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PROGRAM PEMANTAUAN SISTEM YUDISIAL

The Future of the Serious Crimes Unit

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1 Introduction

This report analyses the future of the Serious Crimes Unit (SCU) – the organisation charged with investigating and prosecuting crimes against humanity in East Timor – in light of the end of the United Nations Mission of Support in East Timor (UNMISSET). The UNMISSET mandate, due to expire on 20 May 2004, could potentially result in the closure of the SCU, causing disastrous consequences for the judicial process to try those accused of committing crimes against humanity in East Timor. In all probability, such a situation would severely restrict the scope of investigation into serious crimes and could effectively result in impunity for grave breaches of international humanitarian and human rights law.

This report argues it is essential that the SCU's mandate is extended and funding expanded until the serious crimes process is completed or until Timorese staff can adequately investigate and prosecute serious crimes cases without international support. If building the capacity of local staff to an acceptable level and securing sustainable funding outside the UN system proves unachievable, the UN must support the serious crimes process to the fullest possible extent. Given the overwhelming moral and legal responsibility to support the serious crimes process, the international community should only contemplate ceasing funding to the SCU if East Timor can continue this process on its own. In light of the current inadequacies in expertise and funding facing East Timor's broader judicial system, it is likely that international funding for the SCU will be required for some time.

In reaching this conclusion, this report discusses the impact that a premature closure of the SCU would have on the judicial process in East Timor, the reasons why the continuation of the SCU is imperative, and how the international community bears the ultimate responsibility to ensure that perpetrators of crimes against humanity in East Timor are effectively brought to justice. To further support the extension of SCU funding and to illustrate the inadequate support for the serious crimes process thus far, a comparison of the SCU with other international courts is given. The report concludes with a set of recommendations that amongst others suggest ways to improve SCU work in the future.

1.1 Background

The SCU was established by the United Nations Transitional Authority in East Timor (UNTAET) in June 2000 to conduct investigations and prosecute cases in the Special Panels for Serious Crimes (SPSC) – the tribunal responsible for trying those accused of serious crimes. Both the SCU and SPSC were established as part of the UN's

commitment to participate in bringing those ‘responsible for grave violations of international humanitarian and human rights law’ to justice.¹

Since East Timor’s independence on 20 May 2002, the SCU has operated under the authority of the Prosecutor-General. It is currently staffed and funded primarily through the UN and as such, the SCU is a hybrid organisation with both UN and national components.² At the end of 2003, the SCU had filed 81 indictments against 369 accused filed with the SPSC. From these, there have been 46 convictions, one acquittal and two indictment dismissals³. SCU staff continue to investigate alleged serious crimes and at the time of writing around 16 trials were in progress at the SPSC.

1.2 Mandate of the Serious Crimes Unit

The legal basis of the SCU arises from section 14 of UNTAET Regulation 2000/16 which establishes a Deputy General Prosecutor for Serious Crimes who is ‘the principal official in charge of the Department of Prosecution of Serious Crimes’. There is not, however, a specific regulation that details the objectives, mandate and functioning of the SCU. Nevertheless, the most detailed provision related to the powers of the SCU comes from section 14.4 of UNTAET Regulation 2000/16:

‘the Deputy General Prosecutor for Serious Crimes shall have the exclusive prosecutorial authority to direct and supervise the investigation and prosecution of serious crimes in the competent court’.

Crucial to the SCU’s mandate is the definition of ‘serious crimes’. This is obtained through regulations that establish the SPSC. Pursuant to section 1.1 of UNTAET Regulation 2000/15, the SPSC was established in the Dili District Court with exclusive jurisdiction to deal with ‘serious criminal offences’. These serious criminal offences are defined as genocide, war crimes, crimes against humanity, murder, sexual offences and torture. The SPSC has universal jurisdiction over murder and sexual offences if they occurred between 1 January 1999 and 25 October 1999, while there is no temporal limit applicable for genocide, war crimes and crimes against humanity.⁴ This definition of serious crimes, limited by type of crime and when it occurred, applies equally to the mandate of the SCU.

It is important to note that the regulations do not strictly define the SCU’s mandate, rather this is left to the discretion of the Deputy General Prosecutor for Serious Crimes. Thus,

¹ Security Council Resolution 1319 (2000).

