

Impunity in Timor-Leste: Can the Serious Crimes Investigation Team Make a Difference?

June 2010



UNMIT Forensic Scientists and Timor-Leste National
Police exhume human remains and evidence of possible
crimes on a beach.

07 May 2008
Dili, Timor-Leste

UN Photo/Martine Perret

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About ICTJ

The International Center for Transitional Justice works to redress and prevent the most severe violations of human rights by confronting legacies of mass abuse. ICTJ seeks holistic solutions to promote accountability and create just and peaceful societies. To learn more, visit www.ictj.org.

About JSMP

The Judicial System Monitoring Programme (JSMP) is a non-governmental organization which works in the area of justice and human rights. It was established in 2001 in order to strengthen the judicial system in Timor-Leste.

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LIST OF ACRONYMS

CAVR	Commission for Reception, Truth and Reconciliation
COE	Commission of Experts
CTF	Commission of Truth and Friendship
DLU	Defense Lawyers Unit
DPG	Deputy Prosecutor-General
INTERFET	UN International Force in East Timor
MOU	Memorandum of Understanding
OPG	Office of the Prosecutor-General of Timor-Leste
POLRI	Indonesian National Police (Kepolisian Negara Republik Indonesia)
SCIT	Serious Crimes Investigation Team
SCU	Serious Crimes Unit
SPSC	Special Panels for Serious Crimes
TNI	Indonesian National Military (Tentara Nasional Indonesia)
UN	United Nations
UNDP	United Nations Development Programme
UNMISSET	United Nations Mission of Support in East Timor
UNMIT	United Nations Integrated Mission in Timor-Leste
UNTAET	UN Transitional Administration in East Timor
UNPOL	UN Police
UN OHCHR	UN Office for the High Commissioner for Human Rights

Executive Summary

In August 2006 the United Nations Security Council mandated the establishment of the Serious Crimes Investigation Team (SCIT) as an extension of the previous “serious crimes” process, under the UN Integrated Mission in Timor-Leste (UNMIT). Early in 2008, the team began assisting the country’s Office of the Prosecutor General (OPG) with investigations into outstanding cases of serious human rights violations committed in 1999. The mandate of SCIT is to investigate cases and submit the resulting file to the OPG with a recommendation that the case should either be closed or proceed to prosecution.

The International Center for Transitional Justice (ICTJ) and the Judicial System Monitoring Programme (JSMP) conducted a study on SCIT’s performance since it was established. The main findings of this study were:

- SCIT has suffered from insufficient resources for both investigations and outreach, which has forced the unit to depend on its own initiative to secure additional outside support. Despite this obstacle, SCIT has completed a number of investigations and has recommended some files for prosecution.
- Although the UN and the Timorese government concluded an agreement providing for coordination between the team and the OPG, substantive cooperation between prosecutors and SCIT’s legal and investigative staff thus far has been limited. SCIT has therefore had minimal, if any, impact on the low level of capacity within the OPG. The recent serious crimes trial of Domingos Mau Buti in early 2010 has shown that this limited capacity may not be a problem if prosecutions proceed while SCIT is still functioning and able to support prosecutors during trials. However, SCIT is expected to conclude its work and cease operation in 2011 or 2012. It is likely that few serious crimes cases will be prosecuted before then, due to the large number of indictees who remain across the border in Indonesia outside the court’s jurisdiction and the current political climate in Timor-Leste. The OPG has not yet taken any action on cases that the team has recommended for prosecution.
- When the Security Council created SCIT, the Timorese national justice sector not only lacked the capacity to investigate serious crimes, but also had very limited expertise to prosecute, defend, and adjudicate these cases. These weaknesses remain. This means that even if serious crimes cases are prosecuted on the basis of SCIT recommendations, the ensuing trials will struggle to fulfill international fair trial standards.

- The current political leadership in Timor-Leste and Indonesia are not supportive of accountability and justice for past crimes committed in Timor, favoring an approach presented as “reconciliation,” between the neighboring countries. This presents the greatest obstacle to SCIT’s investigations proceeding to trial. In this climate and in the absence of international support for the national justice sector with respect to serious crimes prosecutions, SCIT alone cannot make a significant contribution to delivering accountability for human rights violations committed in 1999.

SCIT may represent the last chance to gather evidence for cases involving crimes against humanity that were committed more than ten years ago. If these crimes are not investigated, there are serious risks that the available evidence and witness testimony will deteriorate to a point where they are no longer reliable or useful. International experience is increasingly demonstrating that political considerations that block prosecution initiatives after periods of mass violations often change over time. For this reason, SCIT should continue with its important work to investigate and preserve evidence of the mass crimes committed in Timor-Leste while it is still available.

Recommendations:

To the UN Mission in Timor-Leste:

- Facilitate negotiations aimed at producing a more detailed agreement between SCIT and the OGP. The new agreement should provide for specific mechanisms designed to increase the cooperation between SCIT’s legal and investigative staff and national prosecutors.
- Increase SCIT’s resources in order to build community support for its work and maximize skills transfer. In particular:
 - Reinforce support for SCIT public information activities and allocate national outreach staff to work alongside investigators in Dili and the Baucau, Maliana, and Ermera regional offices to provide information to victims’ family members, the local community, and authorities about the serious crimes process. These staff members should also be trained to be sensitive to victims’ situations and to provide moral support to them and their families throughout exhumations or other investigatory phases.
 - Delegate staff within the mission to work with the Center for Judicial Training to further develop its training curriculum on international crimes and facilitate similar trainings for practicing local investigators, court actors, and private lawyers.¹
 - Increase the number of SCIT national investigators, either national staff or national police, and consider increasing the number of legal officers if required by the increased pace of investigations.*

¹ As recommended in *The Justice System of Timor-Leste: An independent comprehensive needs assessment*, UNMIT Oct. 13, 2009, 23, para. 14.

* When research for this report was being finalized, the SCIT was in the process of recruiting for several national investigator posts. In June 2010, the SCIT was allocated an additional five national investigator posts, bringing the total number of national investigator posts to 10. Once these additional posts are filled, there will be 12 investigation teams in operation. Therefore the recommendation that UNMIT increase the number of national investigator posts is no longer valid.

To the Security Council:

- Reaffirm the stated commitment to pursue justice for the mass crimes committed in Timor-Leste by continuing to call for accountability for such crimes in Security Council Resolutions.
- At the end of SCIT's mandate, the Security Council should undertake an assessment that includes an evaluation of the degree to which the recommendations of the 2005 UN Commission of Experts (COE) have been implemented. This should include revisiting the recommendation that an international criminal tribunal should be established if significant progress on achieving justice and accountability has not been achieved.

To Donors:

- The United Nations Development Programme (UNDP) and bilateral donors should coordinate closely with SCIT to ensure that capacity-building efforts include attention to the skills necessary to deal with international crimes. Timor-Leste's history dictates that there will be a continuing need for the justice sector to deal with these extraordinary past crimes for years to come. Donor assistance should include developing the capacity of the Center for Judicial Training to deliver training on international criminal law.

To the Timor-Leste Prosecutor General:

- Proactively seek opportunities to cooperate more closely with SCIT with a view to maximize the opportunities for national prosecutors to develop their skills to prosecute serious crimes before the closure of SCIT. Specifically, the prosecutor general should assign a national prosecutor to work full-time with SCIT.
- Publicly affirm support for the work of SCIT.
- Issue indictments on the basis of SCIT investigations and recommendations, and seek renewed cooperation and extradition from Indonesia of those indictees who are suspected to be in Indonesian territory. This will alleviate current community perceptions that the justice system is not independent and subject to pressure from the government.

To the Government of Timor-Leste:

- Respect the independence of the judiciary and allow it to process serious crimes cases in accordance with the law.

To Indonesia:

- Comply with its international legal obligation to promote accountability for international crimes by providing full cooperation with requests by Timorese authorities for legal assistance in prosecuting serious crimes, including cooperation on the extradition of suspects.
- Implement the recommendations of the 2005 UN COE in relation to prosecution of those responsible for serious crimes in Timor-Leste.

1. Introduction

From 2000 to 2005, mechanisms were in place in Timor-Leste for investigating, indicting, and prosecuting those responsible for serious human rights violations perpetrated in 1999. This process was conducted primarily by a specialized, internationally supported investigation and prosecution unit called the Serious Crimes Unit (SCU), and special groups of judges, referred to as the Special Panels for Serious Crimes (SPSC). However, the process ended prematurely in May 2005 before all the cases had been investigated and after only a small fraction had been brought to trial. The decision to end this process reflected a lack of political commitment on the part of the governments of Indonesia and Timor-Leste, as well as the indifference of the UN and the international community.

Mainly due to international pressure on the UN, the process was partially revived in early 2008 when SCIT resumed investigations.

This report provides an overview of the current state of the serious crimes process in Timor-Leste. It describes the background and outlines the institutional structure of the current process, along with a brief assessment of the work SCIT has undertaken so far. It discusses the major challenges, namely insufficient resources, poor coordination between SCIT and OPG, the capacity of the Timorese justice sector, and, above all, the difficult political climate in which the partially restored serious crimes process is operating. The process in its current form has only limited potential to leave a positive legacy in Timor-Leste, and the report recommends steps that would enhance the team's effectiveness as an investigative unit and as the potential catalyst for a more comprehensive accountability mechanism.

2. Background

Historical Background

The Democratic Republic of Timor-Leste (also known as East Timor) is a former colony of Portugal. In 1960, the UN declared it a non-self-governing territory with the right to self-determination, as defined in Chapter XI of the UN Charter.² However the self-determination process only began in 1974 after the overthrow of Portugal's authoritarian government. A number of political parties then formed in Portuguese Timor. But tensions between them, fuelled by Indonesia, eventually escalated into an armed conflict and caused an estimated 1,500 to 3,000 fatalities.³ Indonesian President Suharto presented the situation on his country's borders as a threat to its security and launched a full-scale invasion of Timor-Leste in December 1975. In July 1976 Indonesia took steps to formally annex Timor-Leste as its 27th province.

