

## **Guest Lecture Series of the Office of the Prosecutor**

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**“Accomplishments and limitations of one hybrid tribunal:  
experience at East Timor”**

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<sup>1</sup> Deputy General Prosecutor for Serious Crimes in East Timor. The views expressed in this paper are those of the author and do not necessarily reflect the views of the United Nations or by the relevant authorities in Timor Leste. Mr. Nicholas Koumjian is a Deputy General Prosecutor for Serious Crimes in East Timor, currently heading the Serious Crimes Unit, which while UN-staffed and funded, is part of the Timorese prosecution service. The mandate of the Serious Crimes Unit is to prosecute cases of genocide, war crimes, crimes against humanity, murder, torture, and sexual assaults committed between 1 January and 25 October 1999. Prior to joining the UN mission in East Timor, Mr. Koumjian was a trial attorney at the ICTY from 2000 to 2003. In particular, he worked on the case of the Prosecutor v. Milomir Stakic, to date, the only case at the ICTY to result in a life sentence. From 1981-2000, Mr. Koumjian was a Deputy District Attorney in Los Angeles County. He has also taught trial advocacy in Argentina, while serving as a member of the US Foreign Service, and worked as a volunteer on legal reform projects in Armenia, Slovakia, Bulgaria and Montenegro.

Hybrid tribunals are one of a variety of mechanisms that have been used in the struggle to achieve justice for victims of crimes committed in conflict situations. As with international tribunals, the principle objective is to hold accountable those responsible for crimes in order to deter future perpetrators, to satisfy the desire of victim communities to see justice done and to discourage acts of revenge perpetuating a cycle of violence. However, in certain situations a hybrid model may better achieve certain secondary objectives. The benefits of a hybrid court may include: the ability to better contribute to reconciliation of communities; the ability to help build capacity of domestic judicial systems and respect for the rule of law in the community that suffered the violence; and the lower cost of this mechanism as opposed to an international tribunal. This paper discusses the experience at one hybrid tribunal, the Special Panels for Serious Crimes in East Timor.

Hybrid courts are those with both international and domestic participation. Although each is quite different in the details of the court's organization, the tribunal in Sierra Leone, the proposed court to deal with the "killing fields" in Cambodia, the proposed national war crimes chambers in Bosnia and the Special Panels for Serious Crimes in East Timor are each examples of this hybrid solution, involving both domestic and international judicial actors in courts with jurisdiction over genocide, war crimes and crimes against humanity. My own experience with hybrid courts is limited to East Timor where I have been the Deputy General Prosecutor for Serious Crimes since October of last year. The following are my personal observations and opinions about the advantages and limitations of this model and are not intended to express the views of the United Nations or the government of East Timor. For those not familiar with the background to the establishment of the Special Panels, I will begin with a very brief description of the historical circumstances that led to the creation of the court.

The island of Timor lies northwest of Australia. The eastern and western half of the island had very different histories due to the fact that the western half of the island had always been colonized by the Dutch and was incorporated into Indonesia when that state gained independence in 1949.

Portugal colonized the eastern half of the island in the sixteenth century and continued to rule after the Dutch had withdrawn from the archipelago. In 1975 when Portugal was preparing to give independence to its colonies and various groups within East Timor were fighting for political control, Indonesia invaded the island and annexed the territory.

Like much in history, the violence in Timor was the result of an unexpected and seemingly disconnected sequence of events. Indonesia's annexation of East Timor had been recognized only by Australia and was the subject of international condemnation throughout the 24-year occupation. Armed resistance to the occupation had been brutally suppressed by Indonesian armed forces but never completely wiped out. The 1997 financial crisis in Asia, which started in Thailand, was most harshly felt in Indonesia and led to the eventual resignation of the long-time dictator Suharto. The new President, Habibie, in a move that surprised even his own cabinet, announced that he would allow the East Timorese to vote on acceptance of autonomy within Indonesia and if they rejected this arrangement, the Timorese would be free to form their own state. After Habibie's announcement, the United Nations, Portugal and Indonesia negotiated an agreement setting out the details of the "popular consultation." The United Nations would be allowed to organize the referendum, send election observers, military observers and a limited number of UN police. Indonesia agreed that security during the election period would be the sole responsibility of its own police.

