the midst of their already busy regular workload the judges will be able to devote the time and attention that such serious matters demand."

<sup>273</sup> Interview with Mr. Vicente Fernandes e Brito, the Deputy Prosecutor General, and Dr. Franklin Furtado, the international prosecutor assigned to the serious crimes cases (4 November 2010).

by destruction of property, was filed by the SCU in 2003.<sup>274</sup> Two and a half years later, after the accused entered Timor-Leste, he was arrested and the case was brought forward to trial by the OPG.<sup>275</sup> Maia was tried before a Special Panel within Dili District Court consisting of two international judges and one national Timorese judge.<sup>276</sup> On 2 August 2006, he was acquitted of all charges after the Special Panel ruled that his involvement in the alleged crimes was not proved. The four pages judgment does not contain any discussion regarding the evidence, but only summarises the facts proven and not proven, based on the testimonies of two eye witnesses which the court considered to be “rigorous and objective”. The legal discussion does not address the matter of crimes against humanity and is limited only to the issue of presumption of innocence.

Another exception is found in the *Alberto da Silva Mali Case* in which an indictment was filed by the Office of the Prosecutor General in 2006 charging the latter of two murders as crimes against humanity according to UNTAET Regulation, as well as two premeditated murders according to the Indonesian Penal Code.<sup>277</sup> This is the only case in five years in which the Timorese authorities conducted an investigation in relation to crimes against humanity and the only case in which the OPG filed an indictment in relation to serious crimes.<sup>278</sup> The OPG indictment however failed to include the chapeau elements of crimes against humanity (that the alleged crime has been committed “as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack”).<sup>279</sup> The omission of such a fundamental element from the indictment indicated the low level of understanding by the Prosecution of the elements constitutive of crimes against humanity. On 19 September 2007, *Mali* was acquitted by

<sup>274</sup> Case No. 2/2003 *The Deputy Prosecutor General for Serious Crimes v. Burhanuddin Siagian et al*, indictment filed on 3 February 2003 against 32 defendants. Maia (defendant no. 32) was charged according to UNTAET Regulation 2000/15 of 6 June 2000 (n. 48), Sections 5.1 (a), 5.1(d) and 5.1 (h). The judgment was delivered on 2 August 2006 (The judgment is available in Portuguese only). Strangely, the judgment is written on a letterhead page of the District Court of Baucau, although the signature identifies Dili as the place of judgment.

<sup>275</sup> JSMP Press Release, “War Crimes Suspect Returns to Timor Leste”, 8 August 2005. Judgment delivered on 2 August 2006. Available at [http://www.jsmp.minihub.org/Press%20Release/2005/August/SPSC%20War%20Crimes%20Suspect%20Returns%20to%20Timor%20Leste/SPSC%20Indictee%20Returns\\_e.pdf](http://www.jsmp.minihub.org/Press%20Release/2005/August/SPSC%20War%20Crimes%20Suspect%20Returns%20to%20Timor%20Leste/SPSC%20Indictee%20Returns_e.pdf) (accessed 25 January 2011).

<sup>276</sup> The Timorese judge was previously a member of the Special Panels and one of the international judges, Judge Dora Martins, was also a member of the Special Panels during 2003.

<sup>277</sup> Indictment No. 400/PDS/I/2006, June 4, 2006. According to UNTAET Regulation, Sections 5.1 (a) and (h). Judgment No. Proc. 01/CG/TDD/2006, Sept. 19, 2007. (Both indictment and judgment are available in Portuguese only).

<sup>278</sup> Interview with Mr. Vicente Fernandes e Brito, the Deputy Prosecutor General (4 November 2010).

<sup>279</sup> UNTAET Regulation 2000/15 of 6 June 2000 (n. 48), Section 5.1.

the Special Panel, as one of the people he allegedly killed was discovered to be alive and it was not proven that the other person *Mali* allegedly killed was indeed dead. As it was not proven that a crime was committed the Special Panel did not conduct any discussion regarding the definition of crimes against humanity.

The third and last exception is the recent case of *Domingos Mau Buti*.<sup>280</sup> The indictment against *Mau Buti* was filed by the SCU in 2004, charging him together with another person with four murders and rape as crimes against humanity. However, *Mau Buti* was only arrested in December 2008, after crossing the border to Timor-Leste. The judgment, which was delivered by the Special Panel in March 2010,<sup>281</sup> found *Mau Buti* to be part of a militia group that acted against supporters of independence and directly participated in the killing of Luis da Silva, his pregnant wife and his six years old daughter, however the Special Panel did not convict *Mau Buti* of murder as a crime against humanity; instead it convicted him of three murders under Indonesian Penal Code. *Mau Buti* was sentenced to 16 years imprisonment. The Special Panel's judgment does not discuss crimes against humanity and/or their application to the present case. (The only reference to crimes against humanity is in the citation of Section 5.1 of UNTAET Regulation 2000/15 of 6 June 2000). No explicit reason is given for the Panel's failure to apply Section 5.1 of the Regulation; it looks as if the *nullum crimen sine lege* principle was the reason for this omission by the Court (Section 12 of UNTAET Regulation 2000/15 of 6 June 2000 is cited following the reference to Section 5.1 – suggesting that the *nullum crimen sine lege* principle did not permit a crimes against humanity based conviction). It is quite astonishing that, in 2010, a Special Panel created in accordance with UNTAET Regulation 2000/15 was of the position that since crimes against humanity were not part of the legislation at the time the offence was allegedly committed, the accused can not be charged for such crimes and according to the Regulation. Such a decision ignored the fact that crimes against humanity enjoyed at the time of the offence the status of customary international law and ignored the entire serious crimes process that took

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<sup>280</sup> Case No. 8/2004 *The Deputy Prosecutor General v. Domingos Noronha aka Domingos Mau Buti*, indictment of 6 December 2004. The Judgment was delivered on 26 March 2010 and the Appeal Judgment on 28 May 2010. (Both the judgment and the Appeal decision are available in Portuguese only).

