

THE SPECIAL PANELS FOR SERIOUS CRIMES OF TIMOR-LESTE: LESSONS FOR THE REGION

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I INTRODUCTION

The establishment of the International Criminal Court (ICC) has filled an important gap in the enforcement of international criminal law. However, domestic, hybrid and regional tribunals will continue to play an important role in providing global justice in the future. Anticipating the limited reach of the ICC, Chief Prosecutor Luis Moreno-Ocampo has stated that the ICC would only be able to investigate six to eight cases during his six-year term, in addition to the current investigations in Darfur, the Democratic Republic of Congo and Northern Uganda. He believes that the major part of the work of international justice will not be done in The Hague, but at the national level in individual states.¹ Aryeh Neier, President of the Open Society Justice Institute, has proposed that more hybrid and ad hoc tribunals be created and highlighted the Asia-Pacific region as one of

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¹ Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court "Keynote Address: Integrating the Work of the ICC into Local Justice Initiatives" (2006) 21 *Am U Int'l L Rev* 497, 497.

two areas in great need of a regional human rights mechanism.² In fact, discussions surrounding a human rights mechanism for Southeast Asia have been going on for over a decade within the Association of Southeast Asian Nations (ASEAN). Most recently, the Jakarta-based ASEAN think-tank has proposed that a regional court of justice and an ASEAN peace and reconciliation council be set up.³

Hybrid tribunals appear to be gaining preference over the ad hoc international model, not only as a cheaper option, but also as a way of providing a response to mass atrocities that has greater relevance for the affected community.⁴ The hybrid model is attractive to those advocating a pluralist approach, allowing for a localised response to violations, rather than the option of a purely international tribunal, which derives its strength from the application of "objective" and "universal" standards. Hybrid tribunals, in their various forms, are being touted as offering a wide range of benefits, including promotion of justice, peace and reconciliation. They also provide capacity-building to local court actors, contribute to the rule of law, legitimise and implement international norms and standards and participate in the transformation of society as part of transitional justice.⁵

2 Aryeh Neier "Lessons Learned: Building on the Success of the Current International Tribunal Framework to Develop the Next Era of War Crimes Tribunals" (2006) 21 Am U Int'l L Rev 517, 519-520.

3 Kurniawan Hari "ASEAN Should Establish Court of Justice: Think Tank" (19 April 2006) *The Jakarta Post* Jakarta <<http://www.thejakartapost.com/yesterdaydetail.asp?fileid=20060419.B02>> (last accessed 18 December 2006).

4 On hybrid tribunals, see K Ambos and M Othman (eds) *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia* (Max Planck Institute, Freiburg, 2002); Laura A Dickinson "The Promise of Hybrid Courts" (2003) 97 AJIL 295; Cesare P R Romano, André Nollkaemper and Jenn K Kleffner (eds) *Internationalized Criminal Courts. Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford University Press, Oxford, 2004); Alberto Costi "Hybrid Tribunals as a Viable Transitional Justice Mechanism to Combat Impunity in Post-conflict Situations" (2006) 22 NZULR 213.

5 See Dickinson, above n 4, 295; Costi, above n 4, 224-225.

This paper examines hybrid tribunals through a case study of the Special Panels for Serious Crimes (SPSC)⁶ of Timor-Leste in order to explore, first, the appropriate purpose of hybrid tribunals and the need for the development of an international criminal law methodology; and, secondly, the ability of the hybrid model to provide a mechanism that is locally relevant. This examination is undertaken with a view to highlighting valid considerations in the establishment and operation of hybrid tribunals such as the Extraordinary Chambers in the Courts of Cambodia and any future regional bodies such as an ASEAN peace and reconciliation commission.

II TIMOR-LESTE AND INDONESIA – DOMESTIC JUSTICE?

