

JUSTICE AND HUMAN RIGHTS

BRIEFING PAPER TO INTERNATIONAL DONORS CONFERENCE CANBERRA June 2001

SUMMARY

Although there are many issues facing East Timor in relation to justice and human rights, the purpose of this briefing paper is to highlight some of the some of the most pressing needs that relate to the following areas:

- Reconciliation
- Administrative transition

Independent reports have consistently concluded that the violence of 1999 was planned, systematic and of a serious nature, involving the highest levels of Indonesian military and civilian command structure*, and yet to date, one and a half years later, only lower ranking militia men are now being prosecuted before the courts in East Timor.

However, there are serious concerns about the capacity of the new justice system in East Timor, particularly as it attempts to address the ongoing impact of the human rights violations that have taken place. Inadequate training and resources are hampering the administration of justice. Without a properly functioning justice system that has the trust of the community, true reconciliation based on respect for the rule of law and human rights cannot be achieved.

This is coupled with alarm on the part of the NGOs of East Timor, and the Timorese community in general, over the lack of progress in Indonesia. This concern has led to increasing calls for an international criminal tribunal for East Timor.

To this end, the NGO Forum recommends that donors direct funding toward:

1. A conference in Dili to examine the possibility of an International Criminal Tribunal for East Timor;
2. Immediately increasing capacity building efforts in the administration of the justice system.

1. Recent developments in East Timor;

UNTAET Regulation 2000/15 of 25 July 2000 established Special Panels of the Dili District Court to hear Serious Criminal Offences, which are defined as genocide, war crimes, crimes against humanity and torture. The Special Panels also have jurisdiction over cases of murder and sexual offences committed in East Timor between 1 January 1999 and 25 October 1999.

Each panel is composed of one Timorese and two International judges. While there are three international judges who can rotate to form different panels, there is only one East Timorese judge who must sit on every case.

From January 2001 when the first trial was heard to the end of May 2001, the Special Panel for Serious Crimes has handed down 8 judgments including against 6 militia members and one against a former Falintil member. Except for two cases that have been dismissed on procedural grounds, all the cases that have proceeded to final judgment have resulted in guilty verdicts and the imposition of substantial prison sentences. In total over 25 indictments have been filed against over 40 individuals .

The vast majority of the serious crimes cases involve East Timorese militia members. Most of the accused have claimed that they committed crimes whilst under the command of superiors. Two cases involve East Timorese former TNI members. No Indonesian troops are in custody, and so far only 2 Indonesian officers have been indicted. They have, however, failed to appear at the preliminary hearings and it is therefore unlikely that they will face trial in East Timor in the foreseeable future.

It is clear that the fair and effective prosecution of these cases is extremely important for East Timorese reconciliation as well to the development of the justice system as a whole. However, there

are serious obstacles to the achievement of these goals. The Special Panel faces significant problems in terms of:

- Lack of court administration and resources.
- Lack of cooperation by Indonesia regarding the memorandum of understanding

1.1 Lack of court administration and basic resources

An efficient court administration is the backbone of a functioning court system. The present official approach appears to be that a judicial system simply requires judges, without specialised judicial administration. Judges and lawyers are not necessarily equipped for this role. Many of the following problems could best be addressed by the provision of key staff with experience in court administration. To date, the Transitional Administration has failed to meaningfully build East Timorese capacity to run a justice system.

Courtroom facilities

Despite the seriousness of matters that come before the Special Panel, there are no means for the recording of trials such as tape recording or detailed minute taking. The Court clerk, who is not always present in Court, takes some notes but this is no substitute for professional transcription. The judges are therefore deprived of having an accurate record of the evidence presented during the trial when it comes to preparing a judgment. This seriously comprises the ability of either party to conduct an adequate appeal. The judges are forced to rely on their own notes taken on a laptop computer in court. In a recent judgment the Court made specific reference to the fact that they were forced to rely on their own notes as the authoritative record of the trial.