<sup>281</sup> The Special Panel was established in accordance with Article 3 of Decree Law 13/2005 implementing the Code of Criminal Procedure.

place in the previous years.<sup>282</sup> It should be noted that on 1 June 2010 the Court of Appeal reversed the finding based on the *nullum crimen sine lege* principle, but nevertheless concluded that the Prosecution should not have charged the accused with Crimes against Humanity, as the Prosecution did not prove that the accused had known that his acts were part of the widespread and systematic attack, and upheld the conviction of murders. *Mau Buti* is currently the only person convicted for serious crimes that still remains imprisoned.<sup>283</sup>

The fact that over a period of more than five years, only one investigation was initiated by the OPG and no further investigations were conducted on the basis the existing SCU investigation files, together with the fact that only three serious crimes cases were brought forward to trial, indicate the lack of will to prosecute such cases. The fact that the cases were tried in a deeply flawed manner further underscores the lack of capacity of the Timorese justice sector to deal with serious crimes cases.

## 5.2 THE SERIOUS CRIMES INVESTIGATION TEAM

### General

When the UNMIT was established in August 2006, its mandate included the creation of a team which would resume the investigative functions of the former SCU.<sup>284</sup> However, unlike the SCU's official mandate, which empowered the unit to investigate crimes committed between 1974 to 1999, the mandate of the new Serious Crime Investigation Team (SCIT) was restricted to crimes committed in 1999 whereas crimes committed between 1974 and 1998 were referred to the national police investigation.<sup>285</sup> Despite the Secretary-General's recommendation to establish such a unit as part of the OPG, the SCIT was established as part of UNMIT's Office of the Deputy Special Representative of the Secretary-General for Security Sector Support and Rule of Law. Still, the OPG was

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<sup>282</sup> It also ignores Article 163 of the Constitution and Article 3 of the Criminal Procedure Code.

<sup>283</sup> Interview with Mr. Vicente Fernandes e Brito, the Deputy Prosecutor General, and Dr. Franklin Furtado, the international prosecutor assigned to the serious crimes cases (4 November 2010).

<sup>284</sup> UN Security Council Resolution 1704 of 25 August 2006 (n. 101), Section 4(i).

<sup>285</sup> UNMIT/Serious Crimes Investigation Team (SCIT) newsletter, issue 6, May 2010, p. 4. Available at [http://unmit.unmissions.org/Portals/UNMIT/Serious%20crimes/SCIT%20newsletter6\\_220310ENG\\_jd.pdf](http://unmit.unmissions.org/Portals/UNMIT/Serious%20crimes/SCIT%20newsletter6_220310ENG_jd.pdf) (accessed 25 January 2011).

entrusted with the responsibility to coordinate, direct and supervise the work of the SCIT.<sup>286</sup>

Notwithstanding its creation in January 2007, the SCIT could only resume the investigations in February 2008, following the signature of the agreement between the UNMIT and Timor-Leste Government permitting the SCIT to access the files of the former SCU held in the OPG.<sup>287</sup>

The SCIT's mandate was also limited to investigative tasks and accordingly, upon completion of investigation, the SCIT does not issue indictments but rather prepare drafts of indictments, requests for arrest warrants and indictment briefs, and submits them along with the case files to the OPG which takes the final decision on whether to prosecute perpetrators or to close the file.<sup>288</sup>

The uncompleted SCU cases received by the SCIT included 486 murder cases that had not yet been investigated.<sup>289</sup> After review of the files, the SCIT identified 396 pending cases.<sup>290</sup> The SCIT decided to complete these cases before investigating any new reports of serious crimes committed in 1999 that had not been reported to the SCU.<sup>291</sup>

As of November 2010, the SCIT investigators had concluded investigations in 163 cases.<sup>292</sup> Like the SCU, the SCIT investigations focus on crimes against humanity and not on war crimes.<sup>293</sup> In many of these cases the SCIT concluded that sufficient evidence amounting to a crime and leading to the identification of the perpetrators was gathered,

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<sup>286</sup> Agreement between the United Nations and the Democratic Republic of Timor-Leste concerning assistance to the Office of the Prosecutor-General of Timor-Leste (n. 104), Sections 3, 4.1, and 4.3.1.

<sup>287</sup> Agreement between the United Nations and the Democratic Republic of Timor-Leste concerning assistance to the Office of the Prosecutor-General of Timor-Leste (n. 104).

<sup>288</sup> Agreement between the United Nations and the Democratic Republic of Timor-Leste concerning assistance to the Office of the Prosecutor-General of Timor-Leste (n. 104), Section 4.4.1.

<sup>289</sup> UNMIT Periodical Report on Human Rights Developments in Timor-Leste: 1 July 2008 – 30 June 2009, p. 14. Available at [http://unmit.unmissions.org/Portals/UNMIT/Human%20Rights/HRR08\\_09E.pdf](http://unmit.unmissions.org/Portals/UNMIT/Human%20Rights/HRR08_09E.pdf)(accessed 25 January 2011). Different sources indicate of a number of 469 murder cases yet to be investigated.

<sup>290</sup> ICTJ, Impunity in Timor-Leste: Can the Serious Crimes Investigation Team Make a Difference? (n. 271), p. 16. According to UNMIT Report on Human Rights Developments in Timor-Leste: 1 July 2008 – 30 June 2009, p. 14, the number of pending cases was 390.

<sup>291</sup> ICTJ, Impunity in Timor-Leste: Can the Serious Crimes Investigation Team Make a Difference? (n. 271), p. 16, citing Mr. Marek Michon, head of SCIT.

<sup>292</sup> Interview with Ms. Josée D'Aoust, Legal Coordination Officer and Deputy of Serious Crimes Investigation Team (4 November 2010). It is unclear with relation to how many murderers these cases refer.