Timor-Leste experienced an intense period of violence in 1999 surrounding a referendum on independence from Indonesia. The mostly state-sponsored violence included the destruction of the greater part of Timor-Leste's public infrastructure and approximately 60,000 homes, the forced deportation of 250,000 civilians to neighbouring West Timor and the murder of over 1400 people.⁷ Grave breaches of human rights were not new to Timor-Leste, as 25 years of Indonesian occupation had resulted in the death of over 100,000 people.⁸ In response to the violence in 1999, a number of fact-finding

6 The Special Panels for Serious Crimes (SPSC) represented the first hybrid tribunal to complete United Nations (UN) mandated trials. The SPSC were part of the Dili District Court and, as such, were established permanently as part of the domestic court system. The UN was largely responsible for the operation of the SPSC. Since the UN ended support for prosecutions and trials on 19 May 2005, no further trials have taken place or been concluded.

7 Commission for Reception, Truth and Reconciliation for Timor-Leste (CAVR) *Chega! The Report of the Commission for Reception, Truth, and Reconciliation Timor-Leste – Executive Summary* (CAVR, Dili, 2005) 110 [CAVR Report], available at East Timor and Indonesia Action Network (ETAN) <<http://www.etan.org/etanpdf/2006/CAVR/Chega!-Report-Executive-Summary.pdf>> (last accessed 28 November 2006).

8 CAVR Report, above n 7, 44.

investigations⁹ were conducted. These concluded that there was substantial evidence of a widespread and systematic campaign against the people of Timor-Leste, lending support to assertions that crimes against humanity had been committed. Despite strong recommendations from United Nations (UN) assessments that the best way to attain justice was in the form of a UN-sponsored international human rights tribunal,¹⁰ the UN agreed to allow domestic attempts, in Indonesia and Timor-Leste, to provide justice for past crimes, with the proviso that the UN would monitor the process "towards a credible response in accordance with international human rights principles."¹¹

The domestic trials conducted in Timor-Leste and Indonesia produced very different results. The trials in Indonesia proceeded – without international assistance – through an ad hoc court established specifically for the trials and are widely regarded as a failure. The UN-mandated Commission of Experts, which reported to the UN Secretary-General in May 2005, stated:¹²

9 UN Office of the High Commissioner for Human Rights "Report of the International Commission of Inquiry on East Timor to the Secretary-General" (31 January 2000) [UNOHCHR Report], annexed to UN Secretary-General "Identical Letters Dated 31 January 2000 from the UN Secretary-General Addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights" Agenda Item 96 – Question of East Timor (31 January 2000) S/2000/59, A/54/726, available at <<http://www.unhchr.ch/Huridocda/Huridoca.nsf/3d1134784d618e28c1256991004b7950/e8205af28b75dd5f80256878003c52ba?OpenDocument>> (last accessed 28 November 2006).

10 UNOCHR Report, above n 9, para 153.

11 UN Secretary-General "Identical Letters Dated 31 January 2000 from the UN Secretary-General Addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights", above n 9.

12 UN Secretary-General "Letter Dated 24 June 2005 Addressed to the President of the Security Council" (15 July 2005) S/2005/458, Annex I "Summary of the Report to the Secretary-General of the Commission of Experts to Review the Prosecutions of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999 (26 May 2005)", para 17.

[T]he prosecutions before the Ad Hoc Court were manifestly inadequate, primarily due to a lack of commitment on the part of the prosecution, as well as to the lack of expertise, experience and training in the subject-matter, deficient investigations and inadequate presentation of inculpatory material at trial.

Only one of the 18 persons tried by the ad hoc court, a Timorese militia leader, was found guilty and sentenced to a term of imprisonment of ten years. In sharp contrast, 85 of the 87 persons tried by the SPSC in Timor-Leste were convicted. However, over 300 persons indicted by the SPSC were not tried as they were located in Indonesia and could not be brought before the SPSC. Many of those who could not be tried are perceived to be those "most responsible" for the violence in Timor-Leste in 1999.