² The SCU currently has 111 staff members including 38 UN International staff including prosecutors, case managers, investigators, forensic specialists and translators as well as 10 UN Police investigators and 35 UN national staff including translators and mortuary staff. In addition, 10 East Timorese trainee prosecutors, case managers, ITU and data coding staff work in teams with International UN staff at SCU as well as a total of 18 East Timorese Police (PNTL) trainee investigators with 12 new trainee PNTL investigators having joined the investigation training programme at SCU in August 2003. Source: Serious Crimes Unit Update, 22 December 2003.

³ One of the indictments that was dismissed, the indictment against Domingos Amati and Francisco Matos was overturned by the Court of Appeal 9 December 2003.

⁴ Section 2.3 Regulation 2000/15.

significant decisions relating to the number and extent to which serious crimes cases are investigated, as well as the criteria to determine which cases result in indictments, rests solely with the UN appointed and funded head of the SCU. This internal SCU process lacks transparency and does not appear to involve direct consultation with the East Timorese Government or community groups. JSMP believes that the specific targets and objectives of the SCU should be readily available to the public. This information is crucial when both the international community and the East Timorese debate the future of the SCU in light of UNMISSET's end.

An example of the uncertainty over the SCU's mandate is pre-1999 serious crimes cases. This uncertainty has been created by two constitutional provisions which relate to this issue as well as an UNTAET Regulation that defines the SPSC's authority. This legal uncertainty has been compounded by a lack of public debate on the matter and the lack of transparency of the SCU's specific objectives.

According to UNTAET Regulation 2000/15 it is clear that the SPSC – and therefore the SCU – has authority to hear trials involving genocide, war crimes and crimes against humanity, wherever and whenever they occurred. This position reflects s 160 of the Constitution of East Timor which states that:

‘acts committed between 25th April 1974 and the 31st December 1999 that can be considered crimes against humanity of genocide or of war shall be liable to criminal proceedings with the national or international courts’.

Yet this provision must be read in conjunction with Section 163.1 of the Constitution which concerns transitional judicial organization:

‘The collective judicial instance existing in East Timor, composed of national and international judges with competencies to judge serious crimes committed between the 1st of January and the 25th of October 1999, shall remain operational for the time deemed strictly necessary to conclude the cases under investigation’.

JSMP believes that a significant degree of uncertainty exists over whether the SCU and the SPSC are required to investigate and prosecute genocide, war crimes and crimes against humanity that occurred pre-1999. It is beyond the scope of this report to analyse the correct mandate the SCU provided for by law, yet the view of the current Deputy General Prosecutor for Serious Crimes is that according to section 163.1 of the Constitution, the SCU is under no obligation to investigate and prosecute cases earlier than 1999.⁵ Section 160 of the Constitution, however, at the very least raises serious questions as to whether pre-1999 cases fall under the SCU's mandate. Further, the current position of the SCU seems at odds with the wishes of the general public in East Timor. JSMP's community consultation meetings along with events such as the National Alliance for an International Tribunal's intended public indictment on the Santa Cruz massacre and the public hearings of the Commission on Reception, Truth and Reconciliation (CAVR)⁶ on events prior to 1999, suggest there is a widespread desire to hold trials for serious human rights abuses committed from 1975 onwards. Unfortunately,

⁵ Interview with the Deputy Prosecutor General for Serious Crimes, Nick Koumjian, 12 January 2004.

⁶ *Comissão de Comissão de Acolhimento, Verdade e Reconciliação de Timor Leste.*

however, this legal uncertainty has not been resolved, and the SCU's current position has not been subject to substantial scrutiny.

The specific objectives of the SCU remain unclear both according to law and in the information available to the public. When the future of the SCU is debated, JSMP believes that the purpose and goals of the serious crimes process be reviewed and made publicly available. Particular note should be taken of the wishes of the people of East Timor to ensure justice is served for all serious crimes, not just those that occurred in 1999.

1.3 Why focus on the Serious Crimes Unit?

JSMP decided to focus solely on the future of the SCU, and not the serious crimes process more generally, for a number of reasons. First, there have already been moves to scale down the SCU, particularly in terms of investigation. It is feared that this trend may spread to the SCU as a whole. Secondly, out of all aspects of the trials before the SPSC, the SCU appears the most reliant on international funding and expertise. Any reduction in UN support would therefore be felt hardest in the SCU. Finally, in determining which cases are investigated and indicted, the SCU plays a crucial role in setting the parameters of the serious crimes process. Its premature closure or a reduction in funding could therefore significantly reduce the number of cases that are properly investigated and reach trial. This would have dire consequences both for the legitimacy of the cases that do come before the SPSC as well as the reconciliation process in East Timor.