Court registry

Generally speaking, the registry of the court is unable to perform its basic functions, including publicising court hearings and maintaining court files. The listing of cases happens in an ad hoc manner, with no centralised and easily accessible source for obtaining information about cases. Until recently, there was generally not even a list of the cases scheduled for the same day posted outside the court. However, even the prosecution and defense have little notice of forthcoming cases, with the public receiving no information at all. In cases of significant public interest, where family members and local communities often travel long distances to come to court, this is clearly inadequate.

Similarly, access to public court records, an important aspect of the human right to a fair trial, is virtually impossible. The registry does not even have a photocopier, and the nearby police office will only make copies if the registry brings its own paper. Lack of confidence in the court registry is illustrated by the facts that judges and prosecutors are hesitant to relinquish original documents to the registry, fearing that they will be inappropriately filed or otherwise misplaced.

Strong management and basic training in the importance and operation of court administration is desperately needed

1.2 Translation and language issues

There are 4 working languages in the Special Panel for Serious Crimes of the Dili District Court: English, Portuguese, Bahasa Indonesia and Tetum. However, in practice the working languages in the Court are English and Bahasa Indonesia. The international prosecutors, the international mentors for the defenders and the two international judges use English. The East Timorese defenders and the East Timorese judge use Bahasa Indonesia, or Tetum when addressing a defendant or witness who only speaks Tetum.

The lack of qualified interpreters is an ongoing problem. Due to a lack of English/ Tetum translators (there is only one), at times a Bahasa Indonesia-Tetum translator has been used for the defendants, or an awkward combination of the judges speaking in English, that being translated by an interpreter from English to Indonesian and then by a second translator from Indonesian to Tetum. In addition to double translations, it is not uncommon for the East Timorese judge to act as a translator when there is no other option, or for an international judge to ask a question first in English and then in Portuguese.

The obvious problems of understanding legal terminology in court proceedings faced by defendants with little or no formal education are compounded by these language difficulties. Defendants in several cases have had obvious problems in understanding the judges' questions. The greatest difficulties appear to be whether the defendants have had access to pre-trial rights and whether they understand the indictments against them.

It is understood that USAID has provided simultaneous translation equipment for the courts, however no one appears to have been trained by the courts to use this technology and to date it has not been installed. We are unaware if the translators required to use this equipment are being hired. In any case, the Dili District Court has an intermittent electricity supply and is not equipped with the generator required to ensure the functioning of the system. The Court of Appeal is presently being equipped with the latest audio visual technology, but again, we are unaware of any training on the usage of this equipment.

1.3 Research facilities

No provision has been made for the research facilities necessary for the judges and defenders to fulfil their functions. In the present environment, as there is no functioning court library, internet access is a minimum requirement for research. Judges and lawyers need internet access to consult the comparative and international jurisprudence relevant to their decisions. Yet neither the judges nor the public defenders have internet access. In order to research international jurisprudence, such as that from the International Criminal Tribunals for the Former Yugoslavia and Rwanda, they are reduced to using UN Internet cafes.

1.4 Capacity building of East Timorese lawyers

It is widely known that East Timor lacks enough lawyers for the required roles. There has been some training and a mentor system in operation at the court, however, international consultants have been rotating out and the public defenders are so busy that often they have difficulties finding the time for training.

Currently there are only 3 assisting international public defenders, some of whom have never practised in criminal law and procedure, and none of whom speak Indonesian or Tetum. The 9 East Timorese defenders who have been formally appointed to cover the whole country have little if any previous practical legal experience and have not received sufficient training, including in areas such as international human rights law.. Those lawyers working privately and in other local legal organizations face even greater difficulties.

On the other hand, the Serious Crimes prosecutors are mainly international staff with extensive experience.

The problems outlined above have serious implications for the rights of defendants to a fair trial, and by extension to developing public confidence in the new justice system. Areas of concern include:

- Equality before the law without discrimination
- Access to effective legal representation;
- The right to a trial within a reasonable time;
- The right to understand the nature of the charges against you and the conduct of the proceedings;
- Proper right of appeal given that there is no transcript of proceedings.