Although it is accepted that those most responsible have not been held fully accountable, the UN Secretary-General has indicated that the resumption of UN-led prosecutions for crimes committed in 1999 is not "practically feasible".¹³ Given that the governments of Indonesia and Timor-Leste have chosen to promote good relations rather than seek justice, it is unlikely that there will be any significant prosecutions of those responsible for crimes committed in Timor-Leste in the foreseeable future. In this context, time is ripe for an assessment of the performance of the SPSC in order to draw lessons from its experience.

III HYBRID TRIBUNAL: SPECIAL PANELS FOR SERIOUS CRIMES

A Absence of a Clear Mandate

In terms of the United Nations Transitional Administration in East Timor (UNTAET) regulations, the SPSC had exclusive jurisdiction over war crimes, genocide and crimes against humanity, whenever

¹³ UN Secretary-General "Report of the Secretary-General on Justice and Reconciliation for Timor-Leste" (26 July 2006) S/2006/580, para 36 [Justice and Reconciliation], available at <<http://daccessdds.un.org/doc/UNDOC/GEN/N06/446/74/PDF/N0644674.pdf?OpenElement>> (last accessed 18 December 2006).

and wherever they occurred, and crimes of murder and torture as well as sexual offences which occurred during 1999 in Timor-Leste.¹⁴ However, unlike other international tribunals, the regulations gave no positive law directions as to whom, how many or in relation to what period prosecutions should take place. Like other international criminal trials promoting peace and reconciliation, the provision of retribution and deterrence are aims commonly cited in the judgments of the SPSC.¹⁵ However, there is little specificity as to how this is to be achieved. The decision to prosecute individual cases was largely determined by the UN-funded and recruited Deputy Prosecutor-General, who, as the Head of the Serious Crimes Unit (SCU), had the "exclusive prosecutorial authority to direct and supervise the investigation and prosecution of serious crimes,"¹⁶ taking directions, when provided, from the UN Security Council. The Deputy Prosecutor-General changed regularly over the five years the UN supported the SPSC, and this personnel change reflects some of the differences in the focus of indictments and priorities of the SCU.

Over the period that the SCU was functional, there was a substantive shift in the nature of the indictments, from the initial drive to prosecute low-level Timorese perpetrators who were present in the country, a number of whom were already detained,¹⁷ toward an

14 United Nations Transitional Administration in East Timor (UNTAET) Regulation 2000/11 (6 March 2000) UNTAET/REG/2000/11, s 9, as amended by UNTAET Regulation 2001/25 (14 September 2001) UNTAET/REG/2001/25, limits jurisdiction to the period between 1 January and 25 October 1999. All UNTAET Regulations are available at <<http://www.un.org/peace/etimor/untaetR/r-1999.htm>> (last accessed 28 November 2006).

15 For example, see SPSC Cases: *Augusto dos Santos* (3 April 2002) 6/2001; *Lolotoe Case* (5 April 2003) 4C/2001; *Lino do Carvalho* (17 February 2004) 10/2001; *Francisco Soares* (12 September 2002) 14/2001; and, *Damaio da Costa Nunes* (10 December 2003) 1/2003.

16 UNTAET Regulation 2000/16 (6 June 2000) UNTAET/REG/2000/16, s 14.4.

17 In the first few years of operation of the Serious Crimes Unit (SCU), a number of indictments did not attempt to characterise crimes as "crimes against humanity", despite a number of cases being of a similar nature to crimes later indicted and proved as "crimes against humanity". See the comments in the dissenting

attempt to target in priority those alleged high-level perpetrators who were unable to be brought before the SPSC as they were residing in Indonesia. With the end of the period of UN support for the trials looming, the choice of those indicted was determined by resources and the ability of the SPSC to complete their trials before the end of the time period mandated by the UN Security Council.¹⁸