In the lead-up to the election, the Indonesian army (or "TNI") organized and funded pro-integration militias and provided them with arms and training. These militias were encouraged to intimidate the population through acts and threats of violence in order to convince the population to support integration over independence. The TNI claimed the militias were outside of their control. However, observers noted that the Indonesian security forces allowed the militias to walk around unhindered bearing military weapons despite the fact that possession of a gun was a serious offence under Indonesian law. Many of the militias attacks seemed to be coordinated with police or army forces who either withdrew just before the attack, stood by while the attacks took place, or actively assisted in attacks on unarmed civilians. Further evidence of military control over the militia has come to light through the investigations and prosecutions in both Indonesia and East Timor discussed below.

Despite the intimidation, the great majority of the East Timorese population registered and voted in the referendum with 78.5% supporting independence. Following the announcement of the results, the militias went on a violent rampage often assisted by military forces, emptying the cities by deporting a third of the population, and destroying approximately three-quarters of all homes and other structures in East Timor. In September, bowing to international pressure, Indonesia agreed to allow an international force to enter the country. The international force, which was much smaller than the security forces that Indonesia had stationed in the territory, quickly ended the violence and established security. The United Nations installed a transitional administration, which governed East Timor until independence in May 2002.

In addition to providing the basic necessities of life and government structure, the United Nations Transitional Administration for East Timor (UNTAET) attempted to provide for a judicial mechanism to deal with the violence surrounding the referendum by establishing the Special Panels for Serious Crimes within the Timorese justice system. The UN was faced with two practical problems. First, there were few trained lawyers in East Timor at the time of independence and almost none who had any experience in court litigation. Second, the Indonesian military and security forces that were responsible for orchestrating the violence had returned to Indonesia and they could not be brought to justice without the cooperation of the Indonesian government. Even most of the ethnic Timorese militia who perpetrated crimes had fled across the border and were living in West Timor.

To deal with the first problem, the UN staffed the serious crimes process with experienced lawyers from a variety of judicial systems around the world. To address the second issue, the transitional administration signed a memorandum of understanding with Indonesia on cooperation in legal, judicial and human rights related matters in which both parties pledged to assist each other in investigations and arrests of fugitives. However, the agreement has never been ratified by the Indonesian parliament and the current Jakarta government considers it invalid.

Regulations establishing the court gave the Special Panels jurisdiction over war crimes, genocide, crimes against humanity and also murder, torture and sexual offences committed between 1 January 1999 and 25 October 1999.<sup>2</sup> The rules of procedure established a civil law

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<sup>2</sup> UNTAET regulation 2000/15 provided for universal jurisdiction over genocide, war crimes and crimes against humanity. However, Article 163 of the East Timorese constitution, effective as of independence on 20 May 2000, implies that the Special Panels jurisdiction is limited to 1999 cases.

system but with many provisions in the rules of procedure that come from an adversarial rather than inquisitorial tradition. Trials and appeals are heard by panels of three judges, which by law must include a combination of two international and one national judge.