Although several countries did recognize the takeover, either de facto or de jure, the UN never did. Indonesia occupied Timor-Leste from 1975 to 1999, and despite the input of massive resources, failed to destroy the Timorese political and armed resistance movement.

The 24-year occupation was characterized by massive human rights violations. Some estimate that around 18,600 civilians were killed or disappeared during those years and that at least 84,200 more died of starvation or illness as a direct result of the conflict; most of these deaths were the predictable outcome of Indonesian counter-insurgency policies.⁴ Other human rights violations, including forced displacement, arbitrary detention, torture, and sexual offenses, were widespread.⁵

The fall of the Suharto regime in Indonesia in 1998 intensified the independence activity in Timor-Leste. This ultimately prompted the UN, Portugal, and Indonesia to hold a referendum, referred to as a Popular Consultation, in which the Timorese people would decide between integration with Indonesia and independence. While the UN would facilitate the logistics of the ballot, Indonesian security forces would maintain peace and security

2 General Assembly Resolution 1542 (XV) on "Transmission of Information under Article 73e of the Charter," Dec. 15, 1960, para. 1(i), available at www.un.org/documents/ga/res/15/ares15.htm.

3 *Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste* (CAVR), Part 7.2, "Unlawful Killings and Enforced Disappearances," 8, para. 24.

4 *Ibid.*, 294, para. 887, and part 7.3, "Forced Displacement and Famine," 143, para. 502.

5 *Ibid.*, part 8.2 and 8.2.1 A, "The State of Indonesia and the Indonesian Security Forces," and part 8.4, "Responsibility and Accountability of the Indonesian Security Forces."

during the period surrounding the consultation. However, in the months leading up to the event, the security forces—composed of the military (TNI), the police (POLRI), and the civil administration in Timor-Leste—orchestrated a campaign of violence against those perceived to be pro-independence, primarily through TNI-supported Timorese militias.⁶

Nonetheless, the result of the ballot on August 30, 1999, was an overwhelming 78 percent vote in favor of independence. In the days that followed, the Indonesian forces and their proxy Timorese militias embarked on a retaliatory, scorched-earth campaign during which an estimated 1,400 people were killed, at least 400,000 people—or about 50 percent of the population—were displaced (many forcibly deported to Indonesian West Timor), and between 60 and 80 percent of all personal and public property was destroyed.⁷ The violence ended after the UN International Force in East Timor (INTERFET) arrived on October 20, 1999, helping to force the last remaining Indonesian forces out of the territory.⁸

On October 25, 1999, the UN Security Council passed a resolution placing Timor-Leste under the control of the UN Transitional Administration in East Timor (UNTAET), which was charged with preparing the territory for independence.⁹ UNTAET was given full legislative and executive powers, and its mandate included the task of developing a basic state infrastructure, including government institutions, and establishing a justice system. Although a UN International Commission of Inquiry in January 2000 recommended establishing an international investigative body and tribunal to pursue criminal accountability for the human rights violations that had occurred before Indonesia left, it was ultimately decided, on the basis of assurances from Indonesia, that it intended to fully pursue justice, that prosecutions and trials could proceed on a national level in Indonesia and Timor-Leste.¹⁰ To this end, an Ad Hoc Human Rights Court was established in Jakarta with limited jurisdiction to try specified cases of international crimes committed in Timor-Leste in 1999. UNTAET also proceeded to create a hybrid mechanism, which included both international and national personnel, for prosecuting people charged with so-called “serious crimes.” To facilitate prosecutions in both Indonesia and Timor-Leste, UNTAET and Indonesia signed a Memorandum of Understanding (MOU) that provided a range of mutual assistance measures and required both parties to enforce arrest warrants and transfer people requested for the purposes of prosecution.¹¹

6 *Report of the International Commission of Inquiry on East Timor to the Secretary-General*, UN OHCHR, UN Doc. A/54/726, S/2000/59, January 2000, para. 136.

7 *Ibid.*, paras. 20, 38, 71, and 130.

8 The Security Council authorized INTERFET under Chap. VII of the UN Charter. See Security Council Resolution 1264, 1999, Sept. 15, 1999.

9 UNTAET was created by Security Council Resolution 1272, UN Doc. S/RES/1272, Oct. 25, 1999.

10 UN OHCHR, *supra* note 6, paras. 152-53. See Jan. 26, 2000, letter from Indonesia’s foreign affairs minister to the Secretary-General, UN Doc. A/54/727 and S/2000/65, Jan. 31, 2000; identical letters dated Jan. 31, 2000, from the Secretary-General to the presidents of the General Assembly and the Security Council, and the chair of the Commission of Human Rights, UN Doc. A/54/726 and S/2000/59; and Feb. 18, 2000, letter from the Security Council president to the Secretary-General, UN Doc. S/2000/137, Feb. 21, 2000.

11 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, section. 1.2, s. 2 (c) and s. 9.

The Serious Crimes Process, 2000–2005

In 2000 UNTAET established district courts and an appellate court.¹² The Dili District Court was given exclusive first instance jurisdiction to address genocide, war crimes, crimes against humanity, and torture committed at any time, and murder and sexual offenses committed between January 1 and October 25, 1999 (hereafter collectively referred to as “serious crimes”).¹³

UNTAET created special panels within the Dili District Court and the Court of Appeal for trying serious crimes, each consisting of two international judges and one national judge.¹⁴ UNTAET simultaneously created a prosecution service for Timor-Leste, which included a UN-staffed SCU with exclusive authority to investigate and prosecute serious crimes.¹⁵

Initially, UNTAET provided significant resources for prosecution but did not make any provisions for the legal defense of accused persons. On May 20, 2002, Timor-Leste became independent, and the transitional administration, UNTAET, was replaced by a UN Mission of Support in East Timor (UNMISSET).¹⁶ In September 2002, UNMISSET created a small Defense Lawyers Unit (DLU) composed of international staff that provided defense services to defendants before the special panels. The SCU continued to operate within the state’s prosecution service, and the new constitution of Timor-Leste provided that the special panels would continue to operate as long as strictly necessary to conclude the cases under investigation.¹⁷

The SCU’s work focused on the investigation and prosecution of cases of crimes against humanity perpetrated in 1999 that involved murders committed during the 1999 violence. The unit did not investigate and prosecute the large number of crimes under international humanitarian and human rights law that occurred between 1975 and 1998. Nor did it pay much attention to cases of rape, torture, and other crimes committed in 1999 that could constitute crimes against humanity, except where they were associated with murders.¹⁸

The SCU was significantly downsized in 2003, ceased investigations in November 2004, and closed the following May. By then, it had indicted 391 people, a significant number of whom were high-ranking members of the Indonesian security forces.¹⁹ While 84 defendants were convicted, three were acquitted in trials before the special panels and more than 300 indictees remained at large, almost all of them in Indonesia.²⁰ However, by the time the SCU shut down, it had not fulfilled its Security Council mandate to complete all investigations by November 2004 and trials by the following May.²¹

12 UNTAET Regulation 2000/11, March 6, 2000. See in particular sections 7 and 14.

13 Sections 10.1 and 10.2, UNTAET Regulation 2000/11, March 6, 2000, and section 2, UNTAET Regulation 2000/15, June 6, 2000.

14 Sections 1.1, 1.2, 22.1, and 22.2, UNTAET Regulation 2000/15, June 6, 2000.

15 Section 14.1, UNTAET Regulation 2000/16, June 6, 2000.

16 UNMISSET was established by Security Council Resolution 1410, May 17, 2002.

17 *Ibid.*, para. 3 (a), and Constitution of the Democratic Republic of Timor-Leste, sSECTION?. 163 (1).

18 The SCU began investigations into a number of major incidents that had occurred before 1998–’99, including the killing of five foreign journalists at Balibo in October 1975, the killing of an estimated 200 people in and around Kraras, Viqueque District, in 1983, and the Santa Cruz massacre of 1991. Yet the SCU abandoned them at an early stage. See Megan Hirst and Howard Varney, *Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor*, ICTJ, June 2005, 7-8, www.ictj.org.

19 *Report of the Secretary-General on Justice and Reconciliation for Timor-Leste*, UN Doc. S/2006/580, July 26, 2006, para. 9; information provided by SCIT.

20 *Ibid.*

21 Security Council Resolution 1543, May 14, 2004, para. 8.

There were many shortcomings with the 2000–2005 serious crimes process. The SCU lacked a coherent prosecutorial strategy for the early part of its tenure, the special panels lacked basic facilities such as translation and transcription, the jurisprudence of the special panels was often weak and in some cases deeply flawed, adequate defense representation was lacking, and outreach to the community, including victims and witnesses, was inadequate.²²

The biggest obstacle the serious crimes process faced was a lack of commitment to justice on the part of the Indonesian government. Parallel trials before the Ad Hoc Human Rights Court in Jakarta have been widely denounced as a sham: all 18 people indicted were eventually acquitted.²³ Despite the MOU between Indonesia and UNTAET, Indonesia consistently failed to cooperate with the serious crimes process.²⁴ The result has been that the vast majority of those who have been indicted—including the high-ranking Indonesian military figures with the greatest responsibility for the violations that occurred in Timor-Leste—continue to enjoy impunity in Indonesia.

Making the process more difficult, the UN and the international community failed to provide sufficient political support for the serious crimes process. Timorese political leaders decided to fall in line with the Indonesian position in order to avoid endangering Timor-Leste's politically and economically sensitive relationship with its much larger, more powerful neighbor.