B Gaps in the Justice Process

The SCU chose not to prosecute crimes which occurred before 1999. Despite an attempt by the penultimate Deputy Prosecutor-General, Nicholas Koumjian, to legally justify such course of action,¹⁹ it appears that these crimes were not investigated because of a lack of resources and the greater relevance, for the UN, of the cases that occurred in 1999. Local human rights and victims groups have been critical of this narrowing of the scope of prosecution. The Commission for Reception, Truth and Reconciliation (CAVR) reported that "the international community has paid little or no attention to the issue of justice for the grave crimes committed in Timor-Leste throughout the 23 years prior to the 1999 atrocities"²⁰ –

judgment in SPSC Case *Joao Fernandes* (25 January 2001) 1/2000. A similar argument may be made in relation to SPSC Cases: *Joseph Leki* (11 June 2001) 5/2000; *Mateus Tilman* (14 June 2001) 8/2000; *Manuel Goncalves Lete Bere* (15 May 2001) 10/2000; *Carlos Soares* (15 May 2001) 12/2000; *Augusto Asameta Tavares* (15 July 2001) 2/2001; and, *Jose Valente* (18 June 2001) 3/2001.

18 See, for example, SPSC Case *Aprecio Guterres aka Mau Buti* (14 February 2005) 18A/2003, in which the prosecution applied to withdraw a case in order to try a different "more egregious" case as both cases could not be tried within the time remaining to the SPSC.

19 Citing the Constitution of Timor-Leste, art 163.1, the Deputy Prosecutor-General stated that the SCU was under no obligation to investigate and prosecute cases from earlier than 1999: see JSMP "The Future of the Serious Crimes Unit" (JSMP Issue Report, Dili, January 2004) 4, available at <[http://www.jsmp.minihub.org/Reports/jsmpreports/The%20future%20of%20SCU/The%20future%20of%20SCU%202004\(e\).pdf](http://www.jsmp.minihub.org/Reports/jsmpreports/The%20future%20of%20SCU/The%20future%20of%20SCU%202004(e).pdf)> (last accessed 28 November 2006).

20 CAVR Report, above n 7, 184.

which far outweighed the atrocities committed in 1999. The CAVR Report concluded that the lack of justice and accountability remains:²¹

[A] fundamental issue in the lives of many East Timorese people and a potential obstacle to building a democratic society based upon respect for the rule of law and authentic reconciliation between individuals, families, communities and nations.

In 2005, it became clear that large gaps in the justice process would remain after the UN had ceased its funding, even for those crimes which occurred in 1999. It was estimated that just over a third of the murders committed in 1999 could be investigated. Although statistics for crimes such as rape and torture were not collated, since they were not given the same organisational priority, it is assumed that the rates of completed investigations and indictments for these crimes were far less than murder cases. For example, the CAVR, in taking statements from almost 8000 people regarding human rights violations from 1974 to 1999, documented 853 cases of sexual violence, of which 43 per cent constituted rape and 93 per cent were attributed to the Indonesian security forces.²² However, only eight cases involving 20 accused were brought, charging inter alia 19 counts of rape leading to only two convictions of crimes including rape, one of those being rape as a crime against humanity.²³ This is compared with 391 persons being indicted for 684 murders.²⁴ Similarly, in respect of cases involving torture, approximately 3558 of those who provided statements to the CAVR included accounts of torture and severe or

21 CAVR Report, above n 7, 183.

22 CAVR Report, above n 7, 116.

23 See SPSC Cases: *Leonardus Kasa* (15 May 2000) 11/2000; *Lolotoe Case* (22 October 2002) 4A/2001; *Francisco Soares* (12 September 2002) 14/2001; *Atabae Case* (Accused at large) 8/2002; *Egedio Manek* (Accused at large) 9/2003; *Erminghindo L Soares and others* (Accused at large) 15/2003; *Dominggos Mau Buti aka Dominggos Noronha and another* (Accused at large) 8/2004; *Lieutenant Sumino and others* (Accused at large) 14/2004.

