



JUDICIAL SYSTEM MONITORING PROGRAMME

PROGRAM PEMANTAUAN SISTEM YUDISIAL

THE FUTURE OF SERIOUS CRIMES
Delivered by: Tiago A. Sarmento
Judicial System Monitoring Programme (JSMP)
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1. The Serious Crimes Process

The precursor to the establishment of a tribunal to prosecute crimes committed prior to, during and immediately after the popular consultation in Timor Leste in 1999 was the creation of two UN-appointed bodies of experts, who were charged with the task of investigating what had taken place at this time and determining responsibility for those crimes. To that end an International Commission of Inquiry on Timor Leste (ICIET) and a group of three Special Rapporteurs visited the region in 1999 and 2000 respectively.

On the basis of their investigations both groups recommended the creation of an international tribunal.¹ It was clear, however, that the creation of a single international ad hoc tribunal along the lines of the ICTR or ICTY was never going to be popular with the Indonesian military and its political establishment as a means of prosecuting Timor-related crimes. In order to avoid the potentially humiliating spectre of an international tribunal, the Indonesian government therefore undertook to try high-level suspects by way of an ad hoc national tribunal sitting in Jakarta.³ Accordingly the Secretary-General did not adopt the proposal of the ICIET or the Special Rapporteurs but instead recommended that suspects be tried by the Indonesian courts and that increased assistance also be provided to develop UNTAET's institutions with a view to possible prosecutions in East Timor. In late 2000 UNTAET finalized the framework for a 'hybrid tribunal' functioning within a specialized jurisdiction of the Dili District Court as a means of prosecuting perpetrators of serious crimes in Timor Leste.

2. The Ad Hoc Tribunal

The Ad Hoc Tribunal was established in 2000 pursuant to Indonesian Act No 26/2000 on the Human Rights Tribunal. The Ad Hoc Tribunal has jurisdiction to investigate and determine cases in which there has been a serious violation of human rights. Human rights violations are defined as being the crimes of genocide and crimes against humanity. Jurisdiction over Timor Leste was limited to violations that took place between April and September 1999.

¹ Report of the International Commission of Inquiry on East Timor to the Secretary General, UN Doc.A/54/726, S/2000/59(2000); The Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions, Special Rapporteur of the Commission on the Question of Torture and Special Rapporteur of the Commission on Violence Against Women, its Causes and Consequences.

³ The Ad Hoc Human Rights Court was created pursuant to Law No 26/2000 as a tribunal of specialized jurisdiction within the existing legal system.

⁶ See generally David Cohen, *Intended to Fail: the Trials before the Ad Hoc Human Rights Court in Jakarta*, International Centre for Transitional Justice, August 2003.

The Ad Hoc Tribunal commenced its work on 14 March 2002. Of the 18 persons indicted before the Ad Hoc Tribunal, 12 were acquitted and six convicted at first instance. All of the convicted defendants appealed, either to the Court of Appeal or to the Supreme Court, the final court of review in Indonesia. Five of those convictions have been overturned and the sixth appellant, Eurico Guterres, remains free pending determination of his appeal by the Supreme Court. There is overwhelming evidence indicating that the Ad Hoc Tribunal either failed in or was prevented from discharging its responsibilities in accordance with international human rights standards.⁶

3. The Special Panels for Serious Crimes: Jurisdiction

UNTAET Regulation 2000/15 provides the Special Panels for Serious Crimes (“SPSC”) with exclusive jurisdiction over:

- war crimes, crimes against humanity, genocide and torture (this jurisdiction is universal, that is, the Court has jurisdiction regardless of where and when they were committed); and
- murder and sexual offences committed between 1 January and 25 October 1999.

The SPSC were therefore conferred with broad jurisdiction, in accordance with principles of international criminal law, to enable them to prosecute perpetrators of crimes committed in relation to the Indonesian occupation of Timor Leste. In JSMP’s view the SPSC are consequently 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. Nevertheless, the Serious Crimes Unit (charged with prosecuting crimes before the SPSC) appeared to adopt an interpretation of the SPSC mandate, as defined by Reg 2000/15, which limited its jurisdiction to offences committed in 1999.⁸

4. Closure of the SPSC: a Statistical Summation of Performance

A large number of reports and articles have assessed the performance of the SPSC in fulfilling its mandate. Rather than repeat what has been written in greater detail elsewhere,¹⁰ we will simply tabulate SPSC case statistics which in our view give an indication of some of the successes and failures of the SPSC:

Statistic Type	2000	2001	2002	2003	2004	2005	Total
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⁸ 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.

¹⁰ Ibid. See also *Unfulfilled Promises: Achieving Justice for Crimes Against Humanity in East Timor*, Coalition for International Justice-Open society Justice Initiative Joint Report, 24 November 2004.

