Hybrid Tribunals: Searching for Justice in East Timor

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The hybrid tribunal is one of the latest attempts to seek justice for crimes of mass atrocity. Designed partly in response to criticisms of the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"), the hybrid model is a system that shares judicial accountability jointly between the state in which it functions and the United Nations.[1] First established in East Timor, variations on the hybrid model have been proposed for Cambodia and are being implemented in Sierra Leone.[2] Should the hybrid tribunals succeed, they may prove more than a fleeting international experiment.

The hybrid model endeavors to combine the strengths of the ad hoc tribunals with the benefits of local prosecutions. As with the ICTY and the

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1. This Article defines the hybrid tribunal in East Timor as consisting of three components: (1) the Serious Crimes Unit ("SCU") responsible for investigations and prosecutions, funded and staffed by the UN, (2) the Special Panel of Judges, which is funded by the UN and jointly staffed by the UN and East Timor, and (3) the Public Defenders' Office, funded and staffed by East Timor. Although court registration and administration is typically considered the third component of the tribunal, I include it in the Special Panel of Judges for purposes of this Article.

2. In Kosovo, international and local judges jointly hear cases, some of which involve crimes committed during the Kosovo conflict. But these "internationalized panels" are not granted exclusive jurisdiction over serious crimes, nor were they appointed specifically to adjudicate them. Sylvia de Bertodano, Current Developments in National and Internationalised Courts (Jan. 13, 2003) (unpublished paper, on file with author). A model that more closely resembles that adopted in East Timor is the Kosovo War and Ethnic Crimes Court, designed specifically in response to crimes committed during the Kosovo conflict, but was never implemented. Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, Criminal Law Forum 12: 185–246, 185 (2001), *available at* http://www.jsmp.minihub.org/Resources.htm. Discussions between the UN and the Cambodian government about the establishment of an "Extraordinary Chambers," in which mixed panels of local and international judges would adjudicate cases involving international crimes committed between 1975 and 1979, have been intermittent. Finally, it should be noted that the Sierra Leone Special Court, which has not yet issued its first indictment, is not formally affiliated with the UN. Although it was established by a treaty between the UN and the Sierra Leone government, it does not receive UN funds, and its international staff is not employed by the UN. For more information on the Sierra Leone court and links to relevant Web sites, *see* http://www.cij.org.

ICTR, the UN is responsible for providing the hybrid court with funding, resources, judges, and prosecutors. It lends the court some degree of legitimacy as a fair mechanism for holding perpetrators responsible for their crimes. As is the case with national courts, the hybrid model is cheaper to operate than the ad hoc tribunals. It is considered to be politically less divisive, more meaningful to victim populations, and more effective at rebuilding local judicial systems.

The hybrid model's greatest risk is that rather than incorporate the best of the international and local judicial systems, it may reflect the worst of both. As a first attempt, the East Timor tribunal has been particularly vulnerable to this risk. To date, many have criticized the tribunal for its inefficiency, for minimizing local participation, and for failing to uphold due process standards. The high expectations for the new "'state of the art' legal regime"[3] have been accompanied by a heightened possibility of disappointment. Siphosami Malunga, a public defender at the tribunal, has lamented that there were "lots of grand ideas, but so many mistakes."[4]

The susceptibility of the hybrid model to grave mistakes might lead one to question whether it is indeed preferable to ad hoc tribunals. Recent developments suggest that the question is moot. The political reality is that "the opportunity for an ad hoc tribunal for East Timor has passed."[5] Overwhelming support for the tribunal among East Timorese failed to convince the UN that an ad hoc tribunal would be worth the cost.[6] Indonesia's National Commission on Human Rights (Komnas HAM) released a detailed report on January 31, 2000, listing the names of Indonesian and East Timorese officials it recommended be investigated for the campaign of violence,[7] but did not persuade the UN of the need to create an ad hoc tribu-

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3. Suzannah Linton, *Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor*, 25 MELB. U. L. REV. 122, 178 (April 2001).

4. Interview with Siphosami Malunga, UN-sponsored public defender of serious crimes, in Dili, East Timor (July 23, 2002).

5. Interview with Sylvia de Bertodano, No Peace Without Justice-sponsored public defender of serious crimes (Sept. 2001–Nov. 2003), in Dili, East Timor (July 30, 2002) [hereinafter Interview with Sylvia de Bertodano]. *See also* Yayasan HAK, leading East Timorese legal aid NGO, Statement of Yayasan HAK for the Independence Day (May 18, 2002) (stating, "We have by now lost nearly all hope that there will be an international tribunal for the crimes against humanity committed in 1999.")

6. Even into the hybrid tribunal's third year, calls for a UN ad hoc tribunal by East Timorese continue. For example, in a November 2002 statement, Yayasan HAK claimed that the recent conviction record of the Indonesian Ad Hoc Human Rights Court on East Timor has "proven that it will not provide justice for East Timorese community." Yayasan HAK, *Joint Declaration for an International Tribunal*, *at* http://www.jsmp.minihub.org/Reports/Internas%20Tribunal.htm. It is also true, however, that support for an ad hoc tribunal is not unanimous. East Timor's President Xanana Gusmao has repeatedly expressed opposition to an ad hoc tribunal, arguing that the country should focus its attention on reconciliation and social and economic justice issues. "There is talk of an international court, but an international court for whom? For Timorese? I would be the first to disagree . . . . Some say there is no reconciliation without justice. But why? Do we not have our own experience of forgetting the past, of forgiving each other?" ("Gusmao Wants Reconciliation, not International Court," Agencia Lusa Todos, posting of Eliot Hoffman, www.etan.org, to East-Timor@igc.topica.com (Oct. 23, 2002) (on file with author)).

7. *See infra* Part I.

nal.[8] The UN refused to implement even its own Commission's recommendation that such a tribunal be established,[9] a decision largely attributed to the UN's decision to defer to promises by the government of Indonesia to prosecute its own military officials.[10] Experiences in Sierra Leone and Cambodia[11] suggest, however, that ad hoc tribunals may no longer be the preferred mechanism for dealing with episodes of mass violence.[12]

With the hope of suggesting how the model might be better implemented in the future, this Article identifies the weaknesses in East Timor's hybrid tribunal and examines their underlying causes. It is motivated by two questions: First, is the theoretical ideal of the hybrid model attainable in practice? Second, is a constrained judicial mechanism preferable to none? Part I provides background to the 1999 violence and the role of the United Nations in East Timor. Part II focuses on two prominently cited causes for the tribunal's flaws: (a) the UN decision to transfer control of the judiciary, with jurisdiction over ordinary crimes,[13] almost immediately to inexperienced East Timorese officials and (b) a severe lack of funding. Although the UN's policy decisions and limited resources shed light on the troubled experience of the tribunal early on, they do not fully explain the tribunal's continuing difficulties. Part III therefore examines three additional contributing factors: (i) the failure of capacity-building programs, (ii) the obstacles posed

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8. *See* KOMNAS HAM, REPORT OF THE INDONESIAN COMMISSION FOR HUMAN RIGHTS VIOLATIONS IN EAST TIMOR (KPP-HAM), Jakarta, Jan. 31, 2000, *available at* http://www.jsmp.minihub.org/Resources.htm (last visited Feb. 23, 2003).

9. *Report of the International Commission of Inquiry on East Timor to the Secretary General*, 54th Sess., Agenda Item 96 at 153, U.N. Doc. A/54/726, S/2000/59 (Jan. 31, 2000).

10. HUMAN RIGHTS WATCH, JUSTICE DENIED FOR EAST TIMOR (Dec. 20, 2002), *available at* http://www.hrw.org/backgrounder/asia/timor/etimor1202bg.htm [hereinafter HUMAN RIGHTS WATCH, JUSTICE DENIED FOR EAST TIMOR].

11. In the case of Cambodia, the UN seemed prepared to implement the February 1999 recommendations of a UN Group of Experts for the establishment of an ad hoc tribunal, despite concerns, particularly in the office of legal affairs, about the challenges of securing adequate funding. Recent discussions between the UN and Cambodia, which have focused on the potential role of domestic law and domestic judges in a hybrid tribunal suggest that an ad hoc tribunal is no longer being considered. E-mail from Craig Etcheson, Advisor, Documentation Center of Cambodia (Jan. 27, 2003) (on file with author).

12. Comments made by former ICTY Judge Patricia Wald suggest that the UN and U.S. may be unwilling to replicate the ICTY. *See* William W. Burke-White, *Regional Approaches to International Criminal Law Enforcement: A Preliminary Exploration*, 38(4) TEXAS INT'L L.J. (forthcoming 2003) ("[T]he United Nations is understandably anxious to bring to closure the ICTY and the Tribunal for Rwanda (ICTR), which together consume almost ten percent of the total UN budget." (quoting Patricia M. Wald, *To Establish Incredible Events by Credible Evidence: The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 HARV. INT'L L.J. 535, 536 (2001))).

13. UNTAET Regulation 2000/15 defines "serious crimes" as genocide, war crimes, crimes against humanity, torture, murder, and sexual offenses. Regulation 2000/11 grants special panels exclusive jurisdiction over the first four of these crimes, as well as the latter two, if committed between January 1, 1999 and October 25, 1999. "Ordinary crimes" are any other crimes, such as burglary, murder, or sexual offenses not committed between January 1, 1999, and October 25, 1999. *Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses*, UNTAET, U.N. Doc. UNTAET/REG/2000/15 (June 6, 2000); *Regulation No. 2000/11 on the Organization of Courts in East Timor*, UNTAET, U.N. Doc. UNTAET/REG/2000/11 (Mar. 6, 2000), *available at* http://www.jsmp.minihub.org/Resources.htm.

by domestic politics, and (iii) the contradictory role of the UN. Part IV concludes by suggesting what might be learned from the experience in East Timor.

I. Brief Overview

A. Before the 1999 Referendum

On May 20, 2002, and after a hard-fought struggle for independence, East Timor became the world's newest democratic state. For more than four centuries, East Timor had been a colony of Portugal. In 1974, after Portugal permitted the formation of political parties and held some local elections in preparation for its withdrawal, the country was given a fleeting glimpse of self-rule. However, in December 1975, Indonesia invaded and attempted to annex East Timor, declaring it in July 1976 to be Indonesia's twenty-seventh province.[14]

Indonesian occupation of East Timor lasted until August 1999, and is characterized by three periods. During the first period, 1975 to 1979, an estimated 200,000 East Timorese, approximately one-third of the population, were killed either directly or indirectly[15] by the Indonesian invasion.[16] The second period, 1980 to 1989, was marked by continued large-scale military operations and a strengthening of East Timorese resistance to Indonesian rule. The government resettled close to eighty percent of the population during these first two periods and prohibited media and other outsiders from entering the region. The final period, 1989 to 1999, saw a relaxation of certain restrictions. Outsiders, including the media, were allowed into the region. However, government intimidation and repression of East Timorese persisted even in the 1990s. For example, nearly 200 peaceful demonstrators were killed in the 1991 Santa Cruz massacre, an event widely reported in the international media.[17]

The 1998 collapse of the Suharto regime and the appointment of B. J. Habibie as president marked the critical turning point for East Timor. In January 1999, in response to international pressure and in an effort to secure his political position, Habibie announced his plan to hold a referendum, allowing East Timor to choose between broad autonomy within Indonesia or transition to self-rule. On May 5, 1999, under the auspices of the UN, Indonesia and Portugal reached an agreement on the conditions for the referendum, which included a provision that granted Indonesia, and not the UN,

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14. *See generally* Australian National Command Element, Department of Defence, "A Short History of East Timor," *at* http://www.defence.gov.au/army/asnce/history.htm.