<sup>293</sup> Interview with Ms. Josée D'Aoust, Legal Coordination Officer and Deputy of Serious Crimes Investigation Team (4 November 2010).

and recommended the OPG to consider possible court proceedings.<sup>294</sup> In accordance with the MOU, all materials submitted to OPG must be translated into Portuguese and/or Tetum, the official languages of Timor-Leste. It therefore necessitates translation of hundreds of documents, gathered both by SCU and SCIT. According to the SCIT Deputy, while some of these cases were sent to the OPG following the completion of the translation process, the vast majority of them are still in the final process of being drafted and translated and therefore have not yet assessed by the OPG.<sup>295</sup>

In June 2009, the OPG has assigned an international prosecutor to the serious crime cases. This is the only person within the OPG who has been allocated to such cases; and even that not in an exclusive manner as the latter is also in charge of other cases within the OPG.<sup>296</sup> The international prosecutor, Mr. Franklin Furtado, is the former Attorney General of Cape Verde; he has no specialisation or previous experience in international criminal law.<sup>297</sup> When interviewed, both the Deputy of the SCIT and the international prosecutor indicated a good level of collaboration. The OPG has the authority and overall responsibility for these cases, and needs to approve in advance the launching of all investigations conducted by the SCIT. During the SCIT investigation, cases are discussed with the international prosecutor on a regular basis and the OPG, via the international prosecutor, confirms different actions the SCIT takes regarding the investigated cases and guides it along the way.<sup>298</sup> The Deputy Prosecutor General underlined that despite the high motivation of the international prosecutor and the fact that so far the latter had managed to address the cases referred to him from the SCIT, when the case load will increase, as expected with the progress of the translation process, the current personnel composed of one international prosecutor, will not be able

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<sup>294</sup> Interview with Ms. Josée D'Aoust, Legal Coordination Officer and Deputy of Serious Crimes Investigation Team (4 November 2010). Ms. Josée D'Aoust declined to reveal the exact number of cases which recommend indictments.

<sup>295</sup> Interview with Ms. Josée D'Aoust, Legal Coordination Officer and Deputy of Serious Crimes Investigation Team (4 November 2010).

<sup>296</sup> Interview with Mr. Vicente Fernandes e Brito, the Deputy Prosecutor General and with Dr. Franklin Furtado, the Prosecutor assigned to serious crimes cases within the OPG (4 November 2010).

<sup>297</sup> Interview with Dr. Franklin Furtado, the Prosecutor assigned to serious crimes cases within the OPG (4 November 2010).

<sup>298</sup> Interview with Ms. Josée D'Aoust, Legal Coordination Officer and Deputy of Serious Crimes Investigation Team (4 November 2010). Interview with Mr. Franklin Furtado, the Prosecutor assigned to serious crimes cases within the OPG (4 November 2010). When asked about the collaboration between the SCIT and the OPG in the Case of Mau Buti, Dr. Franklin Furtado indicated that the SCIT assisted him with providing relevant comparative jurisprudence and materials regarding the elements of the crime.

to address all these cases and more personnel and relevant training sessions will be required.<sup>299</sup>

As of November 2010, no new indictments have been filed by the OPG.<sup>300</sup>

## SCIT Staff

The SCIT is lead by a senior investigator assisted by a supervising legal coordination officer. In comparison to over 120 staff members who worked at the SCU in August 2008, the SCIT was composed of 49 staff members, including 10 international investigators, 5 international legal coordinators and 5 national legal officers. Investigative support is provided by the forensic section, gender affairs officer, external relations officer, language assistants and administrative assistants.<sup>301</sup> As of November 2010, there are 11 regional teams, 7 of which are composed of one international investigator, one national investigator and one interpreter. During 2010, seven additional national investigators were recruited. In addition, as of November 2010, five UN Police (UNPOL) officers are seconded to assist the SCIT investigation teams. The current 2010-2011 budget foresees the recruitment of another three national investigators, and this will increase the number of investigation teams to 14.<sup>302</sup>

The background of SCIT staff members varies. As for the legal staff members, some worked with the ICTY or ICTR and/or with the former SCU, the Prosecutors and Judges in Timor-Leste. The international investigators have at least eight years experience in investigations.<sup>303</sup> When asked about the working relations between the international and the local staff, the SCIT Deputy commented that “the international investigators bring experience in investigation of complex crimes; the national investigators bring their knowledge of the country, the custom and the people. The

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<sup>299</sup> Interview with Mr. Vicente Fernandes e Brito, the Deputy Prosecutor General (4 November 2010).

<sup>300</sup> Interview with Mr. Vicente Fernandes e Brito, the Deputy Prosecutor General and Dr. Franklin Furtado (4 November 2010). Interview with Ms. Josée D'Aoust, Legal Coordination Officer and Deputy of Serious Crimes Investigation Team (4 November 2010).

<sup>301</sup> UNMIT SCIT Fact Sheet, August 2008, available at [http://unmit.unmissions.org/Portals/UNMIT/SCIT/SCIT%20factsheet/SCIT%20factsheet040808\\_ENG.pdf](http://unmit.unmissions.org/Portals/UNMIT/SCIT/SCIT%20factsheet/SCIT%20factsheet040808_ENG.pdf) (accessed 25 January 2011).

<sup>302</sup> Interview with Ms. Josée D'Aoust, Legal Coordination Officer and Deputy of Serious Crimes Investigation Team (4 November 2010).