Number of indictments issued	12	21	13	35	14	0	95
Number of defendants indicted	21	56	59	259	45	0	440
Number of cases tried	0	12	9	13	13	8	55
Number of defendants tried	0	21	9	17	29	11	87
Number of defendants convicted	0	21	9	17	27	10	84
Number of defendants acquitted	0	0	0	0	2 ¹¹	1	3¹²
Number of defendants whose cases were withdrawn/dismissed	2	5	0	1	5	0	13
Number of defendants ruled unfit to stand trial	0	0	0	0	0	1	1
Number of indicted persons beyond jurisdiction							339

5. Current Concerns

The Right of Appeal¹³

The end of the Special Panels for Serious Crimes (SPSC) has meant the departure of UNMISSET legal staff, but not the end of the legal process for those with appeals outstanding from its decisions.

Six matters are still to be heard by the Court of Appeal, but with only one Serious Crimes Unit (SCU) Public Defender and one SCU Prosecutor remaining in Dili until 20 June (the head and acting head of these units respectively) and the recently announced failure of all East Timorese Public Defenders and Prosecutors in their evaluations, there are concerns that appellants may have difficulty obtaining adequate representation in their appeals. The sole remaining Public Defender, who is contracted to remain in Dili until 20 June, co-represented three accused before the Panel in only one (*Mesquita & Ors* (28/2003)) of the six cases currently awaiting appeal.

The right to appeal is a vital guarantee of the right to a fair trial and there ought to be concerted efforts by the remaining SCU authorities and the East Timorese Courts to ensure that this is provided.

¹¹ One of these acquittals was overturned by Timor Leste's Court of Appeal. See JSMP Report, *The Paulino de Jesus Decisions*, April 2005.

¹² See above.

¹³ See JSMP Press Release, 'Concerns over Legal Representation for Outstanding SPSC Appeals', 27 May 2005.

Preservation of Evidence

As part of the SCU's handover to national authorities, critical documents have been translated, a comprehensive database of documents created and detailed instructions provided in respect of indictments which did not proceed to trial in the event that these cases are prosecuted in the future. As yet, however, it remains unclear how these sensitive materials will be stored and managed and whether they will be adequately protected. There is therefore an urgent need to ensure preservation of the huge amount of evidence which has been gathered by the SCU, particularly in light of possible future initiatives to prosecute untried suspects. Furthermore, it is essential to maintain confidentiality of statements given by reluctant witnesses on the strength of undertakings that they will remain confidential.

6. The Future of the Serious Crimes Process

Commission of Experts

The acquittal of all but one of the suspects in the Jakarta trials and the failure of the SPSC to try any senior indictees prompted widespread calls in the international community for an independent evaluation of their performance. On that basis the Secretary General ordered the creation of a Commission of Experts in March 2005.

According to its own terms of reference, the primary role of the Commission is:

- to assess whether the trials conducted by the Special Panels for Serious Crimes in Dili and the Jakarta Ad Hoc Tribunal were impartial and in accordance with 'international standards of justice and due process of law' and
- to 'evaluate the extent to which they have been able to achieve justice and accountability for the crimes committed in Timor Leste'.

The Commission is empowered then, if necessary, to recommend to the Secretary-General measures which would ensure accountability of perpetrators and justice for victims.

The Commission visited Timor Leste in April 2005 and consulted various individuals and organizations, including JSMP, for the purpose of its investigations. After a considerable delay in obtaining visas the Commission more recently visited Indonesia to conduct a similar investigation of the Jakarta Trials and is expected to make its recommendations to the Secretary General in the near future. Nevertheless, the Commission is compelled under its terms of reference to acknowledge and assist the Indonesia-Timor Leste Commission of Truth & Friendship (CTF) in its work. Consequently the CTF cannot be ignored in contemplating future options for the prosecution of serious crimes committed in Timor Leste.

Truth & Friendship Commission

It was announced on 21 December 2004 that the governments of Timor Leste and Indonesia had agreed on the formation of a Truth and Friendship Commission to look into the Referendum-related violence which took place in Timor Leste in 1999. As Jose

Ramos-Horta, Foreign Minister for Timor Leste, has said, the work of the Commission ‘would finally close this chapter. We would hope and intend that this initiative would resolve once and for all the events of 1999’. JSMP understands that the process of appointing commissioners is now underway and that the CTF can be expected to commence its work by the end of the year.

According to its terms of reference:

- the objective of the CTF will be to establish “the conclusive truth” as to what occurred in Timor Leste in 1999 and to prevent a recurrence of similar events;
- the mandate of the CTF will be confined to “the period leading up to and immediately following” the Referendum in 1999. Consequently, *none of the crimes committed during Indonesian occupation prior to 1999 will be investigated*;
- according to one of its foundational principles, “*the CTF process will not lead to prosecution*”. Furthermore, offenders who “cooperate fully in revealing the truth” could be granted amnesty, that is, guaranteed immunity from future prosecution irrespective of the nature of their crimes;
- persons “wrongly accused” of human rights violations are to be “rehabilitated”. What constitutes a false accusation is not clear but it potentially means that persons who have been accused of committing offences but have not been tried in court are entitled to rehabilitation (the meaning of which is also unclear);
- CTF investigations will neither prejudice the work of the Special Panels for Serious Crimes nor recommend the establishment of any other judicial body.