1.4 About JSMP

The Judicial System Monitoring Programme (JSMP) is a non-governmental organisation based in Dili that monitors the operation of the Special Panels for Serious Crimes and East Timor's broader judicial system. JSMP observers, both international and national staff, have jointly monitored more than 90% of all serious crimes cases before the SPSC. As the only independent organisation that has consistently monitored the SPSC, JSMP is uniquely placed to draw conclusions on the operation of the SCU, the impact of its closure and in the event its mandate is extended, the future operation of the SCU.

2 Downsizing of the Serious Crimes Unit

Since August 2003, approximately three years since its commencement, downsizing of the SCU began. JSMP believes that further reduction to its resources will threaten the ability of the SCU to fulfill its mandate. As discussed, the precise mandate of the SCU is legally unclear, however under the narrowest interpretation of the UNTAET and constitutional provisions, the serious crimes process must be operational 'for the time deemed strictly necessary to conclude the cases under investigation'.⁷ Under the SCU's widest possible mandate, all genocide, war crimes and crimes against humanity cases,

⁷ Section 163.1 Constitution of the Democratic Republic of Timor-Leste.

regardless of when and where they were committed, may potentially be tried before the SPSC.⁸ As the SCU is the body charged with investigating and prosecuting such cases, it is clear that the SCU has a large role to play, even if the narrowest mandate is taken as correct. Despite this, downsizing of the SCU has commenced, particularly in the area of investigation. Given the UN's lack of commitment to the serious crimes process, as demonstrated by the premature downsizing of the SCU, it seems possible that the end of UNMISSET may also result in the closure of the SCU.

2.1 Investigation

The number of UNPOL investigators at the SCU has recently been scaled down from 23 to only 8 investigators in December 2003 and UN Investigators have been reduced from 13 to 9. Although the Deputy General Prosecutor for Serious Crimes has stated that investigations are continuing and new cases will be investigated, the investigation process is necessarily affected by the reduction in international staff, the complete closure of an SCU office and the lack of trained Timorese staff to replace the scaled down international contingent. There are moves to compensate for the decline in international investigators through training national police in SCU investigation techniques. Although this initiative is positive, and supports JSMP's position that the SCU should focus on building the capacity of local staff, it is not yet completed and is insufficient to counteract the severe reduction in expertise caused by the decreased number of international investigators.

Seventeen national police are currently undergoing training from international investigators at the SCU. This training is expected to be completed in April 2004 and only at its completion can it be determined whether the national police have acquired the necessary technical expertise to lead investigations into international crimes. Further, there is no guarantee that these investigators will end up working with the SCU. The national police are paid and overseen by the Department of Internal Affairs. Once the training has been finalised, it is at the discretion of government officials as to where the national investigators are placed.

The current policy of the SCU is to use their limited resources as efficiently as possible to focus on priority cases. In this context, the SCU should be congratulated on the quality of work completed thus far. This approach, which favours cases where evidence is easily attainable, the crimes severe and where the accused bears a significant degree of responsibility for the crime, necessarily results in many cases going uninvestigated. Although such an approach is understandable and most effectively uses the SCU's limited funding, it does result in some communities being denied access to the serious crimes process. As a result, victims and families in some areas must live side by side with perpetrators. It is feared this may result in people taking justice into their own hands, thereby jeopardising the fragile security situation in East Timor. The downsizing of the SCU and the limits this has put on its work, threatens to destabilise the situation further.

⁸ Section 2.3 UNTAET Regulation 2000/15.

2.2 Office closure

One of three SCU offices – that located in Oecusse – was closed in 2003. Oecusse is one of East Timor's thirteen districts, and as an enclave surrounded by borders with Indonesian West Timor, its inhabitants were subject to widespread human rights violations. According to SCU estimations there were a total of 88 murder⁹ cases pending investigation as of September 2003. This estimation remains unchanged for June 2004. It therefore appears that no or minimal investigation work will occur into alleged cases in Oecusse in the future. Although it must be noted these figures are nothing more than estimates used for planning purposes, they do illustrate the potential impact the closure of the Oecusse office will have on murder investigations.