UNMIT Forensic Anthropologist examines the human bones and skull found on a beach.
16 May 2008
Dili, Timor-Leste

UN Photo/Martine Perret

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- 22 For the purposes of this report, the term “victims” includes the victims of serious crimes and their family members. Both the work of the SCU and the trials conducted before the special panels have been described and the subject of analysis in earlier ICTJ reports. See Caitlin Reiger and Marieke Wierda, *The Serious Crimes Process in Timor-Leste: In Retrospect*, March 2006, and *Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor*, available at www.ictj.org. A comprehensive critique of the work of the SCU and the special panels, including of the jurisprudence of the panels, can also be found in Cohen, David, *Indifference and Accountability: the United Nations and the Politics of International Justice in East Timor* (East-West Center, June 2006).
- 23 See “Justice Denied for East Timor,” Human Rights Watch, available at www.hrw.org/backgrounders/asia/timor/etimor1202bg.htm, and “Indonesia/ Timor-Leste: International Responsibility for Justice,” Amnesty International, April 14, 2003, available at www.amnesty.org/en/library/info/ASA03/001/2003. For a detailed critique of the ad hoc trials, see Cohen, David “Intended to Fail: The Trials Before the Ad Hoc Human Rights Court in Jakarta,” ICTJ, 2003.
- 24 The Indonesian state's position has been that the MOU was not ratified by its parliament and is therefore not binding. Indonesian authorities 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.

The lack of political support for the serious crimes process among the Timorese leadership came into sharp relief during the events that followed the issuance of the SCU's indictment on February 24, 2003, against Gen. Wiranto (Indonesia's former defense minister and commander of the armed forces during the commission of the 1999 Timor atrocities), six other high-ranking TNI officers, and a former governor of Timor-Leste.²⁵ The Indonesian government reacted to the indictment by attacking the UN for bringing what it described as a politically motivated case. UNMISSET declined to support the SCU, declaring 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.²⁶

The UN's position shocked Timorese leaders who felt that the responsibility for bringing those who had committed the mass crimes to justice should rest with the international community.²⁷ 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.²⁸ The UN's distancing itself from its own work also had a devastating effect on its staff, many of whom had worked long hours for more than a year to investigate and prepare the indictment, expecting it to be lauded as a major achievement which was undertaken in direct fulfillment of a UN Security Council mandate.

From this point on, the conciliatory orientation of the Timorese government toward Indonesia increased and directly undermined the serious crimes process. Like the hundreds of others who were indicted for crimes against humanity, Gen. Wiranto has not been brought to trial. In fact he continued to pursue a high-profile political career in Indonesia and was a candidate in the 2009 presidential elections.²⁹

With the closure of the SCU in May 2005, the Timor-Leste justice system lost the international assistance, in terms of both expertise and funding, that was necessary to prosecute serious crimes. The process essentially ground to a halt as the UN scaled down its presence in the country after more than five years of sustained state-building. The few serious crimes cases that have been prosecuted since the closure have demonstrated the national justice system's lack of capacity to handle such cases.³⁰

The operation of the serious crimes process from 2000 to 2005 had resulted in what appeared to be an impressive number of investigations and prosecutions in a short period of time. However, the SCU only completed investigations and issued indictments for less than

25 The indictment is available at <http://socrates.berkeley.edu/~warcrime/ET-Docs/MP-SCU%20Indictments/2003/05-2003%20Wiranto%20et%20al%20Indictment.pdf>.

26 "Timor-Leste, Not UN, Indicts Indonesian General for War Crimes," *UN News Center*, Feb. 26, 2003.

27 Jolliffe, Jill, "Timor PM Slams UN on War Criminals," *Asia Times*, May 15, 2003.

28 Moestafa, Berni K., "E. Timor Denies Indicting RI Generals," *Jakarta Post*, Feb. 28, 2003.

29 After Wiranto's failed run for the presidency in 2004, he was defeated as Jusuf Kalla's running mate in the July 2009 presidential election.

30 Since the SCU closed, two serious crimes cases have been tried in the Timorese courts: the cases of Manuel Maia and Alberto da Silva Mali. While the SCU indicted the defendant in the former case, the latter was investigated by Timorese authorities after it shut down. Both cases involved crimes against humanity and were tried in a manner that was deeply flawed, illustrating the lack of capacity in the Timorese justice sector to handle cases of this complexity. In addition to these two cases, the Timorese court convicted Domingos Mau Buti for crimes against humanity on March 2010, sentencing him to 16 years imprisonment. The SCU indicted the defendant in 2004, and police captured him in December 2008 as he crossed the border from Indonesian West Timor. JSMP's summary of the case in Indonesian is available at <http://easttimorlegal.blogspot.com/2010/04/ringkasan-persidangan-kasus-tindak.html>. See also section titled "Enduring Weakness of the National Justice Sector" below.

half of the 1,339 reported murders from 1999.³¹ The remaining 655 murders comprised 469 cases that had not been investigated and 186 in which investigations had been completed but indictments had not been issued.³² Moreover, many other serious crimes that were perpetrated in 1999—such as torture and sexual offenses—remain uninvestigated, as do the vast number of crimes under international law that had been committed during the Indonesian occupation.

Antecedents to the Creation of SCIT

Around the time the SCU closed, a UN-appointed COE submitted a report to the UN Secretary-General reviewing the prosecution of serious violations of human rights in Timor-Leste.³³ The COE found that the prosecutions before the Ad Hoc Human Rights Court in Jakarta were manifestly deficient and that the serious crimes process had not yet achieved full accountability for those who bore the greatest responsibility for serious violations of human rights committed in Timor-Leste in 1999.³⁴ The experts noted that it was not practical for the national justice sector to continue the serious crimes process following the closure of the SCU, and they recommended that the SCU, special panels, and DLU continue to operate. As an alternative, they also 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 maintained sovereignty over the justice process but would be aided by international personnel.³⁵ Because of a serious lack of capacity in the Timor-Leste justice sector, this mechanism would focus on building national capacity: international staff would work together with national staff to build capacity and the international staff would be gradually phased out so that the process would ultimately be completely run by national professionals.³⁶ The COE made a number of other “fallback” recommendations, including the establishment of an ad hoc international criminal tribunal in a third state or referral to the International Criminal Court.³⁷

The COE also recommended a series of steps for the Indonesian government to take that would permit its national justice system to credibly hold to account indictees and suspects at large in the country, including those who had already been tried before the Ad Hoc Human Rights Court. It proposed setting a time limit for Indonesia to carry out the recommendations; if the government failed to do so, the commission recommended that the Security Council should then invoke its Chapter VII powers to create an ad hoc international criminal tribunal for Timor-Leste. The COE acknowledged the difficulties in pursuing its recommended course, identifying lack of political will on all sides as well as the legal complications associated with the various judicial solutions proposed.

The Secretary-General submitted the COE report to the Security Council in June 2005. The Security Council declined to directly consider the recommendations, but instead requested

31 *Report of the Secretary-General on Justice and Reconciliation for Timor-Leste*, supra note 19, para. 9.

32 *Ibid.*

33 *Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999*, UN Doc. S/2005/458, July 15, 2005 (hereafter, COE Report). www.undemocracy.com/S-2005-458.pdf.

34 *Ibid.*, Annex II, para. 371, and Annex I, para. 10.

35 *Ibid.*, Annex II, paras. 503-6.

36 The COE recommended that the new mechanism be structured in a manner similar to the War Crimes Chamber of the Court of Bosnia and Herzegovina. For a detailed overview of the structure and work of this war crimes chamber, see Bogdan Ivanišević, “The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court,” ICTJ, 2008.

37 COE Report, supra note 33, paras. 407-58.

that the Secretary-General submit a further report on justice and reconciliation for Timor-Leste with a “practically feasible” approach, taking into account both the COE report and the “views expressed by Indonesia and Timor-Leste.”³⁸ The Secretary-General issued his report on justice and reconciliation for Timor-Leste on July 26, 2006, well after the timeframe the COE envisaged to carry out its recommendations.³⁹ The report acknowledged that the serious crimes process remained incomplete and that its closure left a number of issues unresolved, including how to address the fact that hundreds of indictees were at large in Indonesia and how to handle the impact of the abandonment of prosecutions in communities where the perpetrators of crimes and their victims live side by side.⁴⁰ The Secretary-General explicitly referred to the desire for justice expressed by victims and their families, as well as to concerns about the possible repercussions of not meeting the Timorese people’s expectations for justice.⁴¹ He also noted the need to strengthen national capacity to prosecute and try serious crimes cases.⁴²

Rather than endorsing the COE’s robust recommendations, the Secretary-General determined that, in light of the views expressed by the governments of Timor-Leste and Indonesia, it would not be “practically feasible” to re-establish the prosecutorial component of the by now defunct SCU.⁴³ Instead, he recommended that the Security Council endorse creating an international assistance program for Timor-Leste that would be used to, among other things, establish within the OPG an international investigative team to resume the investigative functions of the SCU with a view to completing investigations into serious crimes committed in 1999 and to strengthen the capacity of national justice sector institutions to prosecute the serious crimes committed in 1999.⁴⁴

The serious crimes process had been dormant for more than a year when the Secretary-General submitted his report to the Security Council. During that time, the issue of accountability had re-emerged in the context of the outbreak of political violence in Timor-Leste involving the police and armed forces in April and May 2006. The violence caused large-scale internal displacement and property damage and ultimately led to the deployment of a new international peacekeeping force and a strengthened UN presence in the country, effectively reversing the UN’s approach since 2001.⁴⁵ The renewed UN focus on Timor-Leste provided an opportunity to revisit the serious crimes issue.

On August 25, 2006, the Security Council established UNMIT under Resolution 1704.⁴⁶ This gave the new mission a broad mandate to do many things, including:

38 “Letter dated 28 September 2005 from the President of the Security Council addressed to the Secretary-General,” UN Doc. S/2005/613.

39 *Report of the Secretary-General on Justice and Reconciliation for Timor-Leste*, supra note 19.

40 *Ibid.*, para 9, 35. The Secretary-General noted that the number of murders in which suspects were indicted represented only about 40 percent of murders committed in 1999 and that the 87 defendants tried before the Special Panels represented only a fraction of the number of individuals indicted.

41 *Ibid.*, paras. 36 and 39 (d).

42 *Ibid.*, para. 36-37.