24 Justice and Reconciliation, above n 13, para 9.

inhumane treatment – only 16 persons have been convicted of torture.²⁵

One aspect of the "justice gap", which is starkly evident in local communities, can be illustrated by the cases which fell between prosecution by the SCU and the non-judicial Community Reconciliation Process (CRP).²⁶ The SCU vetted who could participate in a reconciliation hearing in order to ensure that the deponent was not suspected of having committed a "serious crime". More than 100 persons²⁷ were not allowed to participate in such hearings because they were under suspicion by the SCU. However, indictments were not issued by the SCU in any of these cases. This left the deponents in limbo: it was likely that their community knew that they had not been allowed to be "reconciled" and, therefore, that they remained under suspicion for committing a "serious crime" without the opportunity to respond to the suspicion.

At the conclusion of UN support for prosecutions in Timor-Leste in May 2005, only some of the "small fish" had been tried and punished; the "big fish" remained free. It is widely accepted that "those most responsible for the crimes committed in Timor Leste have not been held accountable"²⁸ and in the short term this is unlikely to change. The inconsistencies of which crimes were investigated, indicted and tried have undermined the work of the SPSC. Although some of the causes of these inconsistencies were beyond the immediate control of the SPSC, the lack of strategy and international support for the work of the SPSC greatly contributed to these failings.

25 JSMP "Torture and Traditional Justice in Timor Leste" (JSMP Issue Report, Dili, April 2005) 6, 26, available at <[http://www.jsmp.minihub.org/Reports/jsmp-reports/Report%202005/April%202005/JSMP_Torture%20and%20Transitional%20Justice%20\(e\).pdf](http://www.jsmp.minihub.org/Reports/jsmp-reports/Report%202005/April%202005/JSMP_Torture%20and%20Transitional%20Justice%20(e).pdf)> (last accessed 29 November 2006).

26 The Community Reconciliation Process (CRP) was part of the reconciliation work of the CAVR.

27 CAVR Report, above n 7, 27.

28 Justice and Reconciliation, above n 13, para 9.

One of the most damning criticisms of the SPSC, linked to the lack of specific mandate, was that there was no clear purpose for what the trials were supposed to achieve. The coordinating judge of the SPSC, after the end of the trials, commented that the "greatest challenge to confront the serious crimes process was the lack of direction provided by its founders concerning the purpose of the process."²⁹ This concern was particularly evident in the operation of the SPSC, but it is a general concern for the operation of hybrid tribunals.

IV EXPECTATIONS AND POSSIBILITIES – WHAT SHOULD BE THE PURPOSE OF HYBRID TRIBUNALS?

A Call for Focused and Realistic Objectives

While international criminal law is not considered a "panacea" to all problems related to recovering from mass atrocities, hybrid tribunals have carried high and somewhat nebulous expectations, from promoting reconciliation to transforming the justice system and society. The range and nature of these goals not only make it difficult to assess what has been achieved, but they may not all be appropriate for one institution. Capacity-building is one such aim that is seen as a major advantage of hybrid tribunals, as international staff are able to provide mentoring and support to local court actors in their joint work. In turn, its benefits are said to promote the institutionalisation of the rule of law and play a critical role in transforming society through transitional justice.³⁰

The hybrid model in general, and in particular that of the SPSC, has been commended as exemplifying attempts to localise "efforts

29 Judge Phillip Rapoza "The Serious Crimes Process in Timor-Leste: Accomplishments, Challenges and Lessons Learned" (International Symposium on UN Peace Keeping Operations in Timor-Leste: Accomplishments and Lessons Learned, Dili, 28 April 2005), available at <<http://www.etan.org/et2005/may/08/28judge.htm>> (last accessed 28 November 2006).