15. Scarce food and medical supplies led to thousands of deaths in forced resettlement camps. *See* East Timor Action Network, "Backgrounder for East Timor's May 20 Independence Day" (May 2002), *at* http://etan.org/news/2002a/05back.htm.

16. Judicial System Monitoring Programme, The General Prosecutor v. Joni Marques and 9 others (The Los Palos Case) 4 (Mar. 2002), *available at* http://www.jsmp.minihub.org/Resources.htm [hereinafter JSMP, Los Palos].

17. *See* Australian National Command Element, *supra* note 14.

full responsibility for providing security.[18] Later that month, the UN Mission in East Timor ("UNAMET") arrived in East Timor to prepare for and then implement the August referendum. Despite a widely reported campaign of intimidation and violence by the Indonesian military and the East Timorese militias that it directed, the election turnout was a remarkable 98.5%. A total of 78.5% of voters rejected the special autonomy offer.

The announcement of the pro-independence results less than a week later incited immediate and widespread violence. As the Indonesian military and its East Timorese militias withdrew, they conducted a scorched-earth campaign in which an estimated seventy percent of all East Timorese infrastructure was destroyed. Around 600,000 East Timorese, at least three-fourths of the population, were uprooted from their homes. They fled to the hills or were forced across the Indonesian border. Over 1,000 civilians were killed.[19] It was only with the intervention of the Australian-led peacekeeping force, International Force in East Timor ("INTERFET"), on September 20, 1999, and the return of the previously evacuated UNAMET staff, that law and order began to be restored.[20]

B. The UN Presence in East Timor

On October 25, the UN Security Council passed Resolution 1272, establishing the UN Transitional Administration in East Timor ("UNTAET"), directing the UN to exercise all executive and legislative authority.[21] It marked the first time that the UN had assumed complete administration over all sovereign functions of a country. In doing so, the UN confronted a central tension: its short-term mandate consisted of centralizing UN control to ensure security and stability and to begin rebuilding state institutions. Its long-term objectives, however, involved establishing a viable system of self-government, which would require an inclusive, decentralized state-building approach that emphasized the training and participation of East Timorese.[22]

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18. For more information on the May 5th Agreements and the referendum on independence, see AMNESTY INTERNATIONAL, EAST TIMOR: SEIZE THE MOMENT (June 21, 1999), *available at* http://web.amnesty.org/ai.nsf/index/ASA210491999.

19. "This was no spontaneous outburst or flare-up of civil war but a one-sided campaign of terror and destruction aimed at those who voted for succession from Indonesia." HUMAN RIGHTS WATCH, UNFINISHED BUSINESS: JUSTICE FOR EAST TIMOR 5 (August 2000), *available at* http://www.hrw.org/backgrounder/asia/timor/etimor-back0829.htm.

20. U.N. S.C. Res. 1264, U.N. SCOR, 54th Sess., 4045th mtg., U.N. Doc. S/RES/1264 (1999), *available at* http://www.un.org/peace/etimor/docs/UntaetDrs.htm (authorizing the creation of a multinational force for East Timor); *see also Report of the Secretary-General on the United Nations Transitional Administration In East Timor*, U.N. S.C., 55th Sess., U.N. Doc. S/2000/53 (2000) (reporting on the restoration of law and order following the arrival of INTERFET).

21. U.N. S.C. Res. 1272, U.N. SCOR, 54th Sess., 4057th mtg., U.N. Doc. S/RES/1272 (1999), *available at* http://www.un.org/peace/etimor/docs/UntaetDrs.htm. Following the granting of East Timor's independence on May 20, 2002, the United Nations Mission of Support in East Timor ("UNMISET") assumed its predecessor UNTAET's mandate for prosecuting serious crimes and assisting the judicial sector. U.N. S.C. Res. 1410, U.N. SCOR, 57th Sess., 4534th mtg., U.N. Doc. S/RES/1410 (2002).

22. This argument is made by Joel Beauvais in *Benevolent Despotism: A Critique of U.N. State-Building*

The decimated judicial system was illustrative of the initial challenges faced by the UN in almost all sectors. In addition to the striking absence of any rule of law, the UN staff arrived in East Timor to confront demolished court buildings whose interiors had been reduced to ashes. Libraries, court equipment, and case records had been looted or destroyed. After the referendum, most East Timorese who had acquired legal, political, and administrative experience working as support staff for the Indonesian government fled to Indonesia to avoid possible retributive violence. Essentially, the UN administration confronted a judicial vacuum. In the words of Hansjoerg Strohmeyer, who served both as Principal and Deputy Principal Legal Advisor to UNTAET, "[a]dministering a justice system is no easy task when there is no system left to be administered."[23] Strohmeyer listed the tasks the UN legal office faced upon arrival, including:

> [T]he identification and selection of judges and prosecutors; the provision of judicial training and mentoring programs; the creation of a legal aid scheme . . . the development of a mechanism to address crimes against humanity and other serious crimes committed in East Timor; the establishment of a mechanism to address land and property disputes; the identification and training of a sufficient number of law clerks and secretaries. . . .[24]

It was not until early 2000 that it became certain that Strohmeyer's office would be granted the additional responsibility of prosecuting the 1999 crimes in East Timor's domestic courts.[25] This additional task was among the most challenging. East Timor had never known a judiciary that did not sanction an illegitimate occupation.[26] The legitimacy of and public trust in the judicial sector would therefore depend heavily upon whether the new legal system would hold accountable those involved in the 1999 campaign of violence.

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in East Timor, 33 N.Y.U. J. INT'L L. & POL. 1101 (Summer 2001). Beauvais analyzes this tension in the political, civil, and "law and order" spheres of the UN administration in East Timor. *Id.*

23. Hansjoerg Strohmeyer, *Policing the Peace: Post-Conflict Judicial System Reconstruction in East Timor*, 24(1) U.N.S.W. L.J. 171, 172 (2000), *available at* http://www.jsmp.minihub.org/Reports/StrohmeyerFF.pdf [hereinafter Strohmeyer, *Policing the Peace*].

24. *Id.* at 173.

25. E-mail from Jonathan Morrow, Assistant Legal Adviser, United Nations Transitional Administration in East Timor (Jan. 21, 2003) (on file with author).

26. *See* UNITED NATIONS DEVELOPMENT PROGRAMME, EAST TIMOR HUMAN DEVELOPMENT REPORT 2002 13 (May 2002), *available at* http://www.undp.east-timor.org (stating, "[t]he Indonesian government suborned the legal system to its own ends and corrupted both courts and the judiciary in East Timor—effectively turning the legal system into a servile extension of the executive.").

C. The Hybrid Tribunal

UNTAET Regulation 2000/11, passed in March 2000, established the structure of East Timor's court system.[27] Regulation 2000/15 was promulgated three months later, creating the Special Panels for Serious Crimes and granting them exclusive jurisdiction over allegations of crimes involving genocide, war crimes, crimes against humanity, and torture, as well as crimes involving murder and sexual offenses committed between January 1 and October 25, 1999. The regulations called for two Special Panels to operate at the Dili District Court, and one at the Dili Court of Appeals, each comprising three judges, two international and one East Timorese. With a few minor exceptions, Regulation 2000/15 adopted the law of the International Criminal Court.[28]

Regulation 2000/16, passed the same day as Regulation 2000/15, established the Serious Crimes Unit ("SCU") as the part of East Timor's general prosecution branch responsible for investigating the 1999 violence.[29] The SCU consists of four teams, each staffed almost exclusively by international prosecutors, investigators, and case managers. It is operated and funded by the UN.[30] No legislation for a corresponding Public Defenders' Office was passed. Rather, defense lawyers continued to act under the Indonesian legislation, which remained in effect in East Timor throughout the transition period.[31] During the summer of 2002, there were two international defenders, one paid by the UN as a judicial affairs officer "on loan," and the other funded by the organization No Peace Without Justice ("NPWJ"). The United Nations Development Programme ("UNDP") funded one additional lawyer to work primarily as a mentor to East Timorese public defenders involved with ordinary crimes.[32] With the exception of these three lawyers, the Public Defenders' Office was staffed and funded entirely by East Timorese. It was and continues to be responsible for both serious and ordinary crimes.

Nearly three years after its establishment, many have expressed disappointment at the tribunal's shortcomings. It has been unable to prosecute

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27. *Regulation No. 2000/11 on the Organization of Courts in East Timor, supra* note 13.

28. For an in-depth discussion of the structure of the serious crimes project and the laws adopted, see Linton, *supra* note 3.

29. *Regulation No. 2000/16 on the Organization of the Public Prosecution Service in East Timor*, UNTAET, U.N. Doc. UNTAET/REG/2000/16 (June 6, 2000), *available at* http://www.jsmp.minihub.org/Resources.htm.

30. As discussed below, the one exception worth noting is the SCU's capacity-building program, funded primarily by NGO and bilateral assistance, not the UN. *See infra* Part III.A.

31. Regulation 1999/1 adopted Indonesian Law to the extent that it (1) was not in conflict with "internationally recognized human rights standards," (2) did not conflict with UNTAET's mandate, and (3) did not conflict with Regulation 1999/1 or any subsequent regulation or directive. The decision to continue with the application of Indonesian law was motivated by practical needs. *See* Jonathan Morrow and Rachel White, *The United Nations in Transitional East Timor: International Standards and the Reality of Governance*, AUSTL. Y.B. INT'L L. 22, 8 (forthcoming) (on file with author).

32. For three weeks in August, the International Foundation for Election System ("IFES") funded an additional international lawyer, Caitlin Reiger, to mentor East Timorese public defenders.

many of those indicted for the 1999 atrocities. Indonesia's refusal to comply with extradition requests or assist the SCU with its ongoing investigations is a significant reason for the tribunal's failures. However, even in cases that it has adjudicated, the tribunal's process has been criticized. For example, Joni Marques was one of ten individuals convicted in the first crimes against humanity trial conducted by the tribunal in November 2001, commonly known as the "Los Palos case."[33] Due to its complexity and size, the case has been recognized as a major achievement for the tribunal. However, a human rights NGO, the Judicial System Monitoring Programme ("JSMP"), released a detailed report outlining its concerns that minimal standards of due process had not been met. The report questioned the impartiality of the Special Panels and the competence of the defense counsel, criticized the delays and interruptions in the trial, and asserted that the interpretation and translation services were inadequate.[34]

With these weaknesses in mind, it is important to acknowledge the significant hurdles that the UN has overcome in implementing the hybrid model. Put simply, it created a judicial system where before there had been none. Within this fragile system, it carved out a special mechanism for dealing with the most unspeakable atrocities. At the very least, the mechanism is operating. The tribunal continues to grapple with the physical devastation of the 1999 campaign, the loss of many experienced East Timorese, and a persistent shortage of resources and support staff. Furthermore, the tribunal continues to improve. The SCU, in particular, has responded to criticism effectively and has undergone substantial restructuring and vast improvement over the past year.[35] However, the improved effectiveness of the SCU accentuates the inadequacies of both the defenders' unit and the judiciary. As Sylvia de Bertodano, the public defender sponsored by No Peace Without Justice, has noted, "the fact that the situation has improved for the prosecution is irrelevant when the other two organs of the court—the judges and defense—are not functioning."[36]

The high number of indictments filed and cases adjudicated might suggest that the tribunal has been successful in fulfilling its mandate. Since hearing its first trial in January 2001, the SCU has investigated and filed 45 indictments for serious crimes against 140 individuals. These indictments resulted in trials and convictions for thirty-one individuals, spanning all levels of the Indonesian military and East Timorese militia command struc-

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33. Case No. 9/2000. For the *Los Palos Case* indictment, judgments and JSMP commentary, *see* http://www.jsmp.minihub.org/Trialsnew.htm.