Vulnerable groups within the community, including women, illiterate people and youth are at particular risk. It is therefore essential that far greater priority be given to resourcing and capacity building in the administration of the Special Panel to properly prosecute those defendants that are within the jurisdiction.

1.5 Lack of monitoring and accountability within the justice system

At the moment the only independent reporting of what is occurring at the Special Panel comes from the Judicial System Monitoring Programme, an as yet unfunded project implemented by the East Timorese Jurists' Association (*ANMEFTIL*) and the East Timorese Institute for Reconstruction Monitoring and Analysis (*La' o Hamutuk.*). Several organisations have called for independent monitoring of the judicial system, including Amnesty International and the International Commission of Jurists. Monitoring and reporting is absolutely necessary to promote the observance of international human rights standards, and is required to identify where ongoing reform is needed.

2. Recent developments in Indonesia

An Ad Hoc Human Rights Court with the jurisdiction to try human rights violations has after long delays been established. However, it is only empowered to investigate cases of serious human rights violations that occurred in East Timor after the popular consultation on 30 August 1999. Unless the jurisdiction of the Court is widened, it will be unable to hear cases relating to the numerous incidents that occurred as part of the campaign of intimidation that preceded the ballot, as well as the many allegations of human rights violations since 1975.

Even if the jurisdiction is expanded, there are numerous procedural issues in the Indonesian human rights court legislation that may prejudice the right to a fair trial.

The outcomes of the trials of militia leader Eurico Guterres (home detention for unlawful possession of weapons) and the 6 men involved with the UNHCR killings in Atambua (sentences of 10-20 months), do not provide the international and East Timorese communities with confidence that justice will be forthcoming.

Lack of cooperation between Indonesia and UNTAET

Even if the Special Panel were able to effectively determine the serious crimes cases currently pending before it, there remains the problem that much of the necessary evidence and perpetrators of such crimes remains in Indonesia.

The Memorandum of Understanding between the Attorney General of the Republic of Indonesia and the Transitional Authority, signed by the Attorney General of the Republic of Indonesia and Sergio Vieira de Mello on 5 April 2000, states that both parties undertake to "transfer to each other all persons whom the competent authorities of the requesting Party are prosecuting for a criminal offence or whom these parties want for the purposes of serving a sentence" (section 9).

If the Memorandum of Understanding is adhered to all persons indicted for trial by the UNTAET Prosecutor for serious crimes could face trial before the Special Panel of the Dili District Court, unless their case had previously been tried in Indonesia.

So far, UNTAET has provided much material to the Indonesian authorities, but it appears that the Indonesian government has been reluctant to hand over evidence, witnesses or suspects to UNTAET, notwithstanding its undertaking to cooperate.

There are at present a number of cases pending before the Special Panel for Serious Crimes in East Timor. The vast majority of these stem from indictments of individuals presently in East Timor. Unless the MOU is adhered to the judges of the Special Panel may have no further cases to hear in a few months time.

3. International Tribunal

Given Indonesia's failure so far to prosecute those responsible for organising the violence and their reluctance to comply with the Memorandum of Understanding, calls are growing amongst the NGO community for the establishment of an International Tribunal to fulfil this role.

At the same time, it seems, international attention and commitment is declining, and the Security Council has as yet taken no action.

The people of East Timor are increasingly troubled and angered by the lack of action against those responsible for the most serious crimes. Families are waiting to have some finality to their grief. Over the past eighteen months, evidence is being misplaced, witnesses move, the perpetrators remain free to dispose of the evidence, and victims have to tell and retell their stories to each new police officer or investigator.

4. The Reception, Truth and Reconciliation Commission

The draft regulation to establish a Reception, Truth and Reconciliation Commission is presently under review by a Standing Committee within the National Council.