30 See Costi, above n 4, 236-237.

through capacity-building".³¹ This conception locates the SPSC at the opposite, and seemingly competing, end of the spectrum to international justice's goal of deterrence.³² An analysis of the capacity-building role of the SPSC reveals that not only were there very few tangible benefits, but that having varied and possibly competing objectives can be destabilising.

Considering the lack of financial and personnel resources in Timor-Leste, and the enormity of the task, capacity-building was a very ambitious and possibly unrealistic goal. The presumption that international personnel could engage in capacity-building simply because they were "internationals" seemed to underpin much of the efforts in Timor-Leste as specific programmes, goals and funding were very limited. The international judges came from a variety of countries, and only two came from superior courts in their home countries.³³ The remaining judges were from lower courts and not necessarily from a criminal jurisdiction.³⁴ International prosecutors and defence lawyers likewise had a wide variety of backgrounds and languages and, combined with resource and time constraints, limited the potential of any capacity-building.

This is not to say that both Timorese and international personnel did not benefit from working together. However, this process appeared as having little formal structure; it did not produce results that had tangible influence over the justice system in Timor-Leste

31 Varda Hussain "Sustaining Judicial Resources: The Role of Outreach and Capacity Building Efforts in War Crimes Tribunals" (2005) 45 *Va J Intl L* 547, 559.

32 Hussain, above n 31, 559.

33 Caitlin Reiger and Marieke Wierda "The Serious Crimes Process in Timor-Leste: In Retrospect" (Prosecutions Case Studies Series, International Center for Transitional Justice (ICTJ), March 2006) 14, available at <<http://www.ictj.org/static/Prosecutions/Timor.study.pdf>> (last accessed 28 November 2006).

34 None of the judges had specific experience in the application of international criminal law or international humanitarian law. See Reiger and Weirda, above n 33, 14.

once the UN ceased support for the prosecution of serious crimes. In 2005, all Timorese judicial personnel had failed their examinations to be appointed permanently in their positions and were required to enter into an 18-month training programme. While this result also reflected more complex problems related to training, language and procedures for permanent appointment, the fact that this included the four Timorese judges who had been adjudicating serious crimes cases did not reflect well on capacity-building efforts. Furthermore, the over 300 outstanding indictments, when the SCU was effectively "closed" by the UN, placed the onus on the national system to deal with these cases should the indictees come within the jurisdiction. Unfortunately, because of the lack of successful capacity-building and institutional strengthening, as exemplified by the lack of accredited national staff, the Timorese legal system was not in a position to adequately deal with outstanding indictments when indictees returned to Timor-Leste.³⁵ Not only was the objective of a hybrid model to transform and strengthen the national justice system not successful, the national system was left under threat of not being able to follow its own laws and procedures. Not discounting the potential for hybrid tribunals to engage successfully in capacity-building given adequate resources and priority, the operation of the SPSC in Timor-Leste highlights the difficulties and dangers in such a venture when neither is present.

B Developing and Refining Goals

Hybrid tribunals are new and they have been established in response to crises. It is, therefore, understandable that it will take time for goals to be refined and adapted to specific circumstances. The interrelated questions of who should be prosecuted and what should be the purpose of hybrid tribunals should be underpinned by international criminal law theory. However, international criminal law has been criticised for lacking a sound methodological base, including its own

35 The Timorese courts have not been able to complete cases relating to ex-militia who have returned to Timor-Leste since May 2005. The one case that started to be heard by the courts was postponed *sine die* due to problems in notifying witnesses and victims. Justice and Reconciliation, above n 13, para 10.

criminology, victimology and penology.³⁶ Criticism surrounding the lack of methodology stems from concern that domestic criminal law models developed in stable states are inappropriately applied to the context of international crimes.³⁷