It is therefore unlikely that the Indonesian and East Timorese governments will support or endorse either of the two forums which have emerged as the principal options for continued prosecution of suspects.

International Tribunal

In its report of 31 January 2000 the ICIET recommended the formation of an international tribunal to prosecute serious crimes committed in Timor Leste during the Indonesian occupation. This assessment was largely based on doubts about the capacity or willingness of Indonesia to bring the perpetrators to justice.¹⁹ Notwithstanding this recommendation, the creation of a tribunal was deferred on the basis of an undertaking given by the Indonesian government to try suspects in its own domestic courts. As described above, however, the trials in Jakarta are widely viewed as a sham. For this reason there are compelling grounds to establish an international tribunal to try suspects who have not yet been tried, either at all or by way of a genuine, impartial process. There will of course be obvious political obstacles encountered in establishing an international tribunal, particularly if along the lines of the expensive ICTY and ICTR processes. Nevertheless, an international tribunal would now appear to be the only means of ensuring a rigorous and impartial prosecution of those alleged to bear primary responsibility for the crimes against humanity committed in Timor Leste during and prior to 1999. Furthermore, it is incumbent on the international community and UN legal experts in particular to creatively think of alternative models for future international prosecutions which do not entail the high cost or lengthy delays characterized by the past

international criminal tribunals. This option appears to have strong support amongst civil society in Timor Leste as well as significant sectors of the international community.¹⁵ If established an international tribunal could focus on prosecution of a select group of the most senior suspects whilst lower level offenders could be tried in the domestic courts of Timor Leste.

Domestic Prosecutions

Although funded by the UN, predominantly staffed by international personnel and operating under principles of international criminal law (hence their characterization as a 'hybrid' tribunal), the SPSC were specially constituted panels of the Dili District Court and therefore under the jurisdiction of the courts of Timor Leste. It is therefore possible for prosecution of offenders to continue in East Timorese courts within the framework under which the SPSC were originally created. Nevertheless, given the present lack of qualified East Timorese judicial actors, this would require ongoing support from the international community. At a minimum, international judges would need to be supplied to hear serious crimes cases. This is because the current law governing such proceedings requires that the panels with jurisdiction to try serious crimes 'shall be composed of two international judges and one East Timorese judge'. The resumption of domestic prosecutions would not, however, address the principal failing of the SPSC, namely, their inability to try suspects beyond territorial jurisdiction. For this reason domestic prosecutions would continue to be confined to lower and possibly mid-level suspects, for example, East Timorese suspects currently in West Timor and other parts of Indonesia who might return to Timor Leste in the future, and those investigated by the SCU but for whom there were inadequate resources to bring to trial.

Reparations

Timor Leste was devastated by the scorched-earth policy inflicted upon it in 1999. It will take many years and a significant amount of money to restore the infrastructure that existed at the time of the Referendum. In light of this economic need, the pursuit of reparations is a feasible option which ought to be given serious consideration.

It is a well established principle of international law, and a corollary of the legal doctrine of state responsibility, that states are obliged to provide reparations for any harm or damage caused by a wrongful act or omission on the part of that state.¹⁷ Not only is this a fundamental principle of international law but it has also been recognised as a basic standard in any open and democratic society in which there is respect for the rule of law.¹⁹

¹⁵ See JSMP Conference Report, *Justice for Timor Leste: Civil Society Strategic Planning*, October 2004.

¹⁷ *Factory at Chorzow*, Jurisdiction, Judgement No. 8, 1927, P.C.I.J., Series A, no. 17, p. 29

¹⁹ Council of Europe, Resolution 78 (8) of the Committee of Ministers, cited by Meleander, G., "Article 8", in Eide et al. (eds.), *The Universal Declaration of Human Rights: A Commentary*, Scandinavian University Press (1992), p.143; *Blake v. Guatemala (Reparations)*, para.63.

²² See generally *The ICC Trust Fund for Victims: Resource Materials on other Trust Funds and Compensation Mechanisms*, July 2002, Redress Publications (available online at www.redress.org/reports.html).

The establishment of an international tribunal to prosecute crimes against humanity committed in Timor Leste would provide the opportunity to incorporate reparations provisions in its founding statute. Article 75 of the *Rome Statute* is a good example.

Funds for reparations could be administered by way of a specially-created ad hoc fund financed through international resources, taxes, private sources, the sale of state assets, or the recovery of assets from perpetrators. This model has either been tried or adopted in El Salvador, Guatemala, Haiti, Malawi, South Africa and Peru. These funds rely to a large extent on international donations although in respect of the above countries this has been at a modest level. This reparations model is said to be appropriate where the class of victims is large and difficult to define and the domestic economy weak, which is the case in Timor Leste.

There are numerous precedents for the establishment of international reparations funds administered under the auspices of the UN.²² If Timor Leste was to pursue internationally-funded reparations (in the absence of an adequately empowered international tribunal or on the basis that the government of Timor Leste was neither able nor willing to provide reparations for acts for which it was not responsible) it would either have to seek international multilateral funding from appropriate target countries or lobby the UN for the establishment and financing of a UN-administered fund.