3 Possible closure of the Serious Crimes Unit

Although the SCU is part of the Prosecution Service of East Timor, it is primarily funded by UNMISSET, and recruitment, selection and performance assessment are the responsibility of the UN. At present, SCU funding is set to end on 19 May 2004 with the end of the UN mission unless an extension is approved by the Security Council. Despite many important reasons justifying the continued presence of the SCU, there remains the possibility that the SCU will be closed. In JSMP's opinion, this would be catastrophic for the serious crimes process and would also jeopardise the reconciliation process in East Timor.

If the SCU closed on 19 May 2004 an unworkable and unstable situation would result. At that time, approximately 40-50% of the estimated 1400 murder cases from 1999 will remain uninvestigated. Accordingly, there will be areas in East Timor in which crimes against humanity have reportedly occurred but investigations have not yet taken place or have not been completed. In Bobonaro, for example, according to the Deputy Prosecutor for Serious Crimes there are well over 100 cases of murder which occurred in 1999 and have not yet been investigated.¹⁰ In terms of prosecution, it is estimated that 18 cases would be at hearing and a further 30 would be awaiting trial.

If international funding were to cease, these cases could only proceed if national prosecutors took over. Six Timorese trainee prosecutors currently work with the SCU, however it is extremely unlikely that they could carry out prosecutions that meet international standards and also prepare quality indictments for future trials. Further, in terms of investigation, there are simply insufficient resources and expertise within the national system for investigations to be effectively carried out. Even if the current trainee investigators and prosecutors can acquire the necessary skills within a reasonable time, other technical positions such as forensic pathologists, forensic anthropologists¹¹ will need to be filled. There are currently no Timorese staff training to fill such positions.

⁹ Murder cases are used as a standard by SCU, but figures can be used to reflect other serious crimes cases as an approximation.

¹⁰ Interview with the Deputy Prosecutor General for Serious Crimes, Nick Koumjian, 12 January 2002.

¹¹ There are currently two trainee data coders and three trainee Information Technology officers in the SCU. There is no other morgue in East Timor other than that provided by the SCU and the SCU also provides mortuary services for ordinary crimes. It is essential for the integrity of investigations into

Alarming, the above statistics do not include crimes against humanity other than murder, nor do they contain the litany of international crimes which allegedly occurred between 1974 and 1999. Nevertheless, the statistics provided plainly illustrate that if the SCU were closed, the UN sponsored body would finish midway through the serious crimes process with many cases uninvestigated and untried.

Not only is the possible closure of the SCU concerning, the timeline for a decision on its future is also problematic. A report from the Technical Assistance Mission – the body charged with analysing and consulting on the imminent end of UNMISSET – will be submitted to the Secretary-General in February 2004, following its visit to East Timor in January 2004. The Secretary-General will then address the Security Council in late April or early May 2004, with a decision on the future of UNMISSET expected shortly after. This could potentially give the SCU two weeks lead time to plan for its closure. Such an unreasonable time frame is set by the UN Department of Peacekeeping Operations (DPKO), and is out of the hands of the SCU. This does illustrate, however, the extremely difficult place the SCU is put in as it cannot confidently plan for the future when its very existence is not assured.

4 Why the Serious Crimes Unit mandate must be extended

4.1 Community demand for justice

The community's demands for justice for the crimes committed in 1999 and earlier remain evidently strong. This is in part due to the failure of the trials of the Ad Hoc Human Rights Court for East Timor, conducted by the Indonesian Government in Jakarta, which bring neither truth nor justice to East Timor.¹² Although a reconciliation process has been initiated by the highest levels of the East Timorese government through the CAVR, JSMP has observed that there are still constant demands for formal justice. An example can be drawn from the statement given by a victim's family member that the SCU should continue to complete its work as it is the only body presently investigating into the serious crimes committed in 1999:

'Jakarta failed to bring justice as desired by the most of East Timorese and the Truth and Reconciliation Commission mandate is limited only to those who committed light crimes. It is therefore crucial that the work of the Serious Crimes Unit continues in order to continue its investigation into the serious crimes cases committed in 1999 and bring to justice the alleged perpetrators'.¹³

ordinary and serious crimes that SCU funding is extended so that a morgue and suitably qualified personnel can continue to operate.