43 *Ibid.*, para. 36.

44 *Ibid.*, para. 39 (d) (iii).

45 In response to an urgent request from the Timorese government, an international peacekeeping force composed of personnel from Australia, New Zealand, Malaysia, and Portugal began operations in Timor-Leste in late May 2006. In a letter dated June 11, 2006, the country’s president, president of the national parliament, and prime minister requested that the Secretary-General ask the Security Council “to establish immediately a United Nations police force in Timor-Leste to maintain law and order in Dili and other parts of the country as necessary and re-establish confidence amongst the people.” (This letter is attached to the letter dated June 13, 2006, from the Secretary-General addressed to the president of the Security Council, UN Doc. S/2006/383.

46 Security Council Resolution 1704, UN Doc. S/RES/1704, Aug. 25, 2006.

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 the 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 1999.⁴⁷

This new investigative team, called SCIT, was created in January 2007 as part of UNMIT's Office of the Deputy Special Representative of the Secretary-General for Security Sector Support and Rule of Law.⁴⁸ The team was thus established within the new UN mission, despite the fact that the Secretary-General had expressly recommended that it be established within the national OPG.⁴⁹ The reasoning behind this remains unclear: it was not explained in the Secretary-General's reports to the Security Council on UNMIT around the time SCIT was established, and, when interviewed, neither SCIT's head nor the deputy special representative of the Secretary-General for Security Sector Support and Rule of Law could provide an explanation.⁵⁰

Although formally created in January 2007, SCIT did not recruit the majority of its staff until many months later and did not begin work until early 2008. Because it did not form part of the OPG, the team could not begin work until the UN and the government of Timor-Leste reached an agreement as to SCIT's formal relationship with the prosecutor general's office. In particular, the team could not resume the SCU's investigations until it gained access to the archives, which had been transferred to the custody of the OPG after the SCU closed. In February 2008, these issues were resolved and formalized in the Assistance Agreement.⁵¹

47 Ibid., para. 4 (j).

48 "Agreement between the United Nations and the Democratic Republic of Timor-Leste Concerning Assistance to the Office of the Prosecutor-General of Timor-Leste," Feb. 12, 2008, section 1.5 (hereafter Assistance Agreement).

49 In his *Report on Justice and Reconciliation for Timor-Leste*, supra note 19, the Secretary-General recommended in para. 39 (d) (iii) that the team be established "within the Office of the Prosecutor General of Timor-Leste" (emphasis added). In *Report of the Secretary-General on Timor-Leste pursuant to Security Council resolution 1690*, UN Doc. S/2006/628 (Aug. 8, 2006), he reiterated in para. 87 his recommendation that an investigation team be established and explained that this team "would be part of the Office of the Prosecutor-General," (emphasis added).

50 "Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 9 August 2006 to 26 January 2007)", UN Doc. S/2007/50. Feb. 7, 2007, merely notes in para. 28 that "UNMIT is recruiting experts to establish a Serious Crimes Investigation Team which will work with the Prosecutor-General" (emphasis added). *Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 27 January to 20 August 2007)*, UN Doc. S/2007/513 (Aug. 28, 2007) simply mentions in para. 37 that UNMIT "established its Serious Crimes Investigation Team," without noting that it was established within UNMIT rather than the OPG, or explaining the reasoning behind this. Interview with Marek Michon, SCIT's head, and Takahisa Kawakami, UNMIT deputy special representative of the Secretary-General for Security Sector Support and Rule of Law, May 15, 2009.

51 Assistance Agreement, supra note 48.

3. The Serious Crimes Investigation Team

Mandate

Unlike the SCU, which was a division of the OPG, SCIT does not have any prosecutorial powers. Its mandate is strictly limited to “assist the Office of the Prosecutor General of Timor-Leste with a view to completing investigations into outstanding cases of serious human rights violations committed in the Timor-Leste in 1999.”⁵² Thus, unlike the SCU, SCIT is precluded from investigating widespread international crimes that were committed during the Indonesian occupation prior to 1999.

Structure

SCIT is part of UNMIT, and its offices are located in UN buildings. It is therefore both legally and physically detached from the OPG. Although SCIT does not have the power to indict, its job is to prepare drafts of the legal documents required for prosecution, including draft indictments, requests for arrest warrants, and indictment briefs.⁵³ Once SCIT completes an investigation and has prepared the necessary legal documents, it hands a case file over to the OPG with a recommendation either to close or prosecute the case. The OPG must then decide whether to indict and prosecute.

Although the entities are separate, the Assistance Agreement contains a number of provisions regarding coordination between the two institutions. In addition to granting SCIT access to the SCU’s archives, the Assistance Agreement provides that the team “will perform its investigative duties under the coordination, direction, and supervision of the Prosecutor-General” and that OPG prosecutors shall supervise the investigations.⁵⁴

Composition

SCIT is led by a senior investigator (the head) and a supervising legal coordination officer (deputy head). Its staff includes 10 international investigators, five international legal

52 Ibid., section 2.1.

53 Section 4.4.1 of the Assistance Agreement provides that “[u]pon completion of an investigation, the SCIT will prepare drafts of the final documents, including indictments and requests for arrest warrants as well as indictment briefs and submit them, along with case files, to the Prosecutor-General of Timor-Leste.” Assistance Agreement, *supra* note 48.

54 Assistance Agreement, *supra* note 48, sections 3, 4.1, and 4.3.1.

coordination officers, five national legal officers, an international gender affairs officer, an international external relations officer, and a range of forensic, administrative, IT, and language staff.⁵⁵ The investigation of serious crimes and case preparation is carried out by investigation teams that cover different geographical areas: this constitutes the investigation section. Within each team, an international legal coordinator, assisted by a national legal officer, works with the two international investigators to gather evidence and prepare drafts of documents required to issue indictments and prosecute suspects in court. The two international investigators, assisted by two national interpreters, work together in gathering witness statements and other evidence. A forensics team supports them when exhumations and autopsies are carried out.⁵⁶ The investigators work with the international legal coordinator and the national legal officer who review the evidence and prepare drafts of the documents that are needed for indictments and prosecutions. Upon completion of an investigation, SCIT submits the case files and draft legal documents to the prosecutor-general with a recommendation either to close or prosecute the case.⁵⁷

Resuming Investigations

After the Assistance Agreement was signed in February 2008, SCIT began going through SCU files, identifying and prioritizing cases for investigation.⁵⁸ SCIT staff identified 396 cases that were left pending following the SCU's closure and began prioritizing these for investigation.⁵⁹ They decided to complete these cases before investigating any new reports of serious crimes committed in 1999 that had not been reported to the SCU.⁶⁰ The team

UNMIT and Timor-Leste Sign Assistance Agreement

Acting Special Representative of the Secretary-General for Timor-Leste, and the former Prosecutor-General of the Republic of Timor-Leste shake hands after signing the Assistance Agreement allowing SCIT to commence work.

12 February 2008
Dili, Timor-Leste



UN Photo/Martine Perret

55 Interview with Julia Alinho, SCIT external relations officer, Feb. 18, 2010. See also UNMIT, SCIT factsheet: http://unmit.unmissions.org/Portals/UNMIT/SCIT/SCIT%20factsheet/SCIT%20factsheet040808_ENG.pdf.

56 In addition to the investigation and forensics sections, there are also IT, database, and administrative sections.

57 Assistance Agreement, *supra* note 48, section 4.4.1.

58 *Ibid.*

59 Interview with Michon, June 9, 2009.

60 *Ibid.* At least two new cases have been reported, but the team does not plan to investigate these until it has completed investigations into the 396 cases inherited from the SCU.

commenced investigations in June 2008. As of February 2010, it had completed investigations into 110 of the cases inherited from the SCU.⁶¹

SCIT prioritized cases on the basis of three criteria: the extent of the SCU's investigation; the geographical location and the attention that the unit gave this location (SCIT team initially focused on areas where significant numbers of serious crimes were committed but where the SCU completed comparatively few investigations, such as the districts of Lautém and Liquiça); and the gravity of the crime.⁶² All SCIT investigations thus far have involved allegations of crimes against humanity. Due to the team's policy of first completing the most advanced investigations, it has inherited the SCU's focus on murder cases, with the result that many other types of serious crimes remain uninvestigated. SCIT has, however, investigated some sexual crimes, including cases of rape and sexual slavery as crimes against humanity.⁶³

61 *Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 24 September 2009 to 20 January 2010)*, UN Doc. S/2010/85, Feb. 12, 2010, para. 76.

62 Interviews with Michon on Nov. 26, 2008, and March 19, 2009.

63 *Ibid.*

4. Major Challenges

Institutional Challenges Facing SCIT

Limited Resources

Despite the fact that it has a similar amount of investigative work as the SCU had, SCIT has considerably fewer investigative staff than its predecessor had at the beginning.⁶⁴ The head maintains that his team needs more than the 10 investigators in order to carry out its work effectively.⁶⁵ He has sought to expand the number of investigators through the secondment of investigators from the UN Police (UNPOL) operating in the country. As of February 2010, three UNPOL investigators were working with SCIT, and the police commissioner has agreed to lend two more to help in the near future.⁶⁶ With these additional resources, SCIT has been able to extend investigations to all 13 districts of the country.

Gender-based crimes were widespread in Timor-Leste in 1999. While international best-practice highlights the importance of including staff with expertise in investigating gender based crimes, the UN merely allocated SCIT a “gender affairs officer” who had no specific investigative expertise.⁶⁷ As a consequence, all investigations into gender-based crimes were carried out by an UNPOL investigator until February 2009.⁶⁸ Once this investigator’s time ended, investigation into gender-based crimes was put on hold and then passed to a female investigator pending recruitment of a new gender affairs officer with experience in investigations.⁶⁹ The failure to provide specialists for gender-based crimes was a mistake made when the SCU was created, and this was repeated in staffing of SCIT. Drawn-out UN recruitment procedures, resulting in key posts remaining vacant for many months, exacerbate this problem of limited resources.