34. JSMP, LOS PALOS, *supra* note 16.

35. Among other steps, the SCU has substantially improved management and recruitment problems, strengthened its training and mentoring programs, and enhanced its public education and outreach efforts. Interview with Eric MacDonald, Prosecutor, Serious Crimes Unit, in Dili, East Timor (July 23, 2002).

36. Interview with Sylvia de Bertodano, *supra* note 5.

ture.[37] As of January 2003, there were twenty cases pending before the Special Panels in which the accused were present in East Timor, although some were still in the pre-trial stage.[38] Particularly when compared to the better funded and staffed ICTR and ICTY, the hybrid tribunal seems to have fared extremely well. Since issuing its first indictment in 1995, the ICTR has indicted more than seventy individuals but has litigated only nine cases, with one appeal still pending. Nine additional trials are currently underway, leaving over half of those indicted still awaiting trial.[39] The ICTY, which has been operating since 1994, has only completed trials of thirty-four individuals, with eight more currently underway, and three awaiting judgment or sentencing.[40]

The comparison with the international tribunals, however, is misleading. The high number of cases prosecuted in East Timor belies the qualitative inadequacy of the trials, something not shared to the same extent by the ad hoc international tribunals. It is questionable, for example, whether all of the accused in East Timor have been provided with an adequate defense.[41] For example, no defense witnesses were called in the first fourteen cases prosecuted.[42] Until relatively recently, the accused have been routinely detained beyond the seventy-two-hour limit and before their preliminary hearings. Some of the accused have been left in prisons for months or even years while awaiting trial. Cases have been repeatedly delayed for lack of translators or judges.[43] For the past year, the Special Panel for the Court of Appeals has not operated.[44] Furthermore, in the cases that have been prosecuted and especially in the earlier ones, the judges neglected to apply international law or applied it incorrectly, and handed down harsh sentences for low-level perpetrators.

The concern is not that the hybrid model achieves more in theory than in practice. The risk is that the tribunal's advocates overlook this gap, while its

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37. HUMAN RIGHTS WATCH, JUSTICE DENIED FOR EAST TIMOR, *supra* note 10.

38. E-mail from Siphosami Malunga, Public Defender, Serious Crimes (Jan. 19, 2003) (on file with author) [hereinafter E-mail from Malunga].

39. International Criminal Tribunal for Rwanda, *Judgments, Decisions, and Orders of the Chambers*, *available at* http://www.ictr.org (last visited Dec. 6, 2002).

40. INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, FACT SHEET ON THE ICTY PROCEEDINGS (Dec. 13, 2002), *at* http://www.un.org/icty/glance/index.htm.

41. Siphosami Malunga & Shyamala Alegendra, Prosecuting Serious Crimes in East Timor: An Analysis of the Justice System, 31 (Aug. 2002) (unpublished paper, on file with author) [hereinafter Malunga & Alegendra].

42. DAVID COHEN, SEEKING JUSTICE ON THE CHEAP: IS THE EAST TIMOR TRIBUNAL REALLY A MODEL FOR THE FUTURE? (East-West Center, AsiaPacific Issues No. 61, August 2002), *available at* http://www.jsmp.minihub.org/Resources.htm.

43. During September 2002, for example, twenty-nine hearings were scheduled, seventeen of which were postponed. Eleven of these were postponed due to judges' unavailability. Press Release, Judicial System Monitoring Programme, East Timor Special Panels for Serious Crimes: More Postponements than Hearings (Oct. 11, 2002), *at* http://www.jsmp.minhub.org/News/12N_10_02.htm.

44. Press Release, Judicial System Monitoring Programme, East Timor Urgently Needs Court of Appeal to Guarantee Fundamental Human Rights (Oct. 14, 2002), *at* http://www.jsmp.minihub.org/News/14N_10_02.htm.

opponents accept it as inevitable. Understanding the reasons for the tribunal's shortcomings would be a step toward avoiding both of these mistakes.

II. Understanding the Flawed Practice of the Hybrid Tribunal

A. A Mistaken Policy Decision

The experience of the hybrid tribunal cannot be understood apart from the troubled legal context in which it was established and continues to operate.[45] Under both the UN administration and in the post-independence period, the legal realm has proved to be one of the weakest sectors of the government. In a World Bank report released in November 2002, justice ranks eleventh out of the twelve sectors evaluated for progress in the transition to independence.[46] The report attributes the strength of the top-ranked sectors, including health and agriculture, to "the involvement of relatively experienced Timorese counterparts early in the transition."[47] Ironically, the legal sector itself has been recognized for its early inclusion of East Timorese officials. But rather than merely "involving East Timorese counterparts," UN legal officer Strohmeyer decided in early January 2000 to transfer complete control of the judiciary, with jurisdiction over ordinary crimes, to East Timorese officers.[48]

Given the lack of legal experience of most East Timorese officials, this early transfer of authority has been blamed for the current frailty of the legal sector.[49] Under the Indonesian occupation, East Timorese had been denied any meaningful opportunity to participate in the justice system. Many of those who had participated in the Indonesian system fled upon the announcement of the referendum results to avoid possible violent retaliation. When the UN arrived in September 1999, only sixty people in East Timor had law degrees. None of them had served as judges, prosecutors, or defenders under Indonesian rule. Of the seven judges sworn into office in January 2000, none had previous judicial experience, and only two had served in the

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45. This point was made recently by the UNMISET Special Representative of the Secretary-General Kamalesh Sharma. "The Serious Crimes Programme of UNMISET . . . is part of the national justice system of Timor-Leste, and its success therefore is dependent on the strength of the justice system as a whole. It is essential to identify strategies to strengthen the national justice system, even for better results of the Serious Crimes process." Posting of John M. Miller to east-timor@igc.topica.com (Jan. 29, 2003) (on file with author) (containing a Jan. 25, 2003 statement by the Special Representative of the Secretary General).

46. The power sector ranks last and health ranks first. *See* Klaus Rohland and Sarah Cliffe, The East Timor Reconstruction Program: Successes, Problems and Tradeoffs 11 (World Bank Group, Conflict Prevention and Reconstruction Unit Working Paper No.2, Nov. 2002), *at* http://lnweb18.worldbank.org/essd/essd.nsf/CPR/Resources-All [hereinafter Rohland and Cliffe].

47. *Id.*

48. Control over the judiciary did not include control over the Serious Crimes Unit or the Special Panels, which remained primarily UN entities.

49. Interview with Christian Ranheim, co-founder, Judicial System Monitoring Programme, in Dili, East Timor (July 18, 2002).

judicial sector as support staff.[50] However, this did not prevent Strohmeyer from handing over responsibility for constructing a judiciary from scratch to them.

Strohmeyer would be the first to acknowledge this lack of experience and the challenges it posed.[51] He defended his decision to transfer command of the legal system at that early point on two different grounds. First, he was attempting to avoid one of the most common critiques of UN state-building efforts: that they are dismissive of local autonomy and participation. Strohmeyer stated,

> political sensitivity to the euphoria and excitement that had followed the international community's intervention in East Timor required that the general expectation that the international community would demonstrate an immediate commitment to domestic involvement in democratic institution building, especially in the legal sector, be accommodated. Hopes for self-determination and self-government meant that the appointment of local judges, which was an unprecedented move, unknown even under Portuguese colonial rule, took on enormous symbolic significance.[52]

Some have praised this initial decision. The judiciary was "the only sphere among the three [judicial, civil, and administrative] in which, virtually from the mission's outset, UNTAET established genuinely East Timorese staffed institutions."[53] Second, Strohmeyer's policy decision was also driven by practical needs. Strohmeyer noted the particularly urgent legal circumstances: Even before the UN's arrival, suspects in the 1999 violence had been arrested and detained and were awaiting trial. Jonathan Morrow, who worked with Strohmeyer during UNTAET's early days, makes the point: "It is not as if any international lawyers were around. It was not as though international jurists were lining up at the door in East Timor."[54]

An argument can be made, however, that even given the staffing constraints and urgent conditions of those detained, the legal office would have fared significantly better if it had arranged for management of the judiciary to be shared with lawyers recruited internationally. While acknowledging the political pressures underlying Strohmeyer's decision to give "complete novices unfettered [judicial] authority," Suzannah Linton, one of the first prosecutors at the tribunal, suggests what could have been a feasible alternative:

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50. Malunga & Alegendra, *supra* note 41, at 6.

51. For a vivid description of the recruiting and appointment process for judicial officers, see Strohmeyer, *Policing the Peace*, *supra* note 23; see also Hansjoerg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L L. 46 (January 2001) [hereinafter Strohmeyer, *Collapse and Reconstruction*].

52. Strohmeyer, *Policing the Peace*, *supra* note 23, at 177.

53. Beauvais, *supra* note 22, at 1155.

54. Interview with Jonathan Morrow, Assistant Legal Advisor, United Nations Transitional Administration in East Timor, in Dili, East Timor (July 27, 2002).

> The task of institution-building would undoubtedly have been better served by having international expertise brought in for the transitional period, with East Timorese counterparts appointed as deputies on probation in order to receive the appropriate training on the job. At the end of the transitional period, their training would have empowered them to assume full responsibility as judges, prosecutors and public defenders.[55]

Some have argued that it was unwise for Strohmeyer to simply implement the models he learned from his prior work experience in Cambodia and Kosovo, when local circumstances in East Timor might have suggested taking another course.[56]

Others have echoed this criticism, citing Strohmeyer's decision as a root cause for much of the difficulty that the judiciary has faced. In a recent interview, Foreign Minister José Ramos-Horta stated, "[w]e should have not rushed into the handover from international staff to East Timorese .... Right now we are harvesting some hasty decisions in transferring responsibility of the judiciary to the Timorese side."[57] Caitlin Reiger, co-founder of the human rights NGO Judicial System Monitoring Programme, has also asserted that much of the current trouble in the judicial system can be traced to "a critical design fault from the beginning."[58]

Furthermore, the primary benefit of Strohmeyer's policy decision—local inclusion—may have proved to be illusory. Although perhaps to a lesser degree than in other sectors, many East Timorese in the judiciary felt sidelined by the UN staff. One prominent example is the promulgation of Regulation 2000/15, establishing the Special Panels for Serious Crimes. East Timorese jurists were frustrated and bitter that they had not been consulted on a decision of such importance—determining which law would apply in the adjudication of referendum-related allegations.[59] This experience was not anomalous. A World Bank report highlights the legal sector as one in which the UN-East Timorese working relationship was particularly non-collaborative.[60]

This tension between East Timorese legal officials and UN staff has persisted. It became particularly palpable in the interactions between East

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55. Linton, *supra* note 3, at 134.

56. *Id.* at 138; *but see* Strohmeyer, *Collapse and Reconstruction*, *supra* note 51, at 54 (elaborating on the reasons for early transfer of authority, including the importance of self-determination, a desire to minimize disruption by later international withdrawal, and international unfamiliarity with local conditions and the relevant law.).