It is intended that the Commission operate for 2 years and deal with “criminal or non-criminal acts committed within the context of the political conflicts in East Timor between 25 April 1974 and 25 October 1999” (Part IV, Section 22.1). “Serious crimes” will continue to be dealt with in the courts. All other crimes will be addressed through community based mediated agreements with any perpetrators who voluntarily come forward to the Commission.

In part, the proposed Commission arises from an assessment by the UN that the formal justice system in East Timor will not be able to cope with the number of criminal matters that occurred during ‘Indonesian time’ and post ballot violence, such as every instance of looting or property damage.

Yet the NGO Forum has often been told by members of the East Timorese community that without justice, there can be no reconciliation. The new Commission should not be seen as a substitute for bringing those responsible for the violence to justice.

4. CONCLUSION

The NGO Forum is concerned about the slow progress of prosecutions in relation to internationally recognised crimes committed in East Timor, particularly the fact that none of the high level militia leaders or TNI officers have yet been tried

The Special Panel of the Dili District Court, as the domestic mechanism created to try serious crimes, is lacking the necessary resources and the administration and planning required to effectively deal with matters in a timely and procedurally fair manner.

It is clear that the government of Indonesia does not have the political will to:

- prosecute those responsible for the human rights violations in East Timor who are presently within their jurisdiction, nor to
- cooperate in any meaningful way with the Transitional Administration pursuant to the Memorandum of Understanding so that the Serious Crimes Unit may prosecute these people.

The people of East Timor have waited long enough. Over the past eighteen months, evidence is being misplaced, witnesses move, the perpetrators remain free to dispose of the evidence, and victims have to tell and retell their stories to each new police officer or investigator.

The political will and structures necessary in Indonesia are lacking, both in regards to their own jurisdiction and the necessary cooperation with UNTAET. The only remaining option for the prosecution of those responsible for human rights violations in East Timor currently residing Indonesia is to establish an International Ad Hoc Criminal Tribunal.

The tribunal should be established on recommendations from, and according to terms negotiated by the East Timorese people. We recognise that this issue is a complex one and that to date there has not been sufficiently informed debate on the topic. The conference should analyse the need for a tribunal and evaluate different models preferable for East Timor. Issues covered should include gender issues, jurisdiction of the tribunal, location, resources available, the role of the national justice system, participation of East Timorese judges in the trial chambers and the possible community impacts within both Indonesia and East Timor.

Therefore, the NGO Forum proposes that:

1. *International donors financially support an international conference on an International Ad Hoc Tribunal to be held in Dili as soon as is practical*
 - *That the conference be organised by the NGO Forum*
 - *That international speakers be invited to share their experiences of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda, some of whom are already working in East Timor*
 - *That the conference seek to reach a common position regarding the need or otherwise for an international tribunal*

2. *That the creation of a **functioning court administration be a priority** for the international donor community, which requires:*
 - *The funding and appointment of experienced administrative court staff who understand the role of court administration in a functioning judicial system.*
 - *The appointment of at least seven additional interpreters able to speak the working languages used by the Special Panel (English, Bahasa Indonesia and Tetum).*
 - *That bilateral donors second experienced public criminal defenders, preferably with Bahasa Indonesia skills, to the Public Defenders office to support the existing mentoring program.*
 - *The funding of the basic facilities necessary for the administration of justice, such as generators, photocopiers, tape recorders, filing facilities, internet access etc*

3. *The NGO Forum proposes that international donors **fund the Judicial System Monitoring Programme** and other such initiatives, involving Timorese participation, to monitor judicial proceedings in East Timor, in the Special Panel and other district court matters.*

Acknowledgements

**Executive Summary Report on the Investigation of human Rights Violations In East Timor, January 31, 2000
Report to the International Commission of Inquiry on East Timor To Secretary General, January 2000
Crimes Against Humanity in East Timor, January to October 1999, James Dunn
UNTAET slow to investigate crimes against humanity, TAPOL Bulletin No.161
March/April 2001*

*** Judicial System Monitoring programme Project Proposal Dili April 2000 www.jsmp.minihub.org,
info@jsmp.minihub.org*