<sup>303</sup> Interview with Ms. Josée D'Aoust, Legal Coordination Officer and Deputy of Serious Crimes Investigation Team (4 November 2010).

collaboration benefits everyone and meanwhile the national investigators gain skills regarding serious crimes investigations for the future".<sup>304</sup>

The international staff members of the SCIT also have the task of providing training to their national counterparts working in the team. In addition, the SCIT may provide professional training to organizations and offices in Timor-Leste whose activities are of relevance to its operations.<sup>305</sup> Accordingly, the SCIT conducted internal training regarding investigation techniques, drafting of reports, elements of crimes and on the job training. In addition, two of the national legal officers participated in Summer Schools on International Law in The Hague and in Galway and further international training is also planned.<sup>306</sup> As for trainings of other related offices, in 2010 the SCIT conducted training session on serious crimes process and the elements of the crimes with International and national prosecutors of the OPG. The training was very well received by the OPG and both bodies expressed the will to conduct other sessions in a near future.<sup>307</sup>

## Outreach Efforts

When the SCIT resumed investigations, outreach was conducted in order inform victims and the public about SCIT and to attract public support for the Team's work. Once again, only one person, Ms. Julia Alhinho (who filled-in this position in the SCU), was assigned for this role, with the assistance of interpreter. She was also in charge of the SCIT's press and public relations.<sup>308</sup> Despite very limited available resources, the significant outreach efforts made by Ms. Alhinho have led to some success.<sup>309</sup> The SCIT has been producing newsletters that are distributed in villages throughout the country.<sup>310</sup> In addition, the SCIT produced a DVD explaining how its work relates to that of the SCU and the Special Panels, CAVR and the CTF. This DVD has been distributed to all village

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<sup>304</sup> Interview with Ms. Josée D'Aoust, Legal Coordination Officer and Deputy of Serious Crimes Investigation Team (4 November 2010).

<sup>305</sup> Agreement between the United Nations and the Democratic Republic of Timor-Leste concerning assistance to the Office of the Prosecutor-General of Timor-Leste (n. 104), Sections 2.2 and 2.3.

<sup>306</sup> Interview with Ms. Josée D'Aoust, Legal Coordination Officer and Deputy of Serious Crimes Investigation Team (4 November 2010).

<sup>307</sup> Interview with Ms. Josée D'Aoust, Legal Coordination Officer and Deputy of Serious Crimes Investigation Team (4 November 2010). Interview with Mr. Vicente Fernandes e Brito, the Deputy Prosecutor General and Dr. Franklin Furtado (4 November 2010).

<sup>308</sup> ICTJ, Impunity in Timor-Leste: Can the Serious Crimes Investigation Team Make a Difference? (n. 271), p. 28.

<sup>309</sup> Interview with Ms. Josée D'Aoust, Legal Coordination Officer and Deputy of Serious Crimes Investigation Team (4 November 2010).

<sup>310</sup> Available at <http://unmit.unmissions.org/Default.aspx?tabid=184> (accessed 25 January 2011).

chiefs in the country, with requests to organize public screenings.<sup>311</sup> During 2008 and again in 2009, the SCIT, in cooperation with UNMIT's Human Rights and Transitional Justice Section (HRTJS), CAVR, the Provedor (Ombudsman) for Human Rights and Justice and other national authorities, held outreach meetings in the capital of each district. It also made presentations at district-level meetings of victims and at a national victims' congress in September 2009.<sup>312</sup> The SCIT reported that these meetings succeeded in delivering information to many victims who on their end, shown great interest in the work of the team.<sup>313</sup> In 2009, the SCIT began to coordinate with a coalition of national NGOs to develop a national victims' network.<sup>314</sup> Toward the end of 2009, the SCIT, in cooperation with UNMIT's Democratic Governance Support Unit (DGSU) and HRTJS, began to extend its outreach to the sub-district level.<sup>315</sup>

### 5.3 THE JUDGES' TRAINING PROGRAMME

Following the publication of the competency examination in January 2005, all Timorese judges as well as prosecutors and public defenders were required to participate in a two and a half years training course at the Judicial Training Center (JTC).<sup>316</sup> Up to that moment, all trainings were sporadic and short-term and this was the first attempt in five years to provide the Timorese judges a long-term comprehensive training. The programme was developed, financed and administrated by the UN Development Programme (UNDP).

A few outstanding characteristics of this training programme, mainly the background of the trainers and the teaching language, raise serious questions relating to this capacity building effort. The trainers which were assessed and appointed by the Superior Council of Judiciary were international judges, prosecutors and public defenders which were serving in Timor-Leste and not professionally trained trainers. All were native Portuguese speaking and the teaching language was exclusively Portuguese regardless the fact that most of the trainees did not understand this

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<sup>311</sup> ICTJ, Impunity in Timor-Leste: Can the Serious Crimes Investigation Team Make a Difference? (n. 271), p. 28.

<sup>312</sup> Interview with Ms. Josée D'Aoust, Legal Coordination Officer and Deputy of Serious Crimes Investigation Team (4 November 2010).

<sup>313</sup> SCIT Newsletter of 4 July 2009.

<sup>314</sup> Ibid.

<sup>315</sup> Interview with Ms. Josée D'Aoust, Legal Coordination Officer and Deputy of Serious Crimes Investigation Team (4 November 2010). See also SCIT Newsletter of 4 July 2009.

<sup>316</sup> For elaborated discussion on this matter see David Cohen, Indifference and Accountability (n. 53), pp. 99-105.