57. *Investors Wary of East Timor on Weak Judiciary*, JOYO INDONESIA NEWS, August 13, 2002, *available at* http://www.jsmp.minihub.org/News/14_8_02-2.htm.

58. Interview with Caitlin Reiger, co-founder, Judicial System Monitoring Programme, in Dili, East Timor (July 23, 2002).

59. Linton, *supra* note 3, at 150.

60. ROHLAND & CLIFFE, *supra* note 46, at 11 (noting "the situation of health, for example, where despite differences between the technical teams and political leadership, there were regular debates on policy, contrasts with the areas of land and property and justice, where there was often little interaction between technical teams—in particular international advisors—and Timorese political leadership.")

Timorese public defenders and the director appointed to oversee their work. At one point, they packed their belongings and moved from a temporary and isolated back office in the Court of Appeals to the Dili district court house, where they were spending most of their days meeting with clients anyway. Although the defenders have since returned to their Court of Appeals office, their frustrations persist. As of August 2002, no East Timorese defenders were helping to defend any serious crimes cases.[61]

It is only with the benefit of hindsight that Strohmeyer's decision in 2000 can be criticized. Both JSMP co-founders have acknowledged as much. Attributing many of the judiciary's failings to Strohmeyer's initial design, Christian Ranheim noted, "Strohmeyer's viewpoint may at the time have seemed correct, but experience shows it didn't work."[62] Caitlin Reiger remarked that "in theory it was a good idea, but what happened along the way was bad, as was the defensiveness in acknowledging it."[63] Strohmeyer himself has repeatedly suggested the need for creating a "stand-by . . . network of experienced and qualified international jurists" ready for "quick deployment" so that the UN does not find itself again in a similar predicament.[64]

The significance of Strohmeyer's policy decision for the hybrid tribunal is twofold. First, it is important to recognize that from the outset, the UN was implementing an innovative and untested model under extremely challenging circumstances—not only in the context of a physically destroyed East Timor, but also in a complicated legal context. Second, Strohmeyer's policy decision may have been symptomatic of similar miscalculations made by UNTAET in failing to recognize the significant challenges involved in operating the hybrid tribunal, including estimating and providing adequate funding.

B. Lack of Funding

The tribunal's difficulties are most often attributed to a lack of resources, particularly the initial resources budgeted to create the tribunal. The UN administration, it has been argued, severely underestimated the costs involved in building and sustaining civil and judicial institutions. Former prosecutor for the tribunal Suzannah Linton noted, "It is ironic that, although UNTAET had been preparing for this enterprise since the passing of Regulation 2000/11, when Regulation 2000/15 was passed, taking immediate effect, no budget had been approved to ensure that immediate implementation."[65]

Part of the UN's early disregard of judicial funding needs resulted from the military aspects of the intervention overshadowing the longer-term ci-

61. Interview with Caitlin Reiger, *supra* note 58; e-mail from Siphosami Malunga, *supra* note 38.
62. Interview with Christian Ranheim, *supra* note 49.
63. Interview with Caitlin Reiger, *supra* note 58.
64. Strohmeyer, *Policing the Peace*, *supra* note 23, at 180 (emphasis omitted).
65. *See* Linton, *supra* note 3, at 149.

vilian and administrative objectives.[66] Even when security concerns receded, however, resources and funding were not reallocated in a way that would better serve "state-building" purposes.[67] In his writing on East Timor, former Legal Adviser Strohmeyer stresses this point: "In order for interventions to succeed, we must look beyond the short-term objectives of obtaining access to distressed populations through military action. Instead . . . it is the civilian component, and in particular [the UN's] capability to meet emerging law and order challenges, that defines the success of an intervention."[68]

Although UN funding for the tribunal has increased since the court was first established, the tribunal still struggles with a lack of resources.[69] Even now, the combined budget of the two UN-sponsored components, the SCU and the Special Panels, is dramatically lower than those of the international ad hoc tribunals. For 2001, the budget was U.S. $6.3 million, with $6 million allotted to the prosecution unit and the remainder almost entirely to salaries for international judges.[70] In comparison, the ICTR and ICTY budgets for 2002–2003 were U.S. $178 million[71] and $223 million[72] respectively.

1. The Serious Crimes Unit

The impact of constrained resources can be detected even within the SCU, which is by far the best financed of the tribunal's three sectors. In response to both time and resource constraints, the SCU in May 2001 selected ten priority cases on which to focus.[73] This left 650 cases in which investigations

66. *See generally* Hansjoerg Strohmeyer, *Making Multilateral Interventions Work: The U.N. and the Creation of Transitional Justice Systems in Kosovo and East Timor*, 25 FLETCHER F. WORLD AFF. 107 (Summer 2001) [hereinafter Strohmeyer, *Making Multilateral Interventions Work*].

67. The East Timor Transitional Administration ("ETTA"), which was the first UN-East Timorese governing body, had a budget of U.S. $65 million for 2001 to meet education, health, civil service, police, defense, justice, and infrastructure demands. The UNTAET $560 million budget for the same period, in contrast, was used to support the UN mission. Forty percent was directed to the Peacekeeping Force. As Amnesty International noted, "[U]nder UN regulations, UNTAET's budget cannot be used for governance matters—a fact which many UNTAET officials regard as a serious impediment to their ability to carry out their mission." AMNESTY INTERNATIONAL, EAST TIMOR: JUSTICE PAST, PRESENT, AND FUTURE 6 (July 27, 2001).

68. Strohmeyer, *Making Multilateral Interventions Work*, *supra* note 66, at 124.

69. Figures for the tribunal's funding for 1999–2000 and 2000–2001 are not readily available. For these years, the tribunal was funded by a combination of the UN mission assessed budget and the consolidated funds of the ETTA. Figures for 2001–2002 are available, however, as this was the only year in which all of the expenditures for the court were streamlined into the UN mission assessed budget. Due to the UN-set deadline for withdrawing from the tribunal, there are decreased funding projections for 2003 and 2004. E-mail from Stuart Alford, Prosecutor, Serious Crimes Unit (Jan. 26, 2003) (on file with author).

70. COHEN, *supra* note 42, at 5. The budget for the Public Defenders' Office has not been made available.

71. *See* International Criminal Tribunal for Rwanda, General Information, *at* http://www.ictr.org/wwwroot/ENGLISH/geninfo/icttrlaw.htm#2 (last visited Feb. 25, 2003).

72. *See* International Criminal Tribunal for the former Yugoslavia, ICTY at a Glance, *at* http://www.un.org/icty/glance/index.htm (last visited Feb. 25, 2003).

73. For a listing of the selected priority cases, see UNTAET Press Office, Fact Sheet 7: Justice and Serious Crimes (April 2002), *available at* http://www.un.org/peace/etimor/fact/fs7.PDF (last visited Feb. 25, 2003).

were either pending or were yet to commence as of August 2002.[74] Siri Frigaard, Deputy Prosecutor of the Serious Crimes Unit in East Timor, has noted in a recent interview that a lack of resources, combined with an approaching deadline for ending investigations, has eliminated the possibility that all cases will be investigated and prosecuted.[75] Human Rights Watch has given the July 2003 deadline particular attention, arguing that it is premature and presents "the greatest challenge to the Serious Crimes Investigation Unit ('SCIU') and Special Panels."[76] Although not the sole motivating factor, funding has likely played a large part in the UN's decision to adhere to the early deadline.

Frustration with the lack of resources has been echoed from all corners of the SCU. The investigation unit in particular has suffered from a persistent staff shortage.[77] The number of investigators has ranged from a minimum of two to the current maximum of ten.[78] Given the overwhelming number of cases, their complexity, the challenges of evidence, and increasing time pressures, even the current staff size is inadequate. This lack of support is particularly troubling to the many who consider the investigations to be the most critical component of the SCU. Due to the unlikelihood that accused Indonesian officials will face prosecution, many consider the SCU indictments almost as statements of fact. The indictments offer some official UN recognition of the responsibility of senior Indonesian military figures in the 1999 violence. Sylvia de Bertodano, a former defender with the tribunal, observed: "Even though the trials are unlikely to happen, the investigations are underway, and that is significant. They will help ultimately to show the truth as to what actually occurred."[79]

2. *The Special Panels*

Although insufficient funding has not been the central cause of the Special Panels' persistent judge shortage, it is responsible for a complete absence of secretaries, court reporters, legal clerks, stenographers, and public liaisons, as well as an acute understaffing of translators.[80] Without legal clerks, judges are expected to do their own research, writing, and editing. Without secretaries, they answer their own phones and often schedule their own meetings. Their facilities, moreover, are minimal, making research ex-

74. Malunga & Alegendra, *supra* note 41, at 18.

75. "East Timor: Deputy Prosecutor Admits Trials Flawed," *Asia Pacific Programs*, Radio Australia, (June 28, 2002) *at* http://www.abc.net.au/ra/asiapac/programs/s593731.htm.

76. HUMAN RIGHTS WATCH, JUSTICE DENIED FOR EAST TIMOR, *supra* note 37. The SCIU is the investigative unit of the SCU.

77. The investigation unit was also constrained by severe lack of resources at its formation, including a lack of cars and computers. This was subsequently addressed to a large extent.

78. Interview with UN official, in Dili, East Timor (July 28, 2002).

79. Interview with Sylvia de Bertodano, *supra* note 5.

80. JSMP, JUSTICE IN PRACTICE: HUMAN RIGHTS IN COURT ADMINISTRATION 11 (November 2001), *at* http://www.jsmp.minihub.org/Reports/JSMP1.pdf [hereinafter JSMP, JUSTICE IN PRACTICE]; *see also* HUMAN RIGHTS WATCH, JUSTICE DENIED FOR EAST TIMOR, *supra* note 10.

tremely difficult. The library consists of a few unused bookshelves, and access to the Internet became available only at the end of 2001.[81] The judges sit three to an office. With the complete absence of support staff, they are left with responsibility for tasks that are necessary, but for which their time could be put to better use. As David Cohen noted, "When I first visited the Tribunal, [the judges] were engaged in moving their furniture."[82]

The lack of a court stenographer or transcriber is more problematic. The first thirteen trials were conducted without a transcript or audio recording.[83] Starting with the Los Palos case, the Special Panels began video-recording the proceedings. Since then, the Special Panels have accumulated hundreds of hours of recordings that essentially serve no purpose, since not a single transcript has been made from them. For the Los Palos case, the judges apparently referred to the typed notes taken during the proceeding by one of the presiding judges.[84] Without written transcripts available to either the counsels or the judges, the Special Panels continue to be in violation of UNTAET Regulations 2000/11 and 2000/30,[85] which establish the right of the accused to an official transcript of the proceeding on which an appeal may be based.[86]

The Los Palos case illustrates the serious practical problems arising from the absence of transcripts. The public defenders have been waiting for an official court transcript of the proceedings on which they plan to base their appeal. Court orders to the registry to make such a transcript available have not been implemented. JSMP states that no official transcript exists, and it is not aware that one is being made from the recordings.[87]

The Special Panels also walk a fine line in terms of compliance with the requirement in Regulation 2000/15 that every person be provided the free assistance of a translator.[88] Because the tribunal operates in four languages (Portuguese, Indonesian, Tetum, and English), proper translation is of critical importance. However, the Special Panels had no formal translation unit as of August 2002. It relies on a staff of seven to act as interpreters during court hearings and to translate court documents. Access to these translators, however, is limited. The seven are also employed by the Ministry of Justice, the District Court, and the National Parliament. They are, as JSMP puts it,

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81. Sylvia de Bertodano, East Timor: Trials and Tribulations (unpublished paper, on file with author).
82. COHEN, *supra* note 42, at 5.
83. *Id.* at 6.
84. JSMP, LOS PALOS, *supra* note 16, at 28.
85. Regulation No. 2000/11, *supra* note 27; *Regulation No. 2000/30 on the Transitional Rules of Criminal Procedure*, UNTAET, U.N. Doc. UNTAET/REG/2000/30 (Sept. 25, 2000), *available at* http://www.un.org/peace/etimor/untaetR/reg200030.pdf.
86. JUDICIAL SYSTEM MONITORING PROGRAMME, THE RIGHT TO APPEAL IN EAST TIMOR (JSMP Thematic Report 2, October 2002), *at* http://www.jsmp.minihub.org/News/17_10%20Appeal.pdf [hereinafter, JSMP, RIGHT TO APPEAL].
87. *Id.* at 18.
88. Regulation No. 2000/15, *supra* note 26.