While all 10 of SCIT’s investigators had at least six years of investigation experience before joining the team, only two have dealt with crimes against humanity, and many did not have experience in interviewing witnesses in the field (rather than in a police station) or through interpreters. They therefore faced some initial difficulties and required time to become

64 Interview with Michon, Nov. 26, 2008.

65 Interview with Michon, Sept. 7, 2009.

66 Ibid. and correspondence with Alinho, Dec. 14, 2009.

67 Interview with SCIT staff member, Sept., 2009.

68 Ibid.

69 Ibid. and meeting with Alinho, Feb. 18, 2010

accustomed to the special challenges of conducting investigations that involve interviewing witnesses in remote parts of Timor-Leste.⁷⁰ According to SCIT's head, the team is now completing cases at a much quicker rate than during its first year of investigation, and this pace has improved with the additional UNPOL investigators.⁷¹

Finally, SCIT lacks staff to handle public information and outreach; responsibility for those tasks is allotted to a single international external relations officer. As explained below, that person has made impressive efforts at engaging in outreach work with victims and communities throughout the country, but further resources are needed in this area.

Communication with Victims and Witnesses

In addition to the difficulties arising from an insufficient number of investigators often trying to conduct investigations in remote areas with extremely poor roads and infrastructure, it is clear that SCIT personnel operating in the field are facing difficulty communicating effectively with and securing the cooperation of witnesses and victims' family members. The team does not have any national investigators or outreach staff based outside of Dili, and so international investigators, helped only by interpreters, must navigate the complex cultural dynamics of the areas in which they work.

An issue that is culturally sensitive and frequently raises difficulties for investigators is that of exhumation. Many family members of murder victims are reluctant to consent to exhuming their relatives' remains, either because of traditional beliefs surrounding the dead or because they believe the amount of compensation offered by SCIT to cover the cost of reburial is insufficient.⁷² Because of this cultural sensitivity, the national legal officers sometimes travel from Dili to the field to assist investigators in their discussions with families on this issue. There have been a number of murder cases in which the families refused to give consent to exhume the victim but SCIT continued its investigation nonetheless, on the basis that exhumation was not crucial given the availability of evidence as to the death and cause thereof.⁷³ Such situations may expose the investigation to subsequent legal challenges if the case proceeds to trial.

Although the investigators receive some support from national legal officers in specific incidents, the problems they face in communicating effectively with victims and witnesses could be mitigated if more national staff were directly involved in investigation. This could be achieved through appointing additional national staff or police officers to work with international investigators, which would enhance communication with and the cooperation of victims and witnesses. An increased national involvement in investigations might also serve to ensure that victims, witnesses, and communities have a greater understanding of where the investigation and prosecution process now stands, thereby helping to avoid unduly raising expectations that SCIT investigations will necessarily lead to justice through the courts in the near future.

70 Interview with Michon, June 9, 2009

71 Ibid.

72 Interviews with family members of people murdered in 1999, Feb. 10 and 11, 2009, and interview with former SCIT staff member, May 7, 2009.

73 Interview with Michon, March 19, 2009.

Coordination between SCIT and the OPG

The Assistance Agreement states that the prosecutor-general will coordinate, direct, and supervise the investigative work of SCIT, and that the investigations shall be supervised by prosecutors in that office.⁷⁴ Under the previous prosecutor-general, there was minimal coordination between the OPG and SCIT, and prosecutors did not closely supervise the investigations. Communication has improved since Ana Pessoa became the new prosecutor-general in March 2009. The deputy head of SCIT now meets weekly with the international prosecutor assigned to deal with serious crimes cases, but there is no ongoing contact at the operational level between prosecutors and SCIT's investigators and legal staff.⁷⁵

SCIT has submitted a number of completed case files with recommendations for indictments to prosecutors since late 2008, but as of February 2010, the prosecutor-general had not issued any new indictments.⁷⁶ The issue of who might have the capacity to effectively prosecute future cases remains a major challenge. Although it is likely that the international prosecutor assigned to working with SCIT would also be responsible for trials held during his or her tenure, Timorese prosecutors who are ultimately assigned these cases could face serious difficulties. They will be required to conduct complex prosecutions having had little or no involvement in or communication with those investigating the cases and preparing the case files. In addition, they will not have the minimum experience and expertise necessary to prosecute complex cases involving crimes against humanity.⁷⁷ The OPG simply does not have the capacity to effectively prosecute these cases without some form of external support.⁷⁸

According to the head of SCIT, its limited mandate and formal subordination to the OPG under the Assistance Agreement renders the unit dependent on the OPG to initiate further operational communication between the two institutions.⁷⁹

Prosecutor-General Pessoa acknowledges that ideally SCIT personnel and prosecutors in her office should coordinate their efforts. But she says that the prosecutors are already overstretched in trying to deal with the backlog of "ordinary" crimes, so she therefore does not intend to initiate coordination since it would add to their workloads.⁸⁰

The disconnect between SCIT and the OPG is at odds with provisions of the Assistance Agreement, as well as with the way other criminal cases are dealt with in the Timor-Leste justice system. The country's criminal procedure code states that the OPG conducts criminal inquiries and that police investigators carry out searches or collect information under the direction of that office.⁸¹ The prosecutors' lack of involvement in the serious crimes investigation has resulted in a role reversal whereby the investigators develop the strategy and framework for the inquiry, as well as conducting the investigation, with the OPG provides approval for procedural steps as required.

74 Assistance Agreement, supra note 48, sections 4.1 and 4.3.1.

75 Interviews with Michon, June 9, 2009, and with Alhinho, Feb. 18, 2010.

76 Interview with Alhinho, Feb. 18, 2010.

77 See section titled "Enduring Weakness of the National Justice Sector" below. None of the prosecutors currently working in the OPG has prosecuted a case involving crimes against humanity. Three of the prosecutors did, however, work in the SCU as assistant prosecutors, accompanying international prosecutors in their work.

78 See "Enduring Weakness of the National Justice Sector" below.

79 Interview with Michon, March 19, 2009.

80 Interview with Ana Pessoa, prosecutor-general of Timor-Leste, May 21, 2009.

81 Decree Law No. 13/2005 of Dec. 1, 2005, approving the Criminal Procedure Code, articles 48 and 52.

Enduring Weakness of the National Justice Sector

Because SCIT's mandate is strictly limited to investigation, the burden of conducting any prosecutions or trials that might result from its work falls entirely on the national justice sector of Timor-Leste. It is widely recognized that there are major weaknesses in the national justice sector, and this raises doubts as to whether serious crimes indictees who are within the jurisdiction of Timor-Leste or who return there in the future can be competently prosecuted. These include both those indicted and previously prosecuted by the SCU and others who might be indicted as a result of SCIT's recommendations.

The UN has documented and consistently acknowledged that Timor-Leste's justice sector continues to display a wide variety of weaknesses. The reports of the Secretary-General to the Security Council on UNMIT regularly note these deficiencies.⁸² In its most recent resolution extending UNMIT's mandate, the Security Council emphasized the need for sustained support of the international community to Timor-Leste to build capacities in the national justice sector.⁸³

This lack of capacity is particularly acute in relation to serious crimes cases, as these are more complex than normal criminal offenses. When the serious crimes process ended in 2005, the Timorese justice sector lost the assistance of international prosecutors, defense lawyers, and judges with special expertise in international criminal law and practice. Although international personnel have since continued to practice as prosecutors, defense lawyers, and judges in Timor-Leste, they are generally hired on the basis of Portuguese language skills and experience of legal practice in Lusophone jurisdictions rather than expertise in international criminal law or practice.

Among the legal and judicial issues raised by the SCU's closure was how the national justice sector might address instances in which perpetrators of serious crimes who had been outside the jurisdiction during the period in which the Special Panels were trying such cases returned to Timor-Leste.⁸⁴ This issue soon arose when Manuel Maia, whom the SCU indicted in 2003, was apprehended after crossing the border from Indonesian West Timor in August 2005.⁸⁵ Maia was charged with committing murder, forcible transfer of a population, and persecution by destruction of property as crimes against humanity,⁸⁶ and spent a year in detention before being tried before the Dili District Court. On August 2, 2006, he was acquitted of all charges. There were significant problems in the way the case was prosecuted, including questionable decisions with respect to the presentation of evidence at trial.⁸⁷

A second serious crimes case came before the Dili District Court in September 2007. Alberto da Silva Mali had not been indicted by the SCU, but had been investigated by national police in 2006 and subsequently indicted by the OPG. The indictment charged Mali with committing murder as a crime against humanity in 1999. However the indictment did not

82 For the two most recent reports, see *Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 21 January 2009 to 23 September 2009)*, UN Doc. S/2009/504, Oct. 2, 2009, para. 59, and *Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 24 September 2009 to 20 January 2010)*, UN Doc. S/2010/85, Feb. 12, 2010, para. 82.

83 Security Council Resolution 1867 (2009), UN Doc. S/RES/1867, Feb. 26, 2009, para. 10.

84 Judicial System Monitoring Programme, Overview of Timor-Leste Justice Sector 2005, January 2006, 31-32.

85 "War Crimes Suspect Returns to Timor-Leste," JSMP, Aug. 8, 2005.

86 Indictment number 02/2003, www.jsmp.minihub.org/Court%20Monitoring/spscscaseinformation2003.htm.

87 "Weaknesses in the Prosecution of a Serious Crimes Suspect," JSMP, Aug. 7, 2006. The prosecutor failed to introduce evidence establishing that the accused was actually a member of a militia group responsible for the 1999 violence.

allege that he committed murder with the knowledge that it was part of a widespread or systematic attack directed against a civilian population.⁸⁸ The failure to include this crucial element of the crime in the indictment displays a serious lack of understanding of the law relating to crimes against humanity on the part of the prosecutor responsible for drafting this indictment and the OPG generally. The judges also seemed to lack a clear understanding of the law on crimes against humanity, as their judgment neglected to mention the need to establish the systematic elements of such crimes.⁸⁹ Mali was ultimately acquitted, because one of the people he was charged with killing could not be identified or proven dead, while the other was found to still be alive.