To date, the Serious Crimes prosecution unit has issued 81 indictments charging 381 individuals. While most of the indictments include charges of crimes against humanity, neither war crimes nor genocide have been charged in any indictments. War crimes charges were not brought because of lack of evidence to prove the element that the crimes took place during an “armed conflict.” All of the evidence indicates that the pro-independence forces remained largely passive and the violence was solely directed against civilian targets. To date, 58 individuals have had their cases completed through the trial stage with 55 convicted of at least some crime although in many cases much reduced from the crimes charged and three complete acquittals. Twenty-nine individuals in 11 cases are currently in trial or pending trial in custody or on conditional release. One additional case involving one accused in custody will be filed shortly. The remaining indictees have not been arrested and are believed to be outside East Timor, most likely in Indonesia. Indonesia has no extradition treaty with East Timor and refuses to enforce the arrest warrants issued by the judges of the Special Panels. In Resolution 1543 passed by the Security Council earlier this year, the Serious Crimes Unit was instructed to complete all investigations by November and all trials as soon as practical but no later than 20 May 2005, the end date for the current UN peacekeeping mission in the country.

Assuming that the trials of all those within the jurisdiction are completed or otherwise resolved, the Serious Crimes Process will have completed the cases of 88 individuals in the five years of its existence, a number that compares very favorably to the statistics for the ICTY and ICTR but which involves much lower-level perpetrators than those much better-funded international tribunals. Indictments against almost 300 individuals who have not been arrested and are believed to be outside of the country will remain outstanding. It is not yet clear what will happen to those indictments. Many had envisioned that the East Timorese would prosecute cases against any indictees who return to the territory before their own domestic courts. However, the law as it currently stands requires that all cases within the mandate of the Serious Crimes process be heard by panels that include two international judges. The UN peacekeeping mission in East Timor is expected to end on 20 May 2005 and there are currently no plans to continue funding international judges beyond that date. Changing the law to remove this requirement of international judges would require a quite simple amendment of the law. However, no steps have yet been taken by the government in order to accomplish this change and such a policy may run counter to the government’s stated position that justice for crimes from 1999 is the responsibility of the United Nations.

The situation is further complicated by the fact that under international pressure the Indonesian government passed legislation in November 2000 establishing an Ad Hoc Human Rights Court with jurisdiction over crimes committed in East Timor in 1999 and a couple of other infamous incidents of police and military violence within Indonesia.<sup>3</sup> Eighteen individuals were charged including several high-ranking officers but excluding General Wiranto, the commander of all Indonesian military and police forces in 1999. The trials were strongly criticized by international observers for the limited charges, the prosecution’s failure to call logical witnesses and use available documentary evidence and for the atmosphere of

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<sup>3</sup> Indonesian Law 26/2000. This legislation followed the public recommendation for creation of an international court by the UN-appointed International Commission of Inquiry on East Timor.

intimidation within the courtroom where military officers in uniform were frequently present. Six of the eighteen charged were convicted at trial, including General Damiri, the regional military commander who was given a three-year sentence even though the prosecution had argued for an acquittal. However, at the appellate court, the convictions of all of the Indonesian army and police officers were overturned. Currently, only two of the original 18 accused in the Jakarta process stand convicted: Abilio Soares, the former governor of the province and Eurico Guterres, a militia commander, both ethnic East Timorese.

The accomplishments of the serious crimes process in East Timor cannot be measured simply by the number of indictments issued or cases processed through trial. In my view the Special Panels have made a significant contribution towards the goal of establishing respect for the rule of law in East Timor and to building the capacity of the domestic system. When the Indonesian government withdrew from East Timor, they took with them all of those involved in the territory's legal system. While perhaps 50 to 100 East Timorese had a legal education, there were very few East Timorese with experience as judges, prosecutors or defense counsel. Moreover, the population had little respect for the legal system from Indonesian times, which was widely viewed as corrupt.

East Timorese judges on the special panels have particularly benefited from the experience gained by working closely with their international colleagues. Thanks to funding from the Norwegian government, the prosecution has hired and worked with trainee prosecutors, IT personnel, evidence custodians, and case managers and I believe the East Timorese justice system will benefit for many years from the skills these individuals developed working with their international colleagues. .