"stretched to capacity."[89] The three international translators are similarly unavailable, as they provide services for the Ordinary Crimes Unit and the Ministry of Justice.[90] The severe understaffing of translators has impeded the filing of appeals and forced many hearings to be postponed.[91]

Even when interpreters are available and used, the quality of translation is dubious. In one detention review hearing, translation was provided only erratically. The judge, prosecutor, and defender spoke in English. An interpreter would translate what they said into Indonesian, and a second would translate the Indonesian into Tetum. Even for this minor and straightforward review hearing, the translation significantly slowed the proceedings. For certain periods of the proceeding, it simply did not occur. Only when the counsel or judge reminded the first interpreter were statements translated. The defendant, it seemed, missed most of what was said in the proceeding.[92]

The low quality of translation has been documented by JSMP, which designates an observer to attend all court hearings. According to JSMP, six languages were used during the Los Palos case. Because the court had no interpreters for three of the languages, the prosecution had to hire their own interpreters. Even with the interpreters, however, communication was difficult. JSMP observed that:

> Everyone in the courtroom had problems following the dialogue at one stage or another. Sometimes the private interpreter of Joni Marges would interrupt and clarify sentences. Other times the mistakes were not made clear to the Panel of Judges. One example was when the Portuguese defender asked a question in English regarding the "hitting of Evaristo Lopez." Due to his linguistic background he did not pronounce the H at the beginning of the word, and it was translated to Bahasa Indonesia as the "eating" (makanan) of Evaristo Lopez.[93]

JSMP has also documented instances in which question-and-answer exchanges between judges and witnesses over traumatic events have been unnecessarily prolonged due to interpretation difficulties. Witnesses have had to repeatedly explain how they watched militias kill their relatives.[94] Communication between defendants and their counsel has also proved to be

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89. JSMP, RIGHT TO APPEAL, *supra* note 86, at 19.

90. Malunga & Alegendra, *supra* note 41, at 25.

91. JSMP notes that the current longest pending appeal is a result of the understaffing of translators. An appeal was filed on May 21, 2001 on behalf of Sergio Castro de Jesus. The judge continues to wait for documents in the case file to be translated from Indonesian to Portuguese so that he may review them. JSMP, RIGHT TO APPEAL, *supra* note 86, at 19.

92. Observations by the author in Dili, East Timor (July 23, 2002).

93. JSMP, LOS PALOS, *supra* note 16, at 27.

94. JSMP, JUSTICE IN PRACTICE, *supra* note 80, at 26.

problematic. Counsel has at times asked members of the public to help with interpretation.[95]

Until July 2002, the Special Panels lacked a court administrator. The Special Panels now have one court administrator and two court clerks. Among other tasks, the Administrative Section is in charge of receiving and organizing case files, tracking the status of cases, and keeping an updated calendar on hearings scheduled.[96] The administrators are responsible for tracking and filing case documents that are primarily in English and Portuguese, despite their unfamiliarity with both languages.[97] Due to the difficulty and volume of administrative work, judges are often left to take care of unaddressed administrative matters. In one detention hearing, the defense counsel motioned that he had not been given sufficient notice and time to prepare. The judge and both counsel then spent the next twenty minutes attempting to reschedule the hearing.[98] The judge also pointed out to the prosecution that certain exhibits of evidence were not on file. The prosecutor, in this instance, spent the afternoon trying to locate the evidence which had been submitted to the court by his predecessor on the case, who had since returned to her home country. Ultimately, the evidence was located in the file of another case.[99]

3. The Public Defenders' Office

Of the three pillars of the hybrid tribunal, the Public Defenders' Office is by far the weakest. It continues to reel from the UN's failure to offer funding and, at least initially, support staff.[100] The office therefore operates on a minimal budget, and is staffed by lawyers who have little, if any, job experience. In theory, they bear the task of defending both serious and ordinary crimes. Following the litigation of the first serious crimes case in January 2001, however, the lack of competent counsel afforded to the accused led to international involvement in defending subsequent cases.[101] Currently, serious crimes cases are defended almost entirely by the one UNMISET-sponsored international defender, Siphosami Malunga, with some assistance

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95. JSMP, LOS PALOS, *supra* note 16, at 28.

96. JSMP, JUSTICE IN PRACTICE, *supra* note 80, at 7.

97. JSMP, RIGHT TO APPEAL, *supra* note 86, at 20.

98. Observations by the author in Dili, East Timor (July 22, 2002). The author observed the detention review hearing for Salvador Soares.

99. Interview with Eric MacDonald, *supra* note 35.

100. In the 2003 budget, the UN substantially increased financial support for the defense component of the Tribunal. E-mail from Malunga, *supra* note 38. Malunga stated, "Now there are six in-house counsel, although we are in the process of recruiting the others, three Defense Assistants, three Defense Investigators, six Interpreters, and three Administrative Assistants." *Id.* Given the delay in appointing judges to the Special Panels, as well as Minister of Justice Pessoa's reluctance to accept international defense counsel, it is unclear when the Public Defenders' Office will be more fully staffed. The timing of the UN's increased support is also worth noting, as the Serious Crimes Unit is now entering its winding-down phase.

101. Malunga & Alegendra, *supra* note 41, at 31.

from one or two international mentors. Because there are no lawyers in private practice, East Timorese public defenders face ordinary crimes cases in addition to a growing number of civil disputes.[102] Even if East Timorese defenders desired to be more involved in the hybrid tribunals' work, the current backlog of cases would likely prevent them.[103]

The public defenders assumed their positions having had no practical experience. There are currently ten public defenders for all of East Timor. Although all have legal degrees from Indonesian universities, none had any litigation experience prior to being hired.[104] It has been suggested that the public defenders were an "afterthought" to the appointment of judges and prosecutors, and less able than their East Timorese counterparts to take on the responsibility of their offices. According to Malunga, "Simply put . . . [t]he public defenders were appointed out of what was left of candidates with law degrees."[105] The inequality between the inexperienced East Timorese defenders and the professional international prosecutors eventually became too obvious to ignore, and prompted UNTAET to offer to sponsor three positions. The offer has been resisted by the East Timorese Ministry of Justice, and to date, only one of the three positions has been filled.[106] The UNDP temporarily funded another international defender to work on the mounting caseload.[107] But even this minor assistance is too little, too late. The East Timorese defenders have effectively left the defense of serious crimes, considering the hybrid tribunal to belong exclusively to the internationals. As Caitlin Reiger, who served briefly as a mentor to the Public Defenders' Office, has stated: "They feel that [the tribunal] has nothing to do with them."[108] As of this writing, the East Timorese public defenders work almost exclusively on ordinary crimes.

The severe lack of resources underscores further the urgency faced by the defenders unit, both for ordinary and serious crimes proceedings. When working out of the Dili District Court, the East Timorese defenders must share a single office, making it extremely difficult for them to meet with and take the statements of clients and witnesses.[109] They lack administrative support and have no access to research facilities, such as a library or the Internet. The defenders' office in the Court of Appeals, where they are currently located, is only marginally better equipped. It has one vehicle and recently acquired access to the Internet. But it too lacks administrative sup-

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102. *Id.* at 30.

103. Resentment at the growing backlog of cases was made evident, for instance, in August 2002, when 190 inmates awaiting their hearings escaped Becora jail in Dili, East Timor. JSMP, *East Timor: Mass Jailbreak in Protest at Legal System Hold-ups* (Aug. 17, 2002), *at* http://www.jsmp.minihub.org/News/17_8_02.htm.

104. De Bertodano, *supra* note 81, at 6.

105. Malunga & Alegendra, *supra* note 41, at 30.

106. *Id.* at 31.

107. *Id.*

108. Reiger, *supra* note 58.

109. Malunga & Alegendra, *supra* note 41, at 32.

port entirely. Moreover, because there are no translators, defense counsel must rely on court interpreters when taking initial statements and reading documents. They have no investigators and no budget for witness expenses such as travel and protection programs.[110] This might explain why no defense witnesses were called in the first fourteen serious crimes trials.[111]

Defendants have suffered under the current system. The quality of the defense in the early cases likely violated the right of the defendants to effective counsel.[112] The introduction of international defenders and mentors improved the situation drastically, yet defendants remain deprived of the same quality of defense provided at the ad hoc tribunals. Defendants, moreover, rarely meet with their lawyers. Investigations and trials progress slowly, so that even monthly meetings may leave public defenders with nothing new to report. When defenders do meet with their clients, it is more to offer contact with the outside than to update them on the progress of their cases.[113]

For a long time, the right of the defendants to be free from arbitrary detention was routinely violated. To its credit, the tribunal has made considerable improvements in this realm. UNTAET law now provides that the accused may be detained for a maximum of seventy-two hours before a review hearing is mandated.[114] Nevertheless, the severe resource and staffing shortages continue to pose barriers to respecting such provisions. One example is the detention review hearing of Ozario Aru Bere. Initially scheduled for a Friday, the hearing was postponed at the last minute to the following Monday in violation of the seventy-two-hour limit. The single "investigative judge," who is assigned responsibility for overseeing such proceedings, was ill. With no other judge to replace him, the defendant sat for an additional two days in prison, waiting for his conditional release.[115] Such occurrences are not uncommon.

III. Additional Contributing Factors

Early policy decisions and limited resources only partially explain the tribunal's difficulties. Although inadequate funding persists, it is not simply due to the UN's inability to provide the necessary resources. As one UN official has stated, "the UN is not short of money. It has put money into a lot of other sectors. But the SCU has been, from the beginning, seen as the to-

110. *Id.* at 31–32.

111. Cohen, *supra* note 42, at 5.

112. Malunga & Alegendra, *supra* note 41, at 30.

113. Interview with Sylvia de Bertodano, *supra* note 5.

114. Although this is a significant improvement over prior practice, it may still be in tension with Article 9(3) of the International Covenant on Civil and Political Rights, which requires hearings to occur "promptly after detention." International Covenant on Civil and Political Rights, Dec. 16, 1996, art. 9, para. 3, 6 I.L.M. 368. Amnesty International notes that 48 hours might be seen as excessive (citing Federal Republic of Germany, Report of the Human Rights Committee, Vol. I, A/45/40, at para 433 (1990)); *see also* Amnesty International, *supra* note 67, at 21.