language. The training programme included lessons on the drafts of the new legal codes that include the Criminal Code, Criminal Procedure Code and the Civil Code, all in Portuguese and based on the Portuguese prototype of these codes. No translated version of these documents to Tetum existed at the time. However, for the first time, and with considerable delay, the judges were provided with Portuguese language lessons.<sup>317</sup> This is quite astonishing considering that Portuguese was practiced as one of the official legal language from 2000 and that since 2002 it became almost the exclusive legal language in Timor-Leste. Still, at least in the first eight months of the programme, most of the training judges could not understand the trainers who spoke Portuguese. It should be mentioned in this regard that the four judges of the serious crimes cases were in a slight better situation as at this point they already learned (on their own initiative and efforts) at least basic Portuguese; however, even they could not always follow the entire discussion in class as the Portuguese spoken by the trainers was high and formal.<sup>318</sup> The trainers, as well as the UNDP coordinator of the training programme at the JTC, were aware of this fact but nevertheless the classes continued to be taught in Portuguese. Moreover, offers by different governments and NGOs to fund interpreters were refused by the Ministry of Justice, notwithstanding the fact that lack of interpretation undermined the utility of the programme (and, in turn, undermined the capacity building effort). According to Cohen's interview with the UNDP coordinator of the JTC training programme, the insistence on Portuguese was intended to force the Timorese judge to learn Portuguese and this was in fact also the reason why the examination was designed in a way that caused judges to fail it. When asked about special classes relating to international humanitarian law or international criminal law, the judges had difficulties to recall whether any sessions were conducted regarding these topics (however all mentioned that sessions on human rights law were provided), and only one judge had finally recollected that there was indeed a session on international criminal law.<sup>319</sup> If IHL and/or ICL classes indeed took place, such lack of recollection may serve as an indication of the shallowness of these classes.

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<sup>317</sup> Interviews with Judge Jacinta Correia da Costa (3 November 2010); Judge Maria Natercia Gusmao Pereira (4 November 2010) and Judge Deolindo dos Santos (5 November 2010).

<sup>318</sup> Ibid.

<sup>319</sup> Ibid.

After two and a half years, the participants had to take an exam. Those who did not pass were removed from office to position of prosecutors and defence lawyers.<sup>320</sup> As of November 2010, there are only four Timorese judges who have previous experience in adjudication of serious crimes in the Special Panels and have some training to hear such cases.<sup>321</sup>

## 5.4 POLITICAL CLIMATE

In 2003, and as a result from the crisis involving the indictment and arrest warrant against *General Wiranto*, the government of Timor-Leste as well as the OPG, started to disengage from the serious crimes process: Hence, the OPG refused to forward the arrest warrant against *Wiranto* to the INTERPOL as well as to submit thereto any subsequent arrest warrant.<sup>322</sup> In 2005, the termination of the serious crimes process was coupled with the creation of the controversial Commission of Truth and Friendship (CTF). The official statements that followed the creation of the latter, describing it as an alternative to the prosecutorial route,<sup>323</sup> and were a clear indication of lack of political will to pursue future prosecutions. Following the publication of the CTF report in July 2008 and despite the harsh conclusions against Indonesia, Timor-Leste satisfied itself with a mutual statement of apology<sup>324</sup> whilst ignoring domestic and international pressure to resume prosecution.

On 20 May 2008, on the sixth anniversary of Timorese independence President José Ramos-Horta, exercising his right under Article 85(i) of Timor-Leste Constitution, signed Presidential decree No. 53/2008 of 19 of May giving clemency measures for 94 prisoners who have shown “good prison behavior”.<sup>325</sup> Annexed to the decree were lists of prisoners that might be entitled to a reduction in sentence. The generous clemency measures had the potential to benefit all those remaining in jail who had been sentenced

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<sup>320</sup> Ibid.

<sup>321</sup> Their availability to sit in a Special Panel is subject to the Judges’ participation in trainings abroad and to maternity leaves that are due to take place in the coming period, meaning that the actual capacity to form a Special Panel, if required, is even smaller.

<sup>322</sup> See *supra* fn. 244.

<sup>323</sup> Radio Australia, Truth commission will not prosecute guilty, August 5, 2005 (n. 97); SBS Dateline, Getting away with murder, 24 August 2005 (n. 95).

<sup>324</sup> Reuters, Indonesia, East Timor leaders regret vote bloodshed, 15 July 2008 (n. 99).

<sup>325</sup> Presidential decree No. 53/2008 of 19 of May 2008, Articles 1 and 2.

for human rights abuses under the Special Panel for Serious Crimes<sup>326</sup> and indeed, nine of the latter also received commutations of their sentences.<sup>327</sup> In response, 11 Timorese citizens comprising human rights groups, lawyers and a member of parliament have launched a legal petition to the Court of Appeal challenging the clemency measures and requesting the Court to examine the constitutionality of the decree. Eventually, the petition was declined. President Ramos-Horta said in this regard that his “personal preference is to adopt a law that simply puts an end to the tragic chapters of the past”.<sup>328</sup>

An example for the current political climate in Timor-Leste is found in the recent events relating to the case of *Martenus Bere*.<sup>329</sup> *Bere* was the leader of one of the militia groups, and together with 13 others was charged with 51 counts of crimes against humanity including murder, extermination, forced disappearances, torture, inhumane acts, rape, deportation and persecution in connection to the Suai Church Massacre that occurred on 6 September 1999 and in which, according to the SCU, 30 to 200 people were killed. Following the filing of an indictment, the Special Panel issued a warrant for *Bere*'s arrest; however, *Bere* (as well as the other accused) remained outside the Court's jurisdiction and was only arrested on 8 August 2009, after crossing the border between West Timor and East Timor. Two days after his arrest, the Suai District Court ordered that he be transferred to preventative detention in Becora prison until his case can be heard. However, mounting pressure from Indonesia's Minister for Foreign Affairs, Hassan Wirajuda, and, apparently, the agreement with the Indonesian government under the Commission of Truth and Friendship, have led Prime Minister Xanana Gusmao to give, on 30 August 2009, orders to be carried out through the Minister of Justice, for prison authorities to release *Martenus Bere* and transfer him to the Indonesian embassy.

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<sup>326</sup> JSMP Press Release, Legal Perspective on Clemency, 10 June 2008. Available at [http://www.easttimorlegalinformation.org/JSMP/100408\\_legal\\_perspectives\\_on\\_clemency.html](http://www.easttimorlegalinformation.org/JSMP/100408_legal_perspectives_on_clemency.html) (accessed 25 January 2011). Indeed, by June 2010, the only person convicted for serious crimes which remain imprisoned was *Mau Buti* which was convicted on March 2010.