The third serious crimes case to come before the Dili District Court since the SCU closed involves militia member Domingos Mau Buti, whom the unit indicted and authorities apprehended after crossing the border from Indonesian West Timor in December 2008.⁹⁰ An international prosecutor—one of six serving in the OPG—adequately presented evidence supporting the elements of crimes against humanity, assisted by SCIT. This appeared to reflect a notable improvement in the professionalism demonstrated by the prosecutors and coordination with SCIT. However, serious questions arose during the hearing regarding the public defenders' office's ability to defend its clients. Mau Buti had three different public defenders over the course of the trial due to schedule mix-ups, the defense called no witnesses, and none of his lawyers attempted to challenge the systematic elements of the crime.

Public defenders require additional support or training to be able to defend suspects in serious crimes cases effectively, as do many members of the judiciary.⁹¹ To enable Timor-Leste to fulfill its duty to investigate and prosecute such cases, it is necessary that the Timorese justice sector receive international support specifically aimed at building its capacity to process serious crimes. Although the national justice sector does receive a large amount of international support, primarily through the UNDP Justice System Programme, this support includes little training on the specific skills required to process complex serious crimes cases involving crimes against humanity.⁹² This is despite the fact that the Timor-Leste criminal code, passed in April 2009, includes genocide, crimes against humanity, and war crimes.⁹³

Increasing the necessary capacity to deal with serious crimes cases could be achieved through technical assistance provided by experts in the field and increasing coordination between the OPG and SCIT in a manner that eases the transfer of knowledge and expertise from the team's legal staff to the prosecutors.

88 Indictment number 400/PDS/I/2006, June 4, 2006.

89 Judgment of the Dili District Court, No. Proc. 01/CG/TDD/2006, Sept. 19, 2007.

90 Decision of the Dili District Court, No. Proc. 08/CG/2004, Jan. 16, 2009.

91 Interviews with Louis James Gentile, head of UNMIT's Human Rights and Transitional Justice Section, May 11, 2009, and a national judge, April 8, 2009.

92 The Human Rights and Transitional Justice Section of UNMIT provides information on the serious crimes process and international crimes during the standard training course at the Centre for Judicial Training. SCIT has also provided presentations on international criminal law. Conversations with court officials indicate that although some information on serious crimes is provided during the training course, it is not sufficient to prepare them for effectively prosecuting and trying international crimes including crimes against humanity.

93 See Decree Law No 19/2009 of April 8, 2009, approving the Criminal Code, articles 123-30.

Political Climate

For at least the past seven years, a lack of sustained political will has been the main obstacle to the pursuit of justice and full accountability for the gross human rights violations committed in Timor-Leste between 1975 and 1999. Trials conducted in Indonesia were almost universally considered to be a sham, and Indonesia's non-cooperation and political opposition to the serious crimes process hindered progress and remains an important obstacle to its resumption. The response of the UN and the international community in the face of such hindrance to the stated goals and mechanisms mandated by the Security Council has been weak at best. The UN Security Council repeatedly failed to provide political support to the serious crimes process at critical junctures. This failure began through an unwillingness to allocate sufficient resources in the early stages of the mandate, became more acute during the denial of the work of UN investigators and prosecutors who produced the Wiranto indictment, and culminated in an abandonment of the process in the premature closing of the SCU. The UN's failure to take a strong institutional position supporting justice is even more surprising because the crimes included the murder of 11 UN personnel, mass destruction of UN property, and the forced evacuation of the entire UN mission from what is now Timor-Leste.

Since 1999 the international community and the UN have also increasingly retreated from exerting any significant pressure on either Indonesia or Timor-Leste to fulfill their duties under international law to pursue justice for the mass crimes committed in Timor-Leste. However, Security Council Resolution 1912, which extended UNMIT's mandate until February 2011, reaffirms "the need to act against impunity... (and) the importance of ongoing efforts to achieve accountability and justice."⁹⁴ In other UN program documents relating to Timor-Leste justice for past crimes received fleeting, if any, mention.⁹⁵

Although Timorese victims and human rights groups continue to advocate strongly for justice, their political leaders have showed an increasing reticence to fulfill this obligation. Within Timor-Leste, there is high-level political opposition to the pursuit of criminal accountability for violations committed between 1975 and 1999, and preference for an approach that focuses on reconciliation between Indonesia and Timor-Leste. This was formalized when the two countries bilaterally created the Commission of Truth and Friendship (CTF) in 2005. The CTF was mandated to reveal the "conclusive truth" regarding the events of 1999, but was precluded from recommending further prosecutions and was expressly granted the power to recommend amnesties.⁹⁶ Human rights groups condemned the CTF as an exercise in perpetuating impunity.⁹⁷ The commission's final report surprised human rights advocates, however, because it declined to recommend amnesties and found that Indonesian security forces and civilian authorities had indeed committed crimes

94 These specific references were made with regards to 2006 crimes without any mention of SCIT. However the affirmation for the need for accountability could be interpreted to include past crimes. See UN S/RES 1912 (2010), Feb. 26, 2010. available at unmit.unmissions.org/.../UNMIT/.../SCR1912_secconus_2010.pdf - Timor-Leste.

95 See, for example, UNDP Country Programme for Timor-Leste (2009-13) and Country Programme Action Plan (2009-13), www.tl.undp.org, which make no mention of the process, and "Strengthening the Justice System in Timor-Leste," UNDP, September 2007, www.undp.org/evaluationadmin/-downloaddocument.html?docid=1460. The latter makes only passing reference to it.

96 Article 12, 13 (c), 14 (c), Commission of Truth and Friendship Terms of Reference, August 2006.

97 Joint statement from Indonesian NGOs on the CTF, "Getting away from the responsibility to prosecute!" Dec. 27, 2004, <http://etan.org/et2004/december/26-31/30ingos.htm>, and "Open Letter to the Timorese President, Parliament, Prime Minister and Foreign Minister," Timor-Leste National Alliance for an International Tribunal (ANTI), Feb. 11, 2005.

against humanity in 1999.⁹⁸ However, while this conclusion to the work of the CTF leaves open the theoretical possibility of prosecutions at some future date, Indonesian and Timorese leaders were united in the view that the CTF should be seen as closing the door on the events of 1999.⁹⁹

Leading political figures in Timor-Leste have long been publicly opposed to prosecuting serious crimes. Prime Minister Xanana Gusmão has publicly taken this position, and so has President Jose Ramos-Horta on many occasions.¹⁰⁰ During his speech marking the 10th anniversary of the 1999 vote for independence, the president called for the closure of “the serious crimes unit” (by which he presumably meant SCIT) and emphatically rejected the possibility of an international tribunal to try international crimes committed in Timor-Leste.¹⁰¹

In an interview with ICTJ, Ramos-Horta gave his reasons for opposing the establishment and operation of SCIT. He said that he does not take it seriously, maintained that Timor-

Prime Minister of Timor-Leste Xanana Gusmão (centre, cross in hand) lays a cross in memory of the priests who perished in the Suai church massacre of 1999. The commemoration recalls the massacre of nearly 200 people inside the Suai church, perpetrated by pro-Indonesia militia following an August 1999 UN-led popular referendum granting Timor-Leste independence from Indonesia.

08 September 2009
Suai, Timor-Leste



UN Photo/Martine Perret

98 For 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 Occasional Paper Series, January 2008, www.ictj.org. 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 Occasional Paper Series, March 2009, www.ictj.org.

99 See, for example, Karen Michelmore, “Indonesia, Timor downplay prospect of formal justice for victims,” *Australian Associated Press*, July 15, 2008; “Human rights violation case in Timor Leste closed: Indonesian FM,” *Xinhua*, July 15, 2008; Khalik, Abdul, “RI, Timor Leste pledge better relations after report,” *Jakarta Post*, July 16, 2008; “UN hopes Timor atrocities report can lead to justice,” *Agence France-Presse*, July 16, 2008; and “Let go of the past, Timor leader urges,” *Agence France-Presse*, July 21, 2008.

100 “Speech of His Excellency President Kay Rala Xanana Gusmão on the Occasion of the Handing Over of the Final Report of the CAVR to the National Parliament,” Nov. 28, 2005, www.unmit.org/UNMISSETWebSite.nsf/e4899f58093d136749256f0a003f1073/2ca1c85976cca654492570c9003245f3?OpenDocument. Jose Ramos-Horta has stated this position in both international and domestic fora. For the former, see “Address by H.E. José Ramos-Horta to 61st Session of the Commission on Human Rights, Geneva, March 14-April 22, 2005,” www.osttimorkommiten.se/div/horta050324.txt; for the latter, see “Address by H.E. President José Ramos-Horta on the Occasion of the Official Opening of the Second Session of the Second Legislature of the National Parliament,” Oct. 9, 2008.