115. Observations by the author, in Dili, East Timor (July 8, 2002).

ken unit."[116] JSMP founder Christian Ranheim notes that the Ministry of Justice has also played a role in the court's financing problems: the inefficacy of the tribunal is "not only a resource issue. There is no lack of funding offers. If the Ministry of Justice had worked professionally in order to coordinate and generate bilateral support, they would have received it."[117] Strohmeyer's decision to transfer control of the judiciary, moreover, might have proved a success had adequate support been given to the mentoring and training programs. To account more fully for the tribunal's difficulties, the remainder of this Article focuses on three additional underlying factors: (i) a significantly flawed mentoring and training program, (ii) impediments posed by domestic politics, and (iii) the ambivalent role of the UN.

A. The Failures of Capacity-Building Programs

Consensus among both UN and non-UN personnel seems to be not just that capacity building has not happened, but that it has hardly begun. As JSMP cofounder Caitlin Reiger put it: "the reality is that more than two years have passed, and the legal system is barely developed."[118] Two years of prior training and mentoring programs failed to fulfill basic training objectives.

Worse, both programs have played a primary role in exacerbating tension between East Timorese and UN personnel in the office. East Timorese defenders now are marginalized from serious crimes litigation. Malunga noted, "the defense lawyers showed so much promise initially. When things first started, they were involved in every case. Now they are totally removed from serious crimes litigation."[119] It is unclear if the damage will be repairable. According to Caitlin Reiger, "the problem is harder to fix now than it was two years ago. East Timorese are sick of internationals coming in and conducting 'workshops.' And it is harder to get people within the UN to acknowledge and admit to what are still the basic, fundamental gaps in the system."[120]

The training and mentoring programs in the SCU and judiciary have not fared much better. The judges' program is effectively nonexistent. There are no mentors, and training has been minimal. It would be mistaken to assume that international judges on the Special Panels can serve as "on-site mentors" to their local counterparts. First, on-site mentors often become distracted by or entirely take over the tasks at hand, such as writing opinions, defeating the purpose of the mentoring. There would be a heightened risk of this with

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116. Interview with UN official, in Dili, East Timor (July 30, 2002).

117. Ranheim, *supra* note 49.

118. Reiger, *supra* note 58. Ms. Reiger served as mentor to the Public Defenders' Office in a project funded by IFES. One of her first assignments was to draft a memo outlining the areas in which training was needed. "How to create and keep a case file" headed the list. *See id.*

119. Malunga, *supra* note 4.

120. Reiger, *supra* note 58.

the Special Panels, given the degree of work and time pressure under which they operate. Second, the current international judges on the Special Panels lack the necessary experience to serve as mentors. Even in the strongest opinions so far, the judges have misapplied international law in certain cases,[121] handed down what seem to be excessively harsh sentences in other cases, and made findings on Indonesian involvement in the 1999 violence without the submission of evidence or issues being litigated.[122]

Although the on-site mentoring program in the SCU of prosecutors, investigators, and managers has been more effective, one can question the delay with which the program was implemented. The first four East Timorese prosecutors and two case managers joined the SCU between May and July 2002. With the SCU entering its "winding down phase," the East Timorese may feel that they have been invited onto the scene inexcusably late. As one of the six East Timorese prosecutors has said, "International staff should stay for five more years, and do training. There is much left to learn."[123]

What explains the failure of the fledging training-mentoring programs? The answer partly lies in a lack of concern with capacity building from the beginning. Understandably, the UN was primarily concerned with security issues when it first arrived. As that urgency waned, other pressing concerns surfaced which did not include capacity building. The UN needed buildings in which to work, it needed means of communicating effectively with other parts of East Timor and New York, and it needed to set up a governmental structure that would begin making decisions with long-term implications. These issues likely crowded out capacity-building concerns.[124]

Capacity building was relegated to the periphery early on for another reason as well: it is not easily packaged. In general, the Security Council and donor countries put pressure on UN missions to demonstrate that objectives are being fulfilled quickly, and that substantial improvements on the ground are being made.[125] Had UN headquarters issued explicit orders that capacity building should be considered a top priority, one can imagine that the training and mentoring programs would have been implemented more quickly and conducted differently. Even now, individual donor governments and NGOs, rather than the UN, are the principal funders for capacity-

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121. JSMP, LOS PALOS, *supra* note 16, at 29–30 (noting that in the dicta of the Los Palos case, in which charges of crimes against humanity were being adjudicated, the judges discussed whether there was the existence of "armed conflict," a requirement for war crimes, but not crimes against humanity, and therefore not relevant to the case).

122. Suzannah Linton, *New Approaches to International Justice in Cambodia and East Timor*, IRRC Vol. 845: 93, 111 (Mar. 2002), available *at* http://www.jsmp.minihub.org/Resources.htm#ARTICLES.

123. Interview with Ivo Jorge Valente, Trainee Prosecutor, Serious Crimes Unit, in Dili, East Timor (July 17, 2002).

124. Morrow and White, *supra* note 31.

125. *See* Beauvais, *supra* note 22, at 2. While analyzing the initial policy changes of UNTAET, Beauvais observes that donors are more satisfied seeing pictures of new courthouses and hearing the numbers of indictments and sentences than in reading accounts about how public defenders are better at organizing their case files. *Id.*

building programs, suggesting that it continues to be under-appreciated by the UN officials in New York.

In the instances where the importance of local participation has been recognized and capacity-building programs implemented, some critical errors were made. One of the most notorious involves the selection of mentors and trainers for the Public Defenders' Office. The UNDP funded two positions for mentors beginning in the spring of 2001. Both proved to be catastrophes. The first mentor had no experience as a criminal defense lawyer, and had never litigated a case. He was a lecturer in commercial law. The other mentor had practiced as a defense lawyer but could not speak any of the court's four languages. Communication between mentor and mentee was all but impossible.[126]

The training programs proved equally disappointing. Often training was simply absent. For the judges appointed to their positions in December 2000, training consisted of a single week in Darwin with others from the office of Judicial Ministry.[127] The training of defenders was ill-focused and poorly organized. Too much emphasis was placed on substantive law, with minimal attention given to administrative and management issues. The training programs were thoughtlessly scheduled. There was no rotation, so defenders were expected to participate in intensive training in the middle of their work days, and all at once, leaving the office empty. Defenders were further deterred from attending since the training was often conducted in Portuguese without translation. None of the defenders speaks Portuguese.[128]

Finally, both the mentoring and training programs exacerbated distrust between the East Timorese and the international staff. Programs were designed so that trainers and mentors from their first days reported on and evaluated the progress of defenders to the Ministry of Justice. Trainers also reported on the attendance of the public defenders at these sessions, and the Ministry of Justice reduced monthly salaries as a penalty for missed sessions.[129] For these reasons, mentors and trainers were seen as an extension of the Ministry, fulfilling a supervisory and disciplinary role rather than offering support and guidance.

Improvements in both the mentoring and training programs are now underway. Of the tribunal's three branches, the SCU has responded most constructively to criticisms. In contrast to the seven-day training session provided for the local judges following their appointment in January 2000, the SCU completed two four-week training programs in 2002, one in July and August, and the other in September and October. The second training session was comprised mainly of members of the Timor Lorosae Police Service, some of whom have continued to work with the SCU, while most others

126. Malunga & Alegendra, *supra* note 41.
127. Linton, *supra* note 3, at 135.
128. Interview with Caitlin Reiger, *supra* note 58.
129. *Id.*

have returned to their original units. For trainees who continue to work with the SCU, UN prosecutors have taken turns giving weekly lectures on some aspect of the law or litigation. Each trainee prosecutor has been assigned to work with a team and "shadow" the UN prosecutors, helping to write indictments and watching and sometimes participating in the court proceedings. While the SCU has managed the trainee programs, the UN has not funded them. According to one UN official, principal funding has been provided by USAID, and the UNDP and Norwegian government have helped to pay for the salaries of local trainees.[130]

Aside from UN unwillingness or inability to provide financial support for capacity-building programs, other significant hurdles remain. Communication between the local prosecutors and the UN staff remains a barrier. Only one of the six East Timorese prosecutors speaks English. He has suggested that a lack of communication continues to damage relations between East Timorese and their international counterparts and impedes the progress of local prosecutors shadowing on the job.[131] The UN personnel, moreover, too often lack the interest and incentive needed of committed mentors. "We, in the UN, have too often looked for managers rather than mentors, who have thus not seen the need to deliver in the vital areas of skill transfer."[132] One UN official has echoed this: "To teach is far harder than to do the job oneself."[133] Without explicit institutional support, even the smallest, most attainable opportunities for "skill transfer" are lost. Efforts by the SCU to rectify these past errors may come too late.[134]

B. The Constraints of Domestic Politics

The East Timorese government, particularly the Ministry of Justice, has played a significant role in undermining the training-mentoring programs, contributing to the tribunal's continual lack of resources, and stalling judicial appointments to the Special Panels. Officials in the Ministry of Justice have rejected numerous substantial offers for funding for the tribunal and capacity-building programs. It is reported, but unconfirmed, that in the summer of 2002, USAID donated U.S. $8.2 million to civil society organizations after its offers to the judiciary "basically to write a blank check" were declined.[135] One employee of an NGO funding organization in Australia

130. This UN official also stated that the UNDP has funded the positions for trainee data entry and IT employees. The Norwegian government has funded the salaries for trainee prosecutors and case managers. USAID has funded the two courses and also paid the wages of thirty local interpreters, who have helped facilitate the training courses and assisted with computer and Portuguese language courses as well. E-mail from UN official (date not available) (on file with author).

131. Interview with Ivo Jorge Valente, *supra* note 123.

132. Morrow and White, *supra* note 31 (citing Sergio Vieira de Mello, Statement at the Donors' Meeting on East Timor, Canberra (14 June 2001)).

133. Interview with UN official, in Dili, East Timor (July 16, 2002).

134. Interview with Siphosami Malunga, *supra* note 4 ("What we lost was the opportunity to build something sustainable.").

135. Interview with local expert on East Timor, in Dili, East Timor (July 2002).

expressed deep frustration that its offers to unconditionally fund numerous positions for international staff in the Public Defenders' Office were also rejected.[136] The International Foundation for Election Systems' provision for a second mentor in the Public Defenders' Office also was never filled before it expired in fall 2002.[137] International lawyers who have worked in the Public Defenders' Office, either as mentors or as defense attorneys, have often been accepted by the Ministry of Justice only after much resistance.[138]

The Ministry's repeated rejection of offers for funds and international staff can be attributed to a deeply held political agenda in which the installing of Portuguese as the official and working language of the courts has been given primacy over all else.[139] Although less than five percent of the country speaks Portuguese,[140] and to date it has not been spoken by a single accused or witness in the hybrid tribunal, nor by any of the East Timorese defenders,[141] the government is insistent that Portuguese be the language of the judicial sector and of government affairs. Language politics have been a volatile subject between the East Timorese government and the UN administration from early on. In a leaked August 2001 confidential memo, Foreign Minister Ramos-Horta stated that he would prohibit his staff from participating in a UN-run Secretariat training workshop if it was conducted in a language other than Portuguese.[142]

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136. E-mail from employee of Australian NGO (July 24, 2002) (name withheld upon request) (on file with author).