However, it is undoubtedly true that the Serious Crimes Process has not been able to meet all the expectations of those that established the panels, the international community and especially the Timorese population. The decision by the Indonesian government to renounce the agreement on mutual cooperation and to withhold any form of assistance to the serious crimes process has meant that the great majority of indictees are beyond the reach of the court, including those at the top level of the army, police and militia command who organized, condoned or failed to act to prevent the violence. Had Indonesia had abided by the agreement on cooperation, the results of the work of the Special Panels would undoubtedly have been very different. But without voluntary cooperation from Indonesia, the Special Panels have always been a flawed solution with no realistic chance of bringing to justice those high-level perpetrators most responsible for the crimes. .

International tribunals established by the Security Council under Chapter VII of the UN charter include enforcement provisions that require all UN member states to cooperate with the orders of the court, such as an arrest warrant. Member states are under a legal obligation that requires cooperation and in the event of defiance, the Security Council could impose diplomatic or economic sanctions. Moreover, in the case of failed cooperation of the states of the Former Yugoslavia with the ICTY, we have seen that the most effective pressure has come from third-party states and organizations, which have conditioned aid and tied membership in organizations such as the EU and NATO to the states demonstrating compliance with what is widely accepted as their legal obligation to enforce the court's orders.

However, the statute of the Special Panels for Serious Crimes was set up by regulations of the UN transitional administration (UNTAET), rather than through a UN Security Council

resolution with Chapter Seven authority. The court sits within the national court system of East Timor. East Timor has no extradition treaty with Indonesia (or any other state to date) and thus Indonesia is able to argue that it is not obligated by international law to extradite its citizens to the courts of another state with which it has no extradition agreement.

In my view, a hybrid tribunal, which includes professionals from the national government, is appropriate for dealing with a conflict that is largely civil in nature, such as the case of Cambodia and Sierra Leone, but predictably ineffective in dealing with international conflicts where perpetrators came from outside of the country in which the hybrid court is located. The Special Panels for Serious Crimes has successfully litigated cases involving the “civil” nature of the conflict in East Timor, but have been powerless to bring to justice those members of the police and armed forces and highest-level militia commanders who organized the violence, because all of these accused are residing in Indonesia which refuses to cooperate.

Moreover, because the serious crimes process is within the national court system, to a considerable degree it is dependent on the cooperation of the East Timorese government. Arrest warrants issued by the Special Panel judges cannot be forwarded to Indonesia, third-party states or INTERPOL without action by the Timorese national authorities. East Timor is one of the poorest countries in the world. It shares a long land border with Indonesia, a country with 200 times its population. The government is naturally very concerned to establish good relations with the giant neighbor with whom it will have to live side-by-side long after the United Nations has moved on to the next trouble spot. Some Timorese government officials have stated that the government’s present and future relationship with Indonesia is a much higher priority than justice for past crimes.

With the May 2005 Security Council deadline for conclusion of the serious crimes process in East Timor looming, the international community is faced with the difficult issues of what to do with the outstanding indictments and the failure of either the serious crimes or Jakarta process to bring to justice those most responsible for the 1999 violence. Some have suggested a formal review of the effectiveness of both of these mechanisms. Several options for the pursuit of justice after the end of the current serious crimes process have been proposed, ranging from various kinds of international tribunals to truth commissions. All of these options have difficulties. I offer no solution but only three comments.

First, it would establish a very bad precedent were the international community to abandon the pursuit of accountability for crimes in East Timor based on the lack of approval of these efforts by the East Timorese government. Given the geo-political vulnerability of the East Timorese to pressure from Indonesia, their government cannot be expected to ask for a mechanism opposed by the Indonesian authorities.

Second, the effect of impunity is not limited to frustrating the desire of the East Timorese people for justice. Whenever and wherever crimes against humanity are allowed to go unpunished, the deterrent effect of international criminal law is diminished.

Finally, there is no statute of limitations for crimes against humanity. The struggle for justice is most often a marathon rather than a sprint and the chances of success often depend upon the extraordinary dedication and endurance of those in pursuit of the perpetrators.