¹² See for example, International Centre for Transitional Justice, 'Intended to Fail: The Trials Before the Ad Hoc Human Rights Court in Jakarta, August 2003, <<http://www.ictj.org/downloads/intendedtofail.pdf>>.

¹³ Interview with Ms. Eliza da Silva Dos Santos, the chief of Rate Laek Victim's Group, 16 January 2004.

Victims groups consider the work of the SCU vital to the reconciliation process and the future of East Timor. A crucial aspect of this is determining the truth of the alleged crimes through an impartial judicial process:

‘How will the crimes against humanity and other crimes committed in 99 are figured out properly if the Serious Crimes Unit has to stop... [t]he closure of the Serious Crimes Unit means that no one, even East Timorese themselves, will ever know exactly the number of people died as result of the 99 violence’.¹⁴

JSMP has been informed by victims groups that they strongly desire an extension of the SCU mandate in order to investigate and prosecute all alleged crimes. If nothing this else, this process should be carried out on behalf of the victims and their families.

4.2 Instability within the community

The closure of the SCU will potentially create instability within East Timor. While some serious crimes cases have been prosecuted and convicted, the closure of the SCU will most likely create tension due to the failure to fully investigate and potentially prosecute a large number of cases. This tension arises due to some perpetrators being subject to proceedings before the SPSC, while others are still at large in communities. JSMP was told by families of victims that they believed the closure of the SCU would possibly have a negative impact on security, as some of those involved in 1999 atrocities have returned home and continue to live freely within communities. It was further stated that a failure to investigate and prosecute alleged perpetrators, including those identified as low-level militia members, would possibly lead to revenge attacks, which may threaten the stability of the nation:

‘Although they are just small fishes, it is important to know that letting them live together with the victims and their families who are still seeking justice is a danger as the community is still traumatized by the past atrocities’.¹⁵

4.3 Required by law

There are some legislative provisions which suggest that the continuation of the SCU is required to some extent by law. Although this is not specifically stated, put together, these provisions suggest that serious crimes process should continue and by implication this gives weight to the extension of the SCU’s mandate. Of importance is section 9 of the Constitution, which requires that ‘the legal system of East Timor shall adopt the general or customary principles of international law’. A fundamental principle of international law is the prosecution of crimes against humanity and other such crimes. Along with this are the two constitutional provisions already discussed – sections 160 and 163.1 – that at the very least provide a requirement to ‘conclude the cases under investigation’.

¹⁴ Interview with Ms. Eliza da Silva Dos Santos, the chief of Rate Laek Victim’s Group, 16 January 2004.

¹⁵ Ibid.

As the SCU is the organisation currently conducting investigations and prosecutions, it is reasonable to imply that any further prosecution work be undertaken by the SCU. Given the unfeasibility of East Timor carrying out this process on its own, primarily due to the absence of resources and expertise, international support will be required for some time. If such support is removed, however, it makes it extremely difficult for the Government of East Timor to meet its constitutional requirement to pursue the serious crimes process.

Aside from the Constitution, UNTAET Regulation 2000/16 also suggests international support for the SCU should be continued. Section 14.6 requires that:

‘The Deputy Prosecutor General for Serious Crimes shall have such staff as may be necessary to enable him/her to effectively investigate and prosecute serious crimes. Such staff shall include, but not limited to, one or more public prosecutors and a Prosecution Support Unit consisting of East Timorese and International experts, as necessary’.

The withdrawal of support or a reduction in funding of the SCU, could potentially breach this provision. Although it is unlikely that such a provision would be binding on any UN body, this does illustrate how the closure of the SCU goes against the intention of an UNTAET provision. The effective investigation and prosecution of serious crimes requires long-term funding for the SCU and particularly international experts. By not providing this, the UN undermines a regulation passed by its own transitional authority.

4.4 Future cases

According to SCU statements, 281 of a total of 369 indictees remain at large in Indonesia and cannot be brought to trial. This problem has been the subject of widespread criticism from human rights groups and has led many civil society organisations both within and outside East Timor to lobby the Indonesian Government to cooperate in handing over SCU indictees. The failure to try senior Indonesian officials currently stands as the main shortcoming of the SPSC trials, and it continually threatens the legitimacy of the serious crimes process.