<sup>327</sup> UN Office of the High Commissioner for Human Rights, Report on Human Rights Development in Timor-Leste: The security sector and access to justice, 1 September 2007 – 30 June 2008, p. 12. Available at <http://www.ohchr.org/Documents/Countries/UNMIT200808.pdf> (accessed on 31 January 2011). Among them was militia leader Joni Marques whose original 33 years sentence had already been reduced by nine years in 2004 and the 2008 Decree halved his remaining term to 12 years. Joni Marques was eventually released in June 2008.

<sup>328</sup> Foreign Policy, “Seven Questions: José Ramos-Horta. East Timor's Nobel Prize-winning president asks, just who is the failed state here?”, 9 July 2009. Available at: [http://www.foreignpolicy.com/articles/2009/07/09/seven\\_questions\\_jose\\_ramos\\_horta?a](http://www.foreignpolicy.com/articles/2009/07/09/seven_questions_jose_ramos_horta?a) (accessed 31 January 2011).

<sup>329</sup> Case No. 9/2003 *The Deputy General Prosecutor for Serious Crimes v. Egidio Manek et al*, indictment of 28 February 2003.

Although such orders utterly violated the separation of powers principle<sup>330</sup> and were severely criticised by Timor-Leste's National Parliament<sup>331</sup> as well as by the international community,<sup>332</sup> commentators<sup>333</sup> and the Timorese Church, *Bere* was released in November 2009 without a judicial hearing and without a court order.

On 30 August 2009, during the events marking ten years of Timor-Leste independence, President Ramos-Horta addressed the nation dismissing the demand for an international tribunal to try perpetrators of serious crimes against humanity in Timor-Leste and called on the United Nations to disband the Serious Crimes Unit. He further said "Ten years after the 'Popular Consultation' we must put the past behind us... Those who committed crimes are the ones who have to live with these crimes and the ghosts of their victims haunting them for the rest of their lives."<sup>334</sup>

Criticism of the executive branch intervention was also heard by the President of the Court of Appeal, Claudio Ximenes, who on 9 September 2009 issued a statement that the release of *Bere* "was not ordered by a court decision". He went on to say that "under our law and our Constitution, only a judge can order that someone who has been placed in prison be released from prison. No non-judicial authority has any power to release or order the release from prison someone whom a judge has sent to prison." President Ximenes then indicated that the Superior Council for the Judiciary had directed its Judicial Inspector to make the necessary inquiries on this matter. He concluded by saying that if that inquiry disclosed that *Bere* had been illegally released, "the appropriate

<sup>330</sup> Constitution of the Democratic Republic of Timor-Leste, Sections 2.2, 118.1, 119 and 121.2.

<sup>331</sup> The matter was debated in length in the Parliament on 13 October 2009 and was aired on national radio and television. [http://www.jsmp.minihub.org/English/webpage/publica/J SMP%20Report%20OJS\\_e.pdf](http://www.jsmp.minihub.org/English/webpage/publica/J SMP%20Report%20OJS_e.pdf) (accessed 25 January 2011).

<sup>332</sup> Letter of Navanethem Pillay, UN High Commissioner for Human Rights, dated 2 September 2009. See also Amnesty International Public Statement of 3 November 2009: Indonesia shelters indicted Timorese Suspect. Available at <http://www.laohamutuk.org/Justice/99/bere/asa210202009en.pdf> (accessed 25 January 2011).

<sup>333</sup> Interview with Mr. Vicente Fernandes e Brito, the Deputy Prosecutor General and Dr. Franklin Furtado (4 November 2010). La'o Hamutuk letter to the UN Security Council, UN has responsibility to end impunity, 20 October 2009, available at <http://www.laohamutuk.org/Justice/09LhtoUNSCJustice.htm> (accessed 25 January 2011); JSMP, Justice Update: Impact of the Maternus Bere Case on the Justice System and the Rule of Law in Timor-Leste, September 2009, available at <http://www.laohamutuk.org/Justice/99/bere/J SMPBereImpactSep09En.htm> (accessed 25 January 2011).

<sup>334</sup> José Ramos-Horta, "The dreams shall never die, we must keep the faith, the struggle goes on": Speech marking the 10th anniversary of the United Nations-sponsored "Popular Consultation" on the status of East Timor on 30th August 1999". On February 2011, in his lecture in the Hebrew University of Jerusalem, President José Ramos-Horta repeated this say emphasising that "the greatest act of justice done to us [the people of Timor-Leste] is that we are free" and that "the perpetrators' punishment is that they cannot return to Timor-Leste". President José Ramos-Horta acknowledged that the fact that many remained at large may not be ideal, however, he said, this is the will of the people of Timor-Leste and it enabled Timor-Leste to reach and maintain its good relations with Indonesia. President José Ramos-Horta, "Timor-Leste, Peace Building, State Building & Reconciliation: Experience & Perspectives", 14 February 2011.

authorities will be notified of that fact to launch the correspondent legal and disciplinary action.”<sup>335</sup>

Notwithstanding these circumstances, when asked whether and to what extent such a political climate affects the independence of the judiciary, judges replied that despite what happened in *Bere Case*, they enjoy independence in their adjudication.<sup>336</sup> Similarly, when asked about the OPG’s independence to file indictments on serious crimes cases relating to the events of 1999, both the Deputy Prosecutor General and the international prosecutor in charge of these cases replied that although the matter is politically sensitive in Timor-Leste today, they do not see any reason preventing them to file indictments in case sufficient evidence exist. The Deputy Prosecutor General further emphasised that there is no policy not to file new indictments regarding these cases and that the OPG enjoys full discretion on this matter and is under no political pressure not to indict these cases.<sup>337</sup> To underscore this point, the international prosecutor noted his intention to file two indictments by the end of 2010 and to file at least another 10-15 indictments by July 2011.<sup>338</sup> However, when asked about existing or new arrest warrants, the Deputy Prosecutor General confirmed that since 2005, no arrest warrant were requested and there are no attempts on behalf of Timor-Leste to pressurize the INTERPOL to activate the existing warrants.<sup>339</sup> As for the *Bere Case*, the Deputy Prosecutor General noted that as far as the OPG concerns, “the case is still open and the collection of evidence is still on-going, regardless of the recent decision”.<sup>340</sup>

Less optimistic views were expressed by NGO representatives and different UN personnel who claimed that even if there is no clear interference of the government, there is a basic understanding within the political and legal circles that reconciliation can be achieved though ways other then prosecution and that it might be that the Prosecution exercise self restraint on this matter.<sup>341</sup>

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<sup>335</sup> Claudio de Jesus Ximenes, President of the Court of Appeal and of the Superior Council for the Judiciary, Communiqué of 9 September 2009.