101 Speech available at www.laohamutuk.org/Justice/99/JRHspeech30Aug2009.htm.

Leste is bound by the agreement signed with Indonesia when the CTF was established with its emphasis on “the definitive closure of the issues of the past” through means other than prosecutorial justice, and that as long as he is the head of state of Timor-Leste he “will not go back to the events of ’99.”¹⁰² He also asserted that the OPG “is not an entity outside the state, it is bound by the highest interests of [Timor-Leste] in [its] relationship with Indonesia.”¹⁰³ President Ramos-Horta has also often said that he favors wiping the slate clean by granting a blanket amnesty for people liable to prosecution for serious crimes committed between 1975 and 1999.¹⁰⁴

There have been growing grounds for concern about the interference of Timorese political leaders in the course of justice, particularly in cases involving serious crimes. In May 2008, President Ramos-Horta commuted a number of sentences of prisoners, including some convicted by the special panels.¹⁰⁵ This brought about the premature release of a number of people convicted of serious crimes like Joni Marques, a notorious militia leader who was found guilty of crimes against humanity that included murdering nuns and priests in a notorious incident in 1999.¹⁰⁶ The president has the constitutional power to commute sentences and to pardon convicted criminals. However, his exercise of those powers should pay some regard to the claims of victims and not flout international legal principles regarding the commutation of sentences and the pardon of those convicted of crimes against humanity.¹⁰⁷

The degree to which political interference impedes justice in Timor-Leste in general and to the serious crimes process is best illustrated by the recent response to the arrest of Maternus Bere. This Timorese man with Indonesian citizenship was indicted by the SCU in 2003 for crimes against humanity for his role as a militia leader in Covalima, where he took part in the Suai Church massacre in September 1999.¹⁰⁸ He remained at large in Indonesian West Timor until he returned to Timor-Leste in early August 2009. Authorities there arrested him. On August 30, 2009—the tenth anniversary of Timor-Leste’s independence vote—he was released and transferred to the Indonesian embassy in Dili; Prime Minister Gusmão admitted that he did this in response to pressure from the Indonesian government.¹⁰⁹ The decision to release Bere was taken without recourse to judicial process as an avowedly political decision, justifiable in terms of the national interest.¹¹⁰ Timor-Leste’s national parliament, Timorese



UN Photo/Martine Perret

Commemorative mass of the 1999 Suai Church Massacre led by the Bishops of Dili and Baucau, Alberto Ricardo da Silva and Basílio do Nascimento.

08 September 2009
Suai, Timor-Leste

102 Interview with Ramos-Horta, June 4, 2009.

103 Ibid.

104 See, for example, Simon Roughneen, “Seven Questions: José Ramos-Horta. East Timor’s Nobel Prize-winning President Asks, Just Who is the Failed State Here?” *Foreign Policy*, July 9, 2009, available at www.foreignpolicy.com/articles/2009/07/09/seven_questions_jose_ramos_horta.

105 Presidential decree No. 53/2008.

106 In December 2001, Marques was sentenced to 33 years and four months imprisonment for his part in the killing of nine people, including two nuns, three priests, and a journalist, in Lautém in September 1999. The sentence was commuted to 25 years by President Xanana Gusmão in May 2004 and then halved by President Ramos-Horta in May 2008. His commutation made Marques eligible for release on the grounds that the latter had served two-thirds of his sentence.

107 See UN Commission of Human Rights, “Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity,” UN Doc. E/CN.4/2005/Add.1, Feb. 2, 2005, especially principles 19 and 24.

108 There is some confusion about Bere’s origins. His passport gives his place of birth as Auren, in Covalima, Timor-Leste. “Estadu TL Fo Dalan ba Milisia Abuza Justisa,” *Tempo Semanal*, Sept. 28, 2009, <http://temposemanaltimor.blogspot.com/2009/09/tempo-semanal-edisaun-158-special-kazu.html>; according to one report, however, he was actually born in Betun in Indonesian West Timor, before moving to Covalima in East Timor some years later. Gutteres, Julio Gil da Silva, “Maternus Bere, Eis Mestri no Katekista Ne’ebe Oho Fali nia Amo Lulik,” *Centru Jornalista Investigativu Timor Leste*, Oct. 14, 2009, http://cjitl.org/index.php?option=com_content&task=view&id=557&Itemid=1.

109 “East Timor releases suspected Indonesian militia,” *Reuters*, Aug 31, 2009, <http://in.reuters.com/article/world-News/idINIndia-42102720090831?sp=true>.

110 These circumstances were frankly recounted in the prime minister’s response to the censure motion brought by

civil society groups, and senior UN OHCHR officials strongly condemned the government's action, which arguably violated multiple provisions of the constitution and constituted a crime under the Timor-Leste penal code.¹¹¹

For several weeks, Bere stayed in the Indonesian embassy, while Timorese government officials gave the impression that his return to Indonesia would take place only after the Timorese courts had authorized it. On October 30, 2009, soon after President Ramos-Horta and Minister of Justice Lucia Lobato had argued that his return was urgent because he was in bad health, Bere was sent back to West Timor through a process that again bypassed the legal system.

Such actions are likely to have serious negative repercussions on the justice system and the degree of confidence the population has in the rule of law. The unmistakable signals from the political elite that they are willing and able to influence decisions of the OPG for political reasons is also cause for serious concern. This may also seriously undermine the chances of prosecutions based on SCIT's recommendations.

the opposition. See "Response by his Excellency the Prime Minister, Kay Rala Xanana Gusmão, on the Occasion of the Motion of No Confidence, Plenary Session of the National Parliament," Oct. 12, 2009, available at www.laohamutuk.org/Justice/99/bere/Censura/PM12Oct09En.pdf.

111 Article 69 of the Timorese Constitution recognizes the separation of powers principle, and article 160 provides that crimes against humanity committed between April 25, 1974, and Dec. 31, 1999, are liable to criminal proceedings in a national or international court. Article 245(1) of the Timor-Leste Penal Code states that "[a]ny person who, by unlawful means, releases or, by any means, aids in the escape of a person lawfully deprived of liberty, is punishable with two to six years imprisonment." A checklist of other constitutional provisions and articles of the penal code that may well have been breached is contained in Judicial System Monitoring Programme, "Dampak Kasus Maternus Bere Terhadap Sistem Peradilan dan Prinsip Negara Hukum Timor-Leste/Impaktu Kazu Maternus Bere ba Sistema Judisiariu no Prinsipu Estadu de Direitu Demokratiku iha Timor-Leste," www.jsmp.minihub.org/index2.htm.

5. Potential for Lasting Legacy

Capacity Building

The lack of communication and coordination between prosecutors in the OPG and SCIT's legal and investigative staff is the greatest obstacle the team faces in having a meaningful impact on the capacity of the national justice sector. As noted above, the national prosecutors at this time lack the experience and capacity to prosecute serious crimes such as crimes against humanity. The team's international staff members have recently conducted some limited training sessions for prosecutors, which demonstrate an improvement on past performance in this regard. However, this is not an effective answer to maximizing the transfer of skills from the international experts to national counterparts. What is needed is a cooperative environment in which SCIT and prosecutors work together daily. This mode of work is common to other civil law systems, it is anticipated by the Timorese Criminal Procedure Code,¹¹² and is essential to effectively build capacity.

The Assistance Agreement says that in addition to SCIT carrying out its main task of providing investigative assistance to the OPG, the team shall give professional training to its own national staff.¹¹³ Accordingly, SCIT's international legal coordination officers are working with their national counterparts. In each of the five investigation teams, a national legal officer works alongside an international legal coordinator, engaging in substantive work and thus building their legal skills. The lack of other substantive national staff in SCIT, however, has meant that the extent of capacity building is quite limited. SCIT is in the process of recruiting additional national investigators, which should increase the opportunity for impact on building Timorese skills.

In addition to providing internal capacity building, the Assistance Agreement allows SCIT to engage in other capacity-building initiatives with outside institutions when possible and appropriate.¹¹⁴ The team has not done so thus far, most likely because it is not sufficiently resourced for this purpose. It has given some forensic training to national police officers and

112 Criminal Procedure Code, *supra* note 81, Articles 48, 52 (2), 55, and 57 provide that the public prosecution directs all investigations carried out by the police (the investigators), and that the police must work in close coordination with the public prosecution.

113 Section 2.2 of the Assistance Agreement provides that "[t]he SCIT international staff members will provide professional training for their national counterparts working in the Team." Assistance Agreement, *supra* note 48.

114 Section 2.3 of the Assistance Agreement provides that "[d]epending on needs and its capabilities, the SCIT may provide professional training to organizations and offices in Timor-Leste whose activities are of relevance to its scope of operations." Assistance Agreement, *supra* note 48.

organized a workshop on the use of medical-legal expertise in criminal cases with a number of judges, prosecutors, and lawyers.¹¹⁵

Outreach and Public Perceptions

The premature closure of the serious crimes process in 2005 caused confusion and frustration among victims, in particular those who had helped the SCU in investigations that ended before they were complete. To ensure that SCIT's work attracted public support, it was imperative that the team inform victims and the public generally about the resumption of serious crimes investigations through conducting a thorough outreach program. Because general public understanding of law and formal legal process is very low, particularly in rural and remote parts of Timor-Leste, this would inevitably be a difficult task. It was exacerbated by the fact that SCIT was allocated only one staff member to handle public information and outreach work. Only an interpreter has assisted her. In spite of these difficulties, SCIT has made impressive efforts to inform victims and the public about its work.

With the assistance of the UNMIT Public Information Office and the UNMIT Human Rights and Transitional Justice Section, SCIT has been producing newsletters that are distributed to villages throughout the country.¹¹⁶ It has also produced a DVD explaining how its work relates to that of the SCU and special panels, the Commission for Reception, Truth and Reconciliation (CAVR), and the CTF. This DVD has been distributed to all village chiefs in the country, with requests to organize public screenings. The team also held outreach meetings in the capital of each district in 2008 and began another round of such meetings in early 2009.¹¹⁷ Although some of the meetings held in 2008 were poorly attended,¹¹⁸ SCIT's broad range of outreach initiatives is likely to improve public knowledge of its work. The overall impact of this work is, however, obviously very difficult to measure.