Although it appears unlikely that those in Indonesia will face trial, there remains the possibility that they will at some stage appear before the SPSC. There are three possible scenarios which give rise to this. First, indictees could travel across the border from West Timor and be arrested by East Timorese or UN police. Secondly, they could travel abroad and be handed over by a third country, perhaps on the basis of an Interpol arrest warrant and an

Public hearing for General Wiranto

On 28 January 2004 the SCU filed a motion with the SPSC seeking the court’s approval to hold a public hearing over the application for an arrest warrant against General Wiranto, the high-profile commander of Indonesia’s armed forces during 1999. Wiranto is currently a presidential candidate in Indonesia’s 2004 election. The intention of such a hearing is to publicise the allegations against Wiranto, give witnesses the chance to give testimony and for evidence against him to be put before an open court.

If an Interpol arrest warrant is issued as a result of the hearing, the likelihood that Wiranto appears before the SPSC for alleged crimes against humanity is increased. This eventuality is made more likely by a recent report from the *Washington Post* that claims Wiranto has been put on a US Government watch list.

extradition treaty. Finally, given a change of Government in Indonesia, the current policy which effectively grants impunity for human rights abuses committed by the military, could possibly be altered. If so, it is foreseeable that Indonesia may wish to cooperate and extradite indictees.

Any of these three scenarios could result in high-level military commanders and civilian officials being tried before the SPSC. The premature closure of the SCU could jeopardise these trials, should they occur. Without skilled international prosecutors, or until national prosecutors gain the requisite skills, questions should be asked about the SPSC's ability to conduct fair trials in these circumstances. These concerns will be compounded if high-level commanders face trials due to the added complexity and pressure that trials of such indictees would entail.

Although improbable, it remains a possibility that Wiranto could face trial before the SPSC. If so, the premature closure of the SCU could jeopardise the success of such a trial. At present or in the near future, national staff simply do not have the capacity to handle such complex and politically charged prosecutions.

JSMP believes the SCU has committed significant resources to the preparation of indictments for Wiranto and other alleged perpetrators at large in Indonesia. It would indeed be troubling if after significant work in drafting indictments and obtaining arrest warrants, there is no effective prosecution service to try indictees such as Wiranto that many possibly become available. Further, if trials do occur but do not meet international standards, possibly the best chance to ensure that effective trials occur and the architects of crimes against humanity face justice will have been lost.

5 The Responsibility of the International Community

It is of paramount importance that the international community shares the responsibility to ensure that crimes against humanity and breaches of international humanitarian law, whenever and wherever they are committed, are not given impunity. This includes ensuring that those responsible for past atrocities committed in East Timor should not go unpunished. As discussed, the SCU is a crucial factor in the Security Council demand that those 'responsible for grave violations of international humanitarian and human rights law' in East Timor are brought to justice. This demand comes from the highest UN body and is an authoritative recognition of the international community's responsibility to prosecute the grave breaches of human rights and humanitarian law committed in East Timor.

The international community can partly discharge this duty by continuing to fund the SCU and the serious crimes process more generally. The work done under UN auspices thus far has by and large been admirable given the resources available. In light of East Timor's dependence on foreign aid, this international funding must continue to ensure the process is completed. JSMP therefore believes that it is the responsibility of all states to assure the effective functioning of the SCU through adequate and sustainable findings.

There is little doubt that the international community bears responsibility for bringing to justice the perpetrators of crimes against humanity in East Timor. This is reflected in two statements, both from UN bodies. The first comes from a special session of the UN Commission on Human Rights (UN CHR) convened in September 1999 to discuss the situation in East Timor. At this session a resolution was adopted which stated:

‘the international community will exert every effort to ensure that those responsible are brought to justice’.

The second comes from the International Commission of Inquiry on East Timor which published a report on 31 January 2000:

‘The UN, as an organization, has a vested interest in participating in the entire process of investigation, establishing responsibility and punishing those responsible and in promoting reconciliation. Effectively dealing with these issues will be important for ensuring that future Security Council decisions are respected.’¹⁶

These two statements make it clear that the international community recognises its responsibility to investigate and prosecute alleged perpetrators. If the SCU is disbanded before this process is completed, the credibility of the UN and their dedication to eradicating crimes against humanity must be questioned.

The mere fact that the serious crimes process commenced is further evidence that the international community recognised its responsibility to take action for the events in East Timor. Just commencing a process, however, is not sufficient. It is imperative that this process is seen through until completion. To leave investigation and prosecution entirely in the hands of national staff would be to neglect the responsibility the international community bears to the people of East Timor.