<sup>336</sup> Interviews with Judge Jacinta Correia da Costa (3 November 2010); Judge Maria Natercia Gusmao Pereira (4 November 2010) and Judge Deolindo dos Santos (5 November 2010).

<sup>337</sup> Interview with Mr. Vicente Fernandes e Brito, the Deputy Prosecutor General (4 November 2010).

<sup>338</sup> Interview with Dr. Franklin Furtado, the international prosecutor assigned to the serious crimes cases (4 November 2010). July 2011 mark the expected end of Mr. Furtado’s appointment. As far as the author knows no new indictments were served by the end of January 2011.

<sup>339</sup> Interview with Mr. Vicente Fernandes e Brito, the Deputy Prosecutor General (4 November 2010).

<sup>340</sup> Interview with Mr. Vicente Fernandes e Brito, the Deputy Prosecutor General (4 November 2010).

<sup>341</sup> Interview notes with the author.

## 5.5 APPLICABLE LAW AFTER 2005

In 2008, Law 13/2008 enacted by Parliament granted the government authorisation to approve a new Penal Code and repealed the relevant legislation in force, relating to the definition of crimes, penalties, security measures, and their respective prerequisites. The new Penal Code came into force on 7 June 2009 and repealed the Indonesian Penal Code.<sup>342</sup> The new penal code contains provisions on genocide, crimes against humanity, and war crimes.<sup>343</sup>

As for procedural law, Decree Law No. 13/2005 approving the Criminal Procedure Code was promulgated on November 2005 and entered into force on 1 January 2006.<sup>344</sup> The new Criminal Procedure Code repealed the previous UNTAET Rules of Criminal Procedure as well as few articles of Decree-Law No. 16/2003, of 1 October.<sup>345</sup> However, when referring to serious crimes the Criminal Procedure Code specifies only cases relating to serious crimes committed between 1 January and 25 October 1999.<sup>346</sup> Article 3 further provides that the provisions regulating cases related to serious crimes will remain in force, specifying particular provisions of UNTAET Regulation No. 2000/11 and No. 2000/15, which established the Special Panels and described both their jurisdiction and the serious criminal offences within their competence. Accordingly, although the Special Panels are not currently functioning, the legal framework for their operation remains in place.<sup>347</sup>

Both Codes are based on a Portuguese model and were created under the guidance of a Portuguese expert. They were at first available only in Portuguese however, later on they were translated to Tetum.

## 6. CAPACITY BUILDING

The efforts of the serious crimes process to build Timor-Leste's capacity to manage independently a similar process in the future were poor and consequently, so were their

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<sup>342</sup> The Government approved the new Penal Code with Decree Law No. 19/2009. The Penal Code repealed few other legal provisions specified in Article 2.

<sup>343</sup> Decree Law No. 19/2009 Articles 123-30.

<sup>344</sup> Decree Law No. 13/2005 of Approving the Criminal Procedure Code, 22 November 2005, Article 5.

<sup>345</sup> Ibid, Article 2.

<sup>346</sup> Ibid, Article 3.

<sup>347</sup> Ibid.

achievements. Indeed, reports published before (and after) the end of the process indicates a lack of local capacity to continue the process without external assistance. The three cases adjudicated before the Special Panels since May 2005 confirm that the current legal system has no capacity to deal with such cases, both in terms of content/knowledge and sufficient personnel and resources.

When the UN arrived in Timor-Leste the justice system, as many other state's institutions, was completely ruined. In this regard the serious crimes process succeeded in creating a legal structure within the domestic justice system where serious crimes cases can be adjudicated and to provide basic training of domestic legal practitioners; however, this progress was not enough to comply with international standards or to build viable local capacity. Rushing and straggling to complete their task under the constraints of time and resources, the focus of the serious crimes process in Timor-Leste was never on capacity building. The fact that on the way, some capacity was built was almost accidental in nature and appears to be due to the efforts of the specific individuals involved.

The Timorese Judges were not provided with comprehensive training or specific sessions in relation to their mission as judges in the Special Panels for Serious Crimes. They were meant to be trained by the international judges, who were to be their mentors, but the latter themselves were not necessarily trained in international criminal law and in most cases communication was problematic and sufficient translations were lacking. The Timorese judges also were not provided with Portuguese language lessons. Only five years later, after the serious crime process already ended, comprehensive training programme, that includes Portuguese language lessons but very limited specific training relevant to serious crimes cases, was provided; however, the programme became a troubling indication of the failures of capacity building, whereas the Superior Council of the Judiciary, the UNDP and the international professional all collaborated with a training programme taught in a language that trainers do not understand. Consequently, performance of the local judiciary during the serious crime process was relatively poor in style and in content. It should be noted that the international judges did not perform much better (in some cases the opposite is true) and their judgments were similarly poor. The jurisprudential legacy of the Special Panel is thus rife with legal mistakes and misapplications of the law. Following the closure of the Special Panels, the latter's jurisdiction was re-invoked only three times when accused returned to Timor-Leste. The

level of the judgments in these cases remains poor in construction and writing and includes crucial legal mistakes. It is evident that three trials in five years do not allow maintaining or keeping up with the required level of practical expertise, especially under circumstances in which judges have not specialised in international criminal law to begin with.