137. Malunga & Alegendra, *supra* note 41.

138. Sylvia de Bertodano, public defender sponsored by No Peace Without Justice, describes her own difficulty in securing a Memorandum of Understanding ("MOU") with the Minister of Justice so that she could begin work. She was ultimately able to secure the MOU with the signature of the Deputy Special Representative of the Secretary-General Dennis Macnamara in December 2001. Even with the MOU, however, she encountered difficulties:

> In January 2002, when Lolotoe [the second crimes against humanity case] was just about to go ahead, Ms. Pessoa got in touch with the head of the Defence Unit and said I was not to be allowed to work there as I had no proper authorization. There was a strong possibility that Lolotoe was not going to be able to start as a result of this. The problem was solved at the 11th hour by the DSRSG insisting to her that she should let me work . . . . I am sure that if this had happened after independence, I would have had far more difficulty in getting authorization to work there.

E-mail from Sylvia de Bertodano, Public Defender of Serious Crimes (Jan. 28, 2003) (on file with author).

139. COHEN, *supra* note 42, at 6.

140. *See* UNDP, *supra* note 26, at 36 (noting that "very few East Timorese speak [Portuguese], typically the older generation educated prior to the Indonesian occupation and those who were exiled to Portugal."); *see also* Chris Brummitt, "East Timor Grapples with Languages" (May 2002), *at* http://etan.org/et2002b/may/12-18/14etgrap.htm; *see also* Simon Chesterman, *East Timor in Transition: From Conflict Prevention to State-Building*, COLUM. INT'L AFF ONLINE, 13 (May 2001), *at* http://www.ciaonet.org/wps/chs03/.

141. Interview with Stuart Alford, Prosecutor for the Serious Crimes Unit, in Dili, East Timor, (July 31, 2002).

142. An August 20, 2002 letter written by Mr. Ramos-Horta stated, "I would like to inform that no staff from this department will attend this Secretariat training workshop, as once again, some of the [UN] international staff seem to wish to impose Bahas Indonesia or English." Mark Dodd, *Ramos Horta Lashes UN in Language Row*, SYDNEY MORNING HERALD, Aug. 25, 2001 at 17.

Even in the post-independence period, language-related tensions persist. In August 2002, Prime Minister Alkatiri was quoted defending the government's adherence to Portuguese: "UNMISET is not the administration and UNAMET has finished. They can make the proposals they like, but I said to [UN High Commissioner for Human Rights] Mary Robinson that the Portuguese instruction will not only be in the language but in technical matters too."[143] Government officials have argued that Portuguese is essential for sustaining East Timor's cultural identity and for preserving close relations with countries such as Portugal and Brazil. It is also seen as preferable to Indonesian, the dominant language during the period of occupation. Joaquim Fonseca, of East Timor's leading legal aid NGO, Yayasan HAK, however, offers a different interpretation of the government's adamancy on the language issue: "To be very frank, it is their own insecurity. They don't exist outside the Portuguese language."[144] Motivated by both cultural and power politics, the Ministry of Justice has rejected funding and mentorship offers from non-Portuguese speaking countries. This rejection has undermined the effectiveness of the tribunal. As Robert Wesley-Smith, spokesperson for Australians for a Free East Timor, has noted, "the government must accept that a large part of the reason for the hiatus in the whole system is the obsession to force all to use the unfamiliar language of Portuguese, as if this is more important than justice . . . ."[145]

Domestic politics also impact the effectiveness of the Special Panels. Regulation 2000/11 calls for two panels at the district level, each comprised of two international judges and one East Timorese judge. Since their establishment, however, the Special Panels have never staffed enough judges for

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143. "East Timor: Judges will be trained in Portuguese, says PM," (Aug. 27, 2002), *at* http://www.jsmp.minihub.org/News/10_9_02-2.htm. This comment was made in response to the release of a UNMISET-authored document, "A Strategic Action Plan for the East Timor Judicial System," in which Indonesian was allegedly endorsed as the appropriate language for training judges (stating that the training of judges should occur "in a language of which legal officials have good working knowledge.") In response to statements made by East Timorese government officials, UNMISET officials denied any favoritism toward hiring Indonesian speakers. *See* "UN Document suggests preference for Indonesian-speaking judges," The Asia Foundation (August 27, 2002), *at* http://www.easttimorelections.org/news/2002/020827-judges.html. Two weeks later, it was clear that East Timorese officials had prevailed on the matter. At a UNDP-sponsored luncheon, describing the Strategic Action Plan, President Xanana Gusmao stated,

> The draft plan adopts a two-track approach whereby the current pragmatic approach will continue with recruitment of international judges and other judicial personnel including a large number of interpreters and translators, while systematic training will be carried out in Portuguese language and civil law . . . . I wish to recognize and commend the close working relationship UNMISET and UNDP have established with the Ministry of Justice by providing advisors to the justice sector and training to Ministry of Justice staff . . . .

Remarks by H.E. President Kay Rala Xanana Gusmao (September 25, 2002), *at* http://www.etan.org/et2002c/september/22-30/25xg.htm.

144. Interview with Joaquim Fonseca, head of the policy advocacy division, Yayasan HAK, Dili, East Timor (July 27, 2002).

145. Posting of Robert Wesley-Smith, Spokesperson, Australians for a Free East Timor, "Justice and Development Issues following X's speech" to east-timor@igc.topica.com (Sept. 29, 2002) (on file with author).

both panels to operate concurrently. Instead, the five current judges have rotated between the two panels, juggling court cases at the same time.[146]

The situation is more urgent at the appellate level, where a lack of judges has prevented the panel from functioning for approximately one year. Because it stands currently as the highest judicial body in East Timor, and is responsible for hearing both the regular judiciary's and the tribunal's appeals, a fully staffed Panel is essential.[147] Prior to independence in May 2002, the failure to fill judicial vacancies was attributed to a lack of communication and coordination in recruiting efforts between UNTAET and the East Timorese justice ministry.[148] In May, however, the Transitional Judicial Service Commission ("TJSC"), comprised of three East Timorese and two internationals, recommended the appointment of a Canadian and an Irish to the appeals panel.[149] Minister of Justice Anna Pessoa and the Department of Judicial Affairs have resisted these recommendations, and the two vacancies remain. Moreover, the Department of Judicial Affairs has refused to extend the pre-independence mandate of the TJSC. Consequently, there is currently no supervisory body to the appointment process. In the meantime, thirty-eight appeals were filed in 2001, and nineteen were filed through November 2002. Thirty-nine cases are currently pending, eight of which are Special Panel appeals.[150]

C. The Contradictory Role of the UN

The UN has played a critical role not simply in giving life and support to the tribunal, but also in hindering the tribunal's potential to bring justice to East Timor by limiting that support. The constraining role of the UN can be detected (i) in its lack of political will, (ii) in its internal culture of unaccountability, and (iii) in the impact of informal interactions.

1. Political Will

When the tribunal ends its investigations under the UN-imposed July 2003 deadline, a very large number of individual and group killings that would have likely fit the category of crimes against humanity will be left unexamined. When the prosecution deadline of May 2004 arrives,[151] many cases on the "priority list" will be relinquished to the Ministry of Justice,

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146. Both prosecution and defense counsel have expressed frustration that the rotation schedule for hearing cases dramatically disrupted and delayed proceedings. Significant time is spent refreshing the court on where the case was prior to its halting, the flow of the trial is severed, and the schedule of witnesses' appearances is destabilizing. Because there is no overseeing authority to coordinate judges' vacations, moreover, the "rotation schedule" is exacerbated by persistently incomplete Special Panels, and the resulting inability to continue proceedings.

147. JSMP, RIGHT TO APPEAL, *supra* note 86, at 12.

148. *Id.* at 10.

149. *Id.* at 9.

150. *Id.* at 9.

151. HUMAN RIGHTS WATCH, *supra* note 10.

which, under the growing caseload of ordinary crimes and civil disputes, is already well over its own capacity. The UN has proffered its own reasons for setting such deadlines: resources are limited and the hybrid tribunal was intended to be temporary. A core point of the hybrid model, some might argue, is that it serves as a temporary means by which knowledge and experience is acquired and shared, and that in due time, it will be managed by East Timorese officials. Although five years will have passed when the UN closes its prosecution unit, the probability is that the East Timorese judiciary will be ill-equipped to assume the added responsibility for prosecuting all serious crimes on its own. Both UN and non-UN personnel have offered three explanations for why the UN would withdraw complete support in spite of this, just as the SCU is making headway both in its investigations and prosecutions.

The commentary of one local expert suggests that for decision makers at some distance in New York, the tribunal is less about the specific impacts that convictions can have in the lives of victims, and more about calling attention to the visibility of the UN's presence and power.[152] In this account, the hybrid tribunal is a trophy to be put on UN bookshelves. The UN is "happy to say we gave the tribunal a good shot. It is not necessarily interested in justice for victims."[153] Were the UN really committed to making more than just a gesture at accountability, this explanation suggests, it would put pressure on Indonesia to adhere to the April 2000 Memorandum of Understanding, in which it agreed to share information with, and transfer those indicted to, East Timor.[154] The UN has been unwilling to do so. Consequently, to date, the hybrid tribunal has been unable to prosecute those most responsible for the violence unleashed in 1999.

A second explanation for the limited support for investigations focuses on UN reluctance to risk destabilizing Southeast Asia. This lack of support has been highlighted by Robert Wesley-Smith, Spokesperson for Australians for a Free East Timor:

> The UN went into Kosovo with human rights lawyers and pathologists accompanying the first troops, determined to find evidence of human rights violations and to prosecute. In East Timor neither INTERFET nor subsequent UN forces have assisted in any meaningful way in finding the evidence. It is clear that the UN and various powerful forces still regard not embarrassing Indonesia as far more important than attaining justice for East Timorese.[155]

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152. Interview with Christian Ranheim, *supra* note 49.

153. *Id.*

154. Memorandum of Understanding Regarding Cooperation in Legal, Judicial and Human Rights Related Matters, Apr. 6, 2000, Indon.-UNTAET, *available at* http://www.jsmp.minihub.org/Reports/MOU.htm.

155. E-mail from Robert Wesley-Smith, Spokesperson, Australians for a Free East Timor (Jan. 23,

The failure of the SCU to at least attempt to capitalize on the possibility of broader UN investigative support has been discussed elsewhere. In an evaluation of the SCIU submitted to an organization based in Europe, one UN official has stated:

> The first deficiency that I recognized by the SCIU was its failure to obtain statements from the 280 CIVPOL and 50 Military advisers and scores of experienced UN staff attached to UNAMET, who were eyewitnesses as the crisis evolved in 1999 . . . many were in fact victims of offences. They failed to obtain the records of UN officials such as the Political Affairs Officers, who had gone to pains and at great risk to record information as it occurred.[156]

Whether failure to obtain eyewitness accounts stemmed from simple oversight or was more intentional remains unclear.

The same evaluation suggests that under former SCU management, investigations may have been structured in such a way as to prevent the possibility that senior Indonesian officials would be indicted.[157] For instance, rather than adopt investigative techniques commonly used to probe chains of command, such as tracking money trails, investigations were dispersed and targeted at lower-ranking perpetrators. When one investigator did begin to follow a money trail, the UN official states, "he was told to immediately stop his investigation."[158] The UN official notes that SCU management ignored offers made by militia leaders to cooperate with the SCU and provide information regarding the responsibility of "higher ranking" Indonesian government officials.[159]

Certain policies of confidentiality under the early management rendered nearly impossible any collaboration among investigative teams, as illustrated by one example: "In one instance, a 'secret' witness who was assisting the 'secret' team was implicated in several serious offences including murder and sexual assault by another team unbeknown to each other."[160] Even for "non-secret" investigations, inter-team communication and coordination was "actively discouraged."[161] Investigation teams would unknowingly work on the same figures. One UN official observed that "Quite simply, the left hand didn't know what the right was doing. Whether this was intentional, one can only speculate."[162]

2003) (on file with author).