6 Comparative analysis

6.1 The Serious Crimes Unit as part of a global process

The international community has fulfilled its responsibility to bring to justice grave violations of humanitarian and human rights law in other countries. This process is currently continuing for crimes committed in Rwanda and the former Yugoslavia, where trials are heavily supported both financially and in terms of expertise. Yet, similar commitment is not shown to a comparable process in East Timor. The premature closure of the SCU would clearly demonstrate double standards on behalf of the UN for weighting crimes against humanity committed in some parts of the world differently to others. Such a situation would be deplorable, and would partly negate the admirable role the UN has played in other contexts bringing those accused of grave international crimes to justice.

The SPSC is one of several tribunals currently prosecuting individuals for breaches of international humanitarian law. These include the International Criminal Tribunal for the

¹⁶ Report of the International Commission of Inquiry on East Timor to the Secretary-General, January 2000. UN Doc A/54/726 and S/2000/59, 31 January 2000.

Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL). All of these mechanisms contain some degree of UN involvement: both international tribunals were established by the Security Council adopting resolutions under Chapter VII of the UN Charter, while the SCSL is a hybrid tribunal established under an agreement between the UN and the local government. The establishment of these mechanisms reflects a worldwide trend to prosecute gross violations of international humanitarian law and to hold senior perpetrators accountable. The work of the SCU and the SPSC should be seen as an integral part of this process to end impunity for such crimes. It appears, however, that the SCU does not receive a comparable amount of funding or support as these other mechanisms. If the work of the Special Panels is further hamstrung by a failure to provide UN funding for the SCU, this will not only affect the pursuit of justice and the reconciliation process in East Timor, but will also undermine global moves to prosecute grave breaches of international humanitarian and human rights law.

As discussed previously, despite a degree of uncertainty, the SCU's mandate concerns serious criminal offences committed in 1999. Accordingly it bears resemblance to the mandates of the ICTY, ICTR and SCSL. The ICTY was established in 1993 due to the threat to international peace and security posed by serious violations of international humanitarian law that occurred in the former Yugoslavia since 1991.¹⁷ The ICTR, on the other hand, was established in 1994, and has jurisdiction over certain breaches of international humanitarian law committed between 1 January and 31 December 1994 in Rwanda and in the territory of neighbouring States.¹⁸ Although the ICTY and ICTR are separate entities, they have shared appellate judges and a common prosecutor. Both tribunals are currently operating and are projected to continue for years to come. The SCSL is a hybrid tribunal established jointly by the UN and the Government of Sierra Leone in 1999 and is mandated to try those who bear the greatest responsibility for violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.¹⁹ It can be seen, that the work of the SCU and the trials of the SPSC operate under a similar, although less extensive, mandate. The SCU, however, must carry out its work on a fraction of the budget of the other courts.

6.2 *Funding*

Admittedly there are differences between the process in East Timor and the other international mechanisms in terms of mandate and legal basis, however the stark differences in funding appear difficult to justify. This is particularly concerning as all sets of trials involve crimes against humanity: trials that diminish all of mankind and are the international community's responsibility to prosecute. It appears, however, that the cases prosecuted by the SCU in East Timor are less supported than those in the ICTY, ICTR and SCSL.

¹⁷ Security Council Resolutions 808 February 22, 1993 and 827 of May 25, 1993. The ICTY is located in the Hague, Netherlands.

¹⁸ Security Council Resolution 955 of November 8, 1994. The ICTR is located in Arusha, Tanzania.

¹⁹ Security Council Resolution 1315 of August 14, 2000. The SCSL is located in Freetown, Sierra Leone.

For the 2002-2003 period, the ICTY had a regular budget of around US \$223 million and employed 1301 staff,²⁰ while for the same period, the ICTR budget was almost US \$180 million with 872 employed.²¹ In both cases, the majority of these funds came from the regular UN budget. The SCSL, on the other hand, is not funded directly by the UN but by donations from UN members such as the United States and the United Kingdom.²² It has a fixed budget of US \$16 million a year for three years and cases are intended to commence in 2004. In contrast, for the 2002-2003 period, JSMP believes the SCU operated on a comparatively small annual budget of around US \$5 million employing 111 staff.²³ Even though the SCU funding only represents the costs for investigation and prosecution, this is by far the most expensive element of the trials as it covers detailed investigation processes, forensic work, the drafting of indictments, witness transportation and accommodation as well as courtroom advocacy. In this light, it is clear that there is great disparity between funding for the international tribunals when compared to the SCU, and to a lesser extent the SCSL.