As for other aspects of the Special Panel's capacity building efforts, relating to supporting staff such as researchers, interpreters, translators and court clerks, as well as administration services such as file management and court transcripts, all were either missing or of a very low quality for most of the period of the serious crimes process. Although some improvements was reached towards the end of the process, both due to the appointment of Judge coordinator as well as to the additional resources supplied in order to complete the work by 2005, when the serious crimes process ended so did some of the funding, From May 2005, basic things such as researchers or secretarial services were again lacking.

As for the Serious Crimes Unit, in the first two years of operations, the involvement of local staff in the Unit was limited to the posts of translators; however, from 2002 following the appointment of new Deputy Prosecutor General for Serious Crimes and her success in securing donations, the Unit started training local investigators and prosecutors as well as other professional related positions. The SCU also had only a limited success in outreach due to insufficient available resources. Likewise, in the Serious Crimes Investigation Team, international and local personnel are working together and the SCIT is involved in training of these personnel as well as other related professionals, such as police and the Office of the Prosecutor General. However, like its predecessor (and even more then the latter), the SCIT is under-resourced. As for outreach, despite the lack of sufficient resources, the SCIT had managed to outreach many victims around Timor-Leste and provide them with important information.

As for the Defence Lawyers Unit, no capacity whatsoever was intended to be build, as none of the defence lawyers were Timorese and no training programme was offered.

Witness protection existed in theory but not in practice as the available resources did not allow any such programme to exist in reality while the serious crimes process was taking place or thereafter.

Regardless of the efforts to achieve accountability, and the experience gained during the years of the serious crimes process took place, the political climate in Timor-Leste in the past few years, which favours reconciliation over prosecution, seemed to block the way before any further progress on this matter. The fact that the OPG appointed only one prosecutor to the 1999 serious crimes cases, which has no previous expertise in international criminal law, is an indication of both lack of will to pursue accountability for these cases as well as lack of domestic capacity to do so. Even if there are prosecutors who previously gained qualifications in the SCU or in the SCIT, their qualifications can not be assessed as no indictments are being served and no trials are taking place, facts which by themselves indicate on lack of capacity.

## 7. LESSONS LEARNED & RECOMMENDATIONS

A hybrid model is a complex one. It might be less expensive than international criminal tribunals; however meeting the challenges of such a complex model still requires tremendous resources which were absent in the case of Timor-Leste. The resources that were allocated to the serious crimes process in Timor-Leste were insufficient to maintain even an ordinary court let alone such a complex model of the Special Panels. In order to succeed, future models must be allocated with a much higher level of resources which fit the special needs of the legal system involved.

Another challenging aspect of the hybrid model is that it was not always clear who is in charge of the process, the UN or the Timorese authorities. For example, it was not always clear who was responsible for obtaining certain resources; who was responsible for the delays in the process of recruitment of judges and who was responsible for the fact that the Court of Appeal was closed for more than a year and a half. Many of these problems were known and well reported however as it was unclear who is liable to solve them they remained unaddressed. In many cases, problematic decisions have taken place at the request of the local authorities and the acquiescence of the UN. One example is the decision to recruit international judges only from Portuguese speaking and civil law countries. Moreover, the UN did not effectively monitor the quality of the judicial process and as a result contracts of judges were kept being renewed despite their bad performance in the court room. Many of these problems resulted from the novelty of this hybrid model. However, as the UN is much more experienced and better

resourced than Timor-Leste, it should have assessed those challenges along the way and taken actions to fix them. In actuality, it chose to ignore too many such problems while shifting the blame and responsibility to the Timorese authorities. Future hybrid model must divide more clearly the responsibilities of the parties to the process and the UN should have the overall responsibility to monitor the process and to take actions in solving problems.

The decision to employ personnel according to language skills and civil law affiliation rather than based on international (or even domestic) criminal law experience and expertise, led to recruitment of personnel which had no qualification and/or experience relevant to the serious crimes cases. Future models must apply rigorous recruitment criteria to assure the best people are recruited.

Political climate may change in the future and cases may be prosecuted in Timor-Leste. In addition, the option of trying such crimes through universal jurisdiction proceedings already exist and an international criminal tribunal might still be established. By the time all these options eventuate, years might pass on but by then it is likely that evidence could not be anymore obtained. Therefore, the importance of allowing the SCIT to continue functioning at this point in time is so crucial. The Serious Crimes Investigation Team should therefore continue its task and be allocated with sufficient support and resources enabling it to complete all investigations and provide the Office of the Prosecutor General with the full files necessary in order for these cases to be prosecuted in the future.

In the current situation it appears that the prospect of future prosecutions of serious crimes in Timor-Leste is slim. The departure from this process seems to be gradual; in 1999, when the process began the SCU was given a mandate to investigate and indict serious crimes occurring from 1974 to 1999. Nevertheless, the SCU limited its investigations to 1999 events. The new Criminal Procedure Code which entered into force on 1 January 2006 refers to serious crimes committed with relation to the 1999 events. Likewise, in 2007, when the SCIT was established, the mandate has shrunk officially to 1999 events. In 2009, the Security Council Resolution relating to Timor-Leste did not even mention 1999 crimes.<sup>348</sup> The UN and the international community should take actions to assure the SCIT's mandate continues until completion of investigation

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<sup>348</sup> Security Council Resolution 1867 (2009) of 26 February 2009, S/RES/1867 (2009).

and provided with sufficient resources required to do so; to assure that the OPG has sufficient qualified personnel to address these cases; to pressure Indonesia to extradite suspects; to pressure Timor-Leste to revise the law allowing the President to exercise a wide and non-transparent discretion regarding pardons. All these will not be achieved without effective international assistance.



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