156. UN official, Report into Serious Crime Investigation Unit: United Nations Transitional Administration in East Timor (submitted to European organization, on file with author).

157. This UN official also suggested that "rumors pervaded" the SCU that the involvement of senior Indonesian officials was not meant to be proved. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

It should be emphasized that the problems discussed above were specific to the SCU management policies of a few individuals, who were eventually transferred to different UN positions outside of East Timor. But more general comments about the UN's diluted political commitment to the tribunal's work can still be heard. Some, for instance, have pointed to the UN's failure to pressure Indonesia into complying with the tribunal's requests for help as illustrative of its weak political will.[163] For both trade and security reasons, this theory holds, Australia refrains from pressuring Indonesia as it is already nervous about Indonesian stability and the possibility of disintegration. In addition, the U.S., particularly after September 11, is unlikely to jeopardize its alliance with the Indonesian government. This argument may also shed light on the U.S.-UN refusal to issue any meaningful criticism of the Indonesia Ad Hoc Tribunal's "sham" trials.[164] Although the U.S. State Department expressed concern and disappointment with the tribunal's rulings in August 2002,[165] it has refrained from publicly pressuring the Indonesian government to either halt or drastically reform the tribunal as it currently operates.

A third explanation offered, termed by more than one person as "the conspiracy theory," holds that the UN has obstructed the hybrid tribunal at various points to prevent any suggestion of U.S. or international complicity in the violence experienced by East Timorese. Limiting the investigations exclusively to referendum-related violence of 1999, despite a mandate that provides for jurisdiction over acts committed during a much broader time frame,[166] was not simply a decision based upon resource constraints. Rather, it was also motivated by a concern that a more expansive inquiry could lead to the indictment of U.S. officials who countenanced the Indonesian invasion and helped to equip and train the Indonesian military both prior to and throughout the occupation.[167] Under this theory, the narrow focus of investigations and prosecutions has not been simply in disregard of the fact that "many Timorese see 1999 as the tip of the iceberg,"[168] but is a response precisely to this fact. Referred to by one person as the "paranoid" version, "this theory holds that the tribunal investigations have been hindered by the UN/U.S. fear that if you dig too deeply, international complicity will surface."[169]

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163. Interview with UN official, in Dili, East Timor (July 30, 2002).

164. *See* HUMAN RIGHTS WATCH, JUSTICE DENIED FOR EAST TIMOR, *supra* note 10.

165. *See* Press Statement by Philip T. Reeker, Deputy Spokesman, U.S. Department of State (Aug. 19, 2002) *at* http://www.state.gov/r/pa/prs/ps/2002/12810.htm.

166. The combined effect of Regulation 1999/1, § 3, Regulation 2000/11, § 5, and Regulation 2000/15 grants jurisdiction for certain acts, such as crimes against humanity, committed at any point. E-mail from Eric MacDonald, Prosecutor, Serious Crimes Unit (Jan. 28, 2003) (on file with author).

167. For information on international complicity in East Timor's occupation, see http://www.etan.org; see also THE NATIONAL SECURITY ARCHIVE, *East Timor Revisted* (Dec. 6, 2001), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB62/.

168. Interview with Christian Ranheim, *supra* note 49.

169. *Id.*

A moderated version of the theory was suggested by one interviewee. The U.S. in particular may not necessarily be driven by the shadow of a potential indictment, but it nevertheless has denied full support to investigations. The U.S. has documents that could be critical for investigations, it was hypothesized, but will not hand them over, since that would entail admitting why and how the U.S. government has come into their possession.[170]

2. A UN Culture of Non-accountability

Although the image of the SCU has improved dramatically since the appointment of new management in early 2002, it suffered significantly from an internal culture of non-accountability. One incident involved attempts by SCU officials to help in the return of two militia leaders, the Carvalho brothers, who had held considerable power in their communities and might have been "politically useful" in encouraging the return of other refugees. The SCU officials went to West Timor to negotiate the conditions for the brothers' return. When one of the brothers returned in October 2001, as described by former public defender Sylvia de Bertodano,

> he was brought before the court as a suspect, released on bail, and was having dinner with the Chief of Staff and senior prosecutors at a restaurant in Dili the same evening. His brother, Cancio, persuaded the UN to appoint and pay for a private defence counsel for him as a condition of his return. Having secured this unique privilege, he nonetheless failed to return in January 2002 as promised, citing unspecified 'technical reasons' for his decision to stay in West Timor.[171]

Neither brother, Sylvia de Bertodano further notes, has yet been charged with any crime.[172]

A culture of UN non-accountability also allowed earlier SCU management to suppress any internal criticism concerning the coordination of investigations. Those who expressed disapproval of the management of investigations found their workload reduced, had difficulty accessing resources, were removed from certain cases, or found entire files deleted from the SCU databases. One officer eventually requested to be transferred to a different unit.[173] At one point, as a result of internal tensions, all investigations were closed with a single exception.[174] According to many UN officials, the situation improved only once the head investigator had left the unit. Unfortu-

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170. Interview with UN official, in Dili, East Timor (July 30, 2002).
171. De Bertodano, *supra* note 81, at 7.
172. *Id.*
173. UN official, *supra* note 156.
174. Interview with UN official, *supra* note 170.

nately, since the only way to release him was to eliminate his position entirely, the SCU now operates without a head investigator.[175]

Although particularly acute under former management, SCU policies and an atmosphere discouraging legitimate internal criticism continues. In response to a question about funding issues, one UN official recently wrote, "the budget is complicated and there are a number of issues which I am not allowed to talk about. SCU gets its money from a number of places and the money that they say they are giving us is not always the money that finally trickles down."[176]

3. The Impact of Informal Interactions

Perhaps the least examined aspect of the UN is the potentially constraining impact it has on the tribunal through the daily interactions of its staff with their East Timorese counterparts. The exchanges between UN staff and East Timorese working with the tribunal influence how the UN and its projects are received, and what legacy it will leave behind. Even the most fleeting interactions may enhance or diminish the tribunal's effectiveness, not necessarily in the adjudication of crimes, but certainly in fostering or hampering the establishment of a positive human rights culture in the judiciary.

The potential impacts of informal interactions can be seen in the example of one detention review hearing initiated by an SCU prosecutor to ensure that the defendant would not be detained beyond the seventy-two-hour limit. The prosecutor arranged in advance for the detainee to be brought to the courthouse thirty minutes early, so that he would have time to confer with his lawyer before the proceeding. A group of East Timorese lawyers sat chatting and laughing at a large conference table in the room designated for the proceeding. Upon arriving in the room, the UN prosecutor interrupted them abruptly to say that that it was reserved. The lawyers looked surprised and confused, then gestured to the far side of the room, where another large conference table was available. The prosecutor impatiently repeated in an abrasive tone that the room was reserved for a detention review hearing, and that the lawyers must leave. Still confused, some of the lawyers interrupted him, insisting on the legitimacy of their presence. Mistaking their response for dismissiveness, the prosecutor retorted sharply that the regulations required the proceedings to be closed to the public. He insisted that they leave, warning that he was prepared to have them escorted out. After a brief silence, the lawyers left the room without a glance in the prosecutor's direction. The investigative judge, defender, and detainee arrived soon thereafter. The hearing was conducted, and on the prosecutor's motion, the detainee

175. Without a head investigator, prosecutors have been put in charge of investigations. Since many prosecutors lack experience conducting investigations, this may not be the ideal system.

176. E-mail from UN official to author (January 2003) (on file with author).

was granted "conditional release." Since the detainee had no money with him, the prosecutor chipped in with some others to give him money for the bus back to his village.[177]

This example illustrates the UN's dual impact. On one level, the prosecutor strictly adhered to UN regulations ensuring that detainee rights be upheld. It is likely that if the prosecutor had not initiated the hearing, the defendant would have remained in illegal detention, unnoticed by either his defense counsel or the investigative judge. The prosecutor's actions of scheduling the detainee's arrival well before the hearing and giving him money for transportation afterwards suggest ways in which UN personnel interactions may strengthen the image of the tribunal. Yet the fleeting exchange prior to the hearing also suggests the potential for interactions to undermine the tribunal. One might question how meaningful the tribunal is to East Timorese who feel sidelined or alienated by the UN presence. These informal interactions may be every bit as important as the formal processes of adjudication.

IV. Conclusion: Lessons and Their Limitations

The mixed record of the hybrid tribunal should serve as a starting point for discussion rather than a conclusion. The critical analysis offered here is motivated by a desire to understand the weaknesses of the tribunal so that they may be avoided in the future. These weaknesses can partly but not solely be attributed to inadequate resources and early policy decisions. A more complete explanation would need to account for, at a minimum, the failures of the capacity-building program and the barriers potentially arising from domestic politics and the UN.

Despite the motivations underlying this analysis, the lessons here may be limited. In future projects, the UN might seek to improve upon this hybrid experiment by ensuring adequate funding and by giving primacy to capacity-building programs. But certain weaknesses of the tribunal, such as impediments posed by domestic politics, are beyond UN reach. Other factors may be within the grasp of the UN, but are inherently difficult to predict. The decision to quickly transfer control of the judiciary, for instance, has been criticized only in retrospect. Its underlying motivation, to encourage local autonomy and participation, is difficult to fault. Finally, there are some factors that will continue to persist—the UN's limited political will and its culture of unaccountability—and that will likely pose future obstacles to experiments in seeking justice for international crimes.

An argument can be made that the obstacles faced by the hybrid tribunal are insurmountable. In the absence of the ad hoc tribunal as an alternative, it might be contended that the choice of no justice is preferable to a justice

177. Observations by the author, in Dili, East Timor (July 8, 2002).

that is severely compromised.[178] The hybrid model may encourage the international community to mistakenly equate prosecutions with justice, leading to "a false sense of accomplishment" and complacency.[179] It may inadvertently undermine "the very standards of justice and the rule of law" that it was intended to promote.[180] As JSMP has stated, "a wide 'margin of appreciation' on international human rights standards is both confused and dangerous. It assumes that the mechanisms of a justice system can be established without the principles and standards necessary to safeguard its operation."[181] Opting for compromised justice in the short run may set the stage for its absence in the long term.

Yet absent a politically viable alternative, it is premature to discard the hybrid model. Sierra Leone offers some prospects for improving upon it. There, the hybrid tribunal is not dependent on UN funding. Although it too faces funding constraints, its annual budget of U.S. $20 million may suggest some awareness by foreign governments of the crucial need for adequate funding.[182] The prosecutions, moreover, are focused on ten to twenty prime perpetrators and the court is comparatively well-staffed and equipped. It is possible that a properly implemented hybrid tribunal will become a preferable alternative to the ad hoc tribunals. In the meantime, however, East Timor is paying a high price for the possibility of improving justice elsewhere.

178. "The experience in East Timor and Jakarta indicate that whether a minimally credible tribunal is better than none at all is the real issue that the United Nations has been unwilling to address openly." COHEN, *supra* note 42, at 7.

179. Linton, *supra* note 3, at 177.

180. COHEN, *supra* note 42, at 7.

181. JSMP, RIGHT TO APPEAL, *supra* note 86, at 22.

182. Press Briefing, United Nations, Press Briefing on Sierra Leone Special Court (Mar. 20, 2002), *at* http://www.un.org/News/briefings/docs/2002/SierraLeonebrf.doc.htm.