It must be recognised that the ICTY and ICTR, as purely international tribunals, require far greater funding due to their location and reliance on international staff. However, the vast difference in resources attributed to these as opposed to the SCU seems difficult to justify. Factors which perhaps substantiate the need for greater funding to the two international criminal tribunals are the size of the countries where the crimes took place, the greater scope of the crimes in question, the greater number of victims, and the fact that those at the very top of the command chain can be put on trial. The argument goes that the SCU does not need as much funding because the situation in East Timor was less grave as in Rwanda and Former Yugoslavia, for example it is estimated that over 400,000 people were allegedly killed during the violence in Rwanda. Also, those primarily responsible for the crimes committed in East Timor remain at large in Indonesia and cannot be put on trial. As the situation in East Timor was comparatively far less severe in terms of numbers of crimes, it has been argued that the trials deserve less expenditure. Regardless of the strength of these justifications, it is clear that compared to the other international courts and tribunals, the SCU operates on a comparatively small budget and is significantly under-resourced to prosecute the Crimes Against Humanity which occurred in East Timor.

At the time of writing, the SCU had filed 81 indictments with the Special Panels. Charges have been filed against 369 accused persons and 47 trials have reached a verdict. In comparison, by September 2003, ICTR had indicted 81 persons while in January 2004, the ICTY had indicted around 140 persons. This is despite a far greater amount of funding and time as opposed to the SCU. Further, the SCU has around 15 lawyers in

²⁰ See <http://www.un.org/icty/>.

²¹ See <http://www.ictt.org/>.

²² See <http://www.sc-sl.org/>

²³ JSMP could obtain no publicly available official information on the SCU's budget. It therefore had to rely on unofficial sources. The US\$4 million estimate was taken from a Radio Australia transcript, 'Concern over future of Serious Crimes Unit' 29 April 2003, available at <http://www.etan.org/et2003/may/01/29concern.htm>.

total, while the ICTY has approximately 8 lawyers per case. Given such a vast difference in resources yet a similar level of output, it is clear that the SCU operates far more efficiently than the ICTY and ICTR. It is likely, however, that this reduced funding impacts on the quality of investigations and indictments. Further, a likely result is that a significant number of cases are not fully investigated and brought to trial. This situation can be avoided with an extended mandate and with funding on a comparable level to other international tribunals.

7 Recommendations for the future of the Serious Crimes Unit

JSMP bases the following recommendations on its extensive monitoring of the SPSC and its community consultation meetings.

JSMP strongly recommends that:

- The SCU is given as much support as necessary to fully investigate, issue indictments and where possible prosecute all serious crimes cases.
- The SCU's mandate is extended and funded until such time as Timorese staff and resources can adequately prosecute serious crimes cases or until all such cases have been fully investigated and prosecuted.
- Due to the possibility of UN support ceasing, the SCU aims to be run entirely by national staff as soon as is practicably possible. If this can be achieved, and national staff have requisite skills, international support should cease at this time.
- Further attention is given to skill transfer and capacity building of national staff to ensure that crimes against humanity trials can continue in the absence of international support.
- Criteria are set to determine which cases are pursued and which are closed. These standards or criteria should be the result of community and governmental consultation and should be transparent and readily available to the public.
- All investigations opened by the SCU are either pursued or those that do not meet the set criteria are closed.
- Victims and families are notified if a case is pursued or closed and are updated in significant progress in matters.
- All cases pursued are continued until verdict and sentence issued. A commitment must be made to see this process through to completion.
- The SCU should explore alternative funding arrangements outside of the UN system. As mentioned above, the Special Court for Sierra Leone operates on bilateral funding direct from governments such as the US and the UK. The SCU should at the very least explore the possibility of additional bilateral funding. Currently, JSMP understands the SCU receives some bilateral funds, however it is believed this constitutes a small amount of the SCU operational budget, and is generally targeted at training programmes. Additional sources of revenue should be actively pursued, along the lines of the Sierra Leone Court to ensure the SCU can operate to some extent in the event that UN support is not renewed.