The outreach work, particularly efforts to reach victims, significantly improved in 2009. In an effort to inform victims about its work, SCIT began to coordinate with a coalition of national NGOs to develop a national victims' network. In addition, SCIT made presentations at district-level meetings of victims and at a national victims' congress in September.¹¹⁹ Participants at these meetings, many of whom were hitherto unaware that serious crimes investigations had resumed, have generally shown great interest in hearing about SCIT's work.¹²⁰ At these meetings, the team also gave victims the opportunity to ask privately for information about specific cases, including those that were incompletely investigated by the SCU. This has been a particularly important endeavor because a considerable number of victims did not know what had become of incomplete SCU investigations. Many were also unaware that SCU investigations in which they cooperated had actually led to the indictment of suspects at large in Indonesia.¹²¹ In the case of the former, SCIT staff have discussed the prospects for resuming suspended investigations; in the case of the latter, SCIT staff have provided copies of the indictments to the victims.¹²² Toward the end of 2009, SCIT began to extend its outreach to the sub-district level. By

115 Serious Crimes Investigation Team Newsletter, Issue 1, October 2008, and Issue 2, December 2008.

116 Interview with Alhinho, May 14, 2009.

117 Ibid.

118 Interview with Gentile, Dec. 12, 2008.

119 Serious Crimes Investigation Team Newsletter, Issue 4, July 2009.

120 ICTJ/JSMP monitoring of pre-congress meetings, May 26-28, 2009.

121 ICTJ/JSMP interviews with family members of people murdered in 1999, Feb. 10-11, 2009.

122 Interview with Alhinho, May 14, 2009.

working with a local NGO in the eastern districts, the external relations officer has been able to provide information on SCIT's work to community leaders and victims.

Assessing how the public views SCIT's work is difficult, but some tentative conclusions can be gleaned from the reactions of civil society groups and victims. As was the case when the SCU and special panels operated from 2000 to 2005, victims and civil society organizations have expressed disappointment at the inevitability that the majority of those who might be indicted on the basis of SCIT investigations would evade justice by remaining at large in Indonesia.¹²³ Victims and civil society organizations have also expressed concern that national institutions, including the OPG, would not cooperate with SCIT or act on its recommendations because of the current political climate and the tendency of political leaders to interfere with the justice process through the excessive use of pardons and commutations.¹²⁴

Civil society and victims have expressed dissatisfaction at limiting serious crimes investigations to violations committed in 1999.¹²⁵ Victims of violations committed before then are frustrated and offended by the complete failure of past and current serious crimes investigations to address those crimes. Civil society groups argue that 1999 violations are inextricably connected to violations committed during the Indonesian occupation prior to 1999 and that the focus on 1999 crimes is therefore arbitrary.¹²⁶



Widows of the 1983 Kraras Massacre weep during a 2008 commemoration ceremony.

Photo ICTJ, 2008

123 Comments of members of national NGOs and civil society organizations at an ICTJ/JSMP workshop on "The Serious Crimes Process in Timor-Leste," Dili, April 30, 2009; comments of victims at pre-congress meetings; ICTJ/JSMP interviews with family members of people murdered in 1999, Feb. 10-11, 2009.

124 Ibid.

125 Ibid. and *Report on Human Rights Developments in Timor-Leste: 1 July 2008 to 30 June 2009*, OHCHR, 2009, and "Rejecting Impunity: Accountability for Human Rights Violations Past and Present," UNMIT, Sept. 15, 2009, para. 54, 14.

126 Ibid.

6. Conclusion and Recommendations

The serious crimes process that operated in Timor-Leste from 2000 to 2005 ended prematurely in a manner that displayed a lack of political commitment on the part of the governments of Indonesia and Timor-Leste, as well as the UN and the international community, to the pursuit of accountability for serious human rights violations perpetrated in Timor-Leste in 1999 and during the preceding Indonesian occupation. Despite being advised by the COE to fully restore the serious crimes process, the UN Security Council only partially restored this process in deference to the political opposition of the governments of Indonesia and Timor-Leste to the pursuit of accountability for these crimes. Although the Timorese justice sector clearly lacked the capacity to prosecute, defend, and try serious crimes cases, the UN only established an internationalized investigation team, SCIT, with a heavily restricted mandate, incapable of realizing accountability for the gross human rights violations committed in Timor-Leste from 1975 to 1999.

In addition, SCIT was given insufficient resources to effectively carry out the team's investigative and outreach work. In doing so, the UN displayed a failure to learn from past mistakes, in particular those it made establishing the original serious crimes process in Timor-Leste despite the fact that these mistakes having been highlighted in UN and NGO reports.¹²⁷ Key SCIT personnel have used their own initiative to minimize the effect of those decisions, but their impact has seriously undermined the prospects of achieving justice for the serious crimes committed in Timor-Leste.

It is unlikely that SCIT's investigations will lead to full and fair prosecution. The work has been disconnected from that of the OPG, and this has created a danger that once the team concludes its work and ceases to operate, prosecutors will be unprepared to proceed with cases that SCIT recommended for prosecution. In addition, the national justice sector lacks the capacity to deal with offenses such as crimes against humanity. Even if serious crimes cases resulting from SCIT recommendations proceed to trial, the result may be affected by a lack of experience and ability of prosecutors to deal with the level of legal and factual complexity.

¹²⁷ See *The Serious Crimes Process in Timor-Leste: In Retrospect*, ICTJ, March 2006, and *Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor*, ICTJ, June 2005; "Indifference and Accountability: the United Nations and the Politics of International Justice in East Timor," supra note 22; and *Report of the Secretary-General on Justice and Reconciliation for Timor-Leste*, supra note 19.

There is also a danger that the current political climate in Timor-Leste will affect the approach of the OPG to serious crimes cases and that Timorese political leaders will directly interfere in the justice process as they have done in the recent past. Ultimately, however, the greatest challenge to SCIT investigations leading to comprehensive prosecutions is Indonesia's continuing refusal to cooperate in the justice process, and a lack of political will from the UN and the international community to provide sufficient political support for trials of serious crimes suspects. As long as Indonesia refuses to extradite serious crimes indictees to Timor-Leste or bring them to justice in Indonesia, and is able to successfully influence the international community in this regard, the vast majority of perpetrators will continue to enjoy impunity.

The manner in which SCIT was resourced and separated from the OPG has minimized the team's potential to produce a positive impact on the capacity of the national justice sector. It may succeed in conducting effective outreach and benefit from public support of its work, but victims and civil society will nonetheless continue to be frustrated by the drastic limitations on the unit's mandate, the scope of its work, and by the reality that SCIT simply cannot achieve a significant level of accountability for the massive human rights violations committed in Timor-Leste from 1975 to 1999. Victims and civil society will continue to be frustrated and offended by the fact that the vast majority of perpetrators will remain at large in Indonesia and that their own government, the international community, and the UN appear to be indifferent to their international legal obligations to hold these criminals accountable.

Despite these inherent flaws, SCIT is systematically investigating crimes and preserving evidence that would otherwise decay, thereby making a significant contribution to the potential for successful prosecutions in the future. Lessons learned from many other contexts indicate a real possibility that with the passage of time and political change, the will of the Timorese and Indonesian governments to prosecute those responsible for crimes against humanity will change, along with the motivation to protect people who have committed horrendous crimes against innocent civilians. The victims' voices calling for justice will not diminish, and preparation of case files at this point in time is an important goal, even if imminent prosecutions appear unlikely.

Recommendations

To the UN Mission in Timor-Leste:

- Facilitate negotiations aimed at producing a more detailed agreement between SCIT and the OGP. The new agreement should provide for specific mechanisms designed to increase the cooperation between SCIT's legal and investigative staff and national prosecutors.
- Increase SCIT's resources in order to build community support for its work and maximize skills transfer. In particular:
 - Reinforce support for SCIT public information activities and allocate national outreach staff to work alongside investigators in Dili and the Baucau, Maliana and Ermera regional offices, to provide information to victims' family members, local communities, and authorities about the serious crimes process. These staff members should also be trained to be sensitive to victims' situation and provide

moral support to victims and their families throughout exhumations or other investigatory phases.

- Delegate staff within the mission to work with the Center for Judicial Training to further develop its training curriculum on international crimes and facilitate similar trainings for practicing local investigators, court actors, and private lawyers.¹²⁸
- Increase the number of SCIT national investigators, either national staff or national police, and consider increasing the number of legal officers if required by the increased pace of investigations.*

To the Security Council:

- Reaffirm the stated commitment to pursue justice for the mass crimes committed in Timor-Leste by continuing to call for accountability for such crimes in Security Council Resolutions.
- At the end of SCIT’s mandate, the Security Council should undertake an assessment that includes an evaluation of the degree to which the recommendations of the 2005 UN COE have been implemented. This should include revisiting the recommendation that an international criminal tribunal should be established if significant progress on achieving justice and accountability has not been achieved.

To Donors:

- UNDP and bilateral donors should coordinate closely with SCIT to ensure that capacity-building efforts include attention to the skills necessary to deal with international crimes. Timor-Leste’s history dictates that there will be a continuing need for the justice sector to deal with these extraordinary past crimes for years to come. Donor assistance should include developing the capacity of the Center for Judicial Training to deliver training on international criminal law.

To the Timor-Leste Prosecutor General:

- Proactively seek opportunities to cooperate more closely with SCIT with a view to maximizing the opportunities for national prosecutors to develop their skills to prosecute serious crimes before the closure of SCIT. Specifically, the prosecutor general should assign a national prosecutor to work full-time with SCIT.
- Publicly affirm support for the work of SCIT.
- Issue indictments on the basis of SCIT investigations and recommendations, and seek renewed cooperation and extradition from Indonesia of those indictees who are suspected to be in Indonesian territory. This will alleviate current community perceptions that the justice system is not independent and subject to pressure from the government.

To the Government of Timor-Leste:

- Respect the independence of the judiciary and allow it to process serious crimes cases in accordance with the law.

¹²⁸ *The Justice System of Timor-Leste: An independent comprehensive needs assessment*, 23, para. 14.

* When research for this report was being finalized, the SCIT was in the process of recruiting for several national investigator posts. In June 2010, the SCIT was allocated an additional five national investigator posts, bringing the total number of national investigator posts to 10. Once these additional posts are filled, there will be 12 investigation teams in operation. Therefore the recommendation that UNMIT increase the number of national investigator posts is no longer valid.

To Indonesia:

- Comply with its international legal obligation to promote accountability for international crimes by providing full cooperation with requests by Timorese authorities for legal assistance in prosecuting serious crimes, including cooperation on the extradition of suspects.
- Implement the recommendations of the 2005 UN COE in relation to prosecution of those responsible for serious crimes in Timor-Leste.



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