Theorists seeking to propose different models for international criminal law have sought to differentiate and accommodate the context in which international crimes are committed. They have identified mass violence and repressive states as markers.³⁸ The unstable nature of the state in transition, after the cessation of violence, and the use of state institutions to promote mass atrocities are also relevant to the different methodological considerations required in international criminal law. As David Gray suggests, there is a "possibility that the practical realities of scale and complicity that distinguish abusive regimes are not merely differences in magnitude, as compared to everyday problems that face 'ordinary justice'."³⁹ The goals of deterrence and retribution have been highlighted as areas in which the differences in the context of ordinary and mass crimes are relevant to the underlying methodology of criminal trials.⁴⁰

One of the goals of international criminal justice is to prevent atrocities occurring in the future. A number of judgments of the SPSC cite deterrence as the "most prominent aim" in sentencing crimes against humanity.⁴¹ Such deterrence is promoted by letting would-be

36 See Mark A Drumbl "Towards a Criminology of International Crime" (2003) 19 Ohio St J on Disp Resol 263, 268-269.

37 Immi Tallgren "The Sensibility and Sense of International Criminal Law" (2002) 13 EJIL 561, 566-568; Drumbl, above n 36, 268.

38 See David C Gray "An Excuse-Centered Approach to Transitional Justice" (2006) 74 Fordham L Rev 2621, 2624-2625.

39 Gray, above n 38, 2648.

40 Tallgren, above n 37, 566; Drumbl, above n 36, 270.

41 See for example SPSC Cases: *Victor Manuel Alves* (8 July 2004) 1/2002, para 22; *Damaio da Costa Nunes* (10 December 2003) 1/2003, para 84, referring to *The Prosecutor v Zejnir Delalic et al* (Judgment) (16 November 1998) IT-96-21

perpetrators know that they will be prosecuted and by embedding respect for the rule of law. However, this is not easy to measure empirically and "there is no evidence that existing tribunals have deterred atrocious crimes."⁴² It is difficult to establish that a reduction in mass atrocities has occurred since the coming into operation of international and hybrid criminal tribunals.

C Consideration of the Context of Mass Crimes in the Development of an International Criminal Law Methodology

In examining the rationale of deterrence in relation to international criminal law, inconsistencies in the operation of domestic criminal law theory in contexts typical of international crimes emerge. Some commentators have suggested that the classic model of deterrence through threat of punishment does not extend to circumstances associated with mass crimes and abusive regimes, especially where crimes are committed by the state or by a large number of the members of society with legal sanction.⁴³ As Immi Tallgren argues:⁴⁴

[T]he offender may be less likely to break the group values than the criminal norms. The commitment of crimes may be encouraged not just by material benefits but by various techniques affecting the offender's judgement as to what constitutes prohibited conduct. That way the actor may be manipulated, lured or indoctrinated to commit the crimes.

It follows that even if perpetrators knew that there was a chance that they might be prosecuted, or had they been punished previously, they would not be deterred from committing the crime in the future.

(Trials Chamber, ICTY) and *The Prosecutor v Drazan Erdemovic* (Judgment) (29 November 1996) IT-96-22 (Trial Chamber, ICTY).

42 Diane Orentlicher "Judging Global Justice: Assessing the International Criminal Court" (2003) 21 *Wisconsin Intl LJ* 495, 500.

43 See Tallgren, above n 37, 573; Drumbl, above n 36, 271.

44 Tallgren, above n 37, 573.

The forces pressuring them to commit international crimes would be stronger and more immediate than possible future punishment.

This argument against deterrence has resonance with the circumstances of many of the defendants before the SPSC. The archetypal defendants were subsistence farmers with little education, who claimed that they joined the militia because they – or their families – were threatened with death or serious physical abuse. They committed the acts they were charged with on direction from someone in authority or under fear of physical harm.

Acting pursuant to an order could not be used as a defence in the SPSC, but could be used as a mitigating factor in sentencing.⁴⁵ For a person pressured to commit a crime, the only defence available was that of duress; establishing that there was an imminent threat of death or serious harm and the conduct engaged in was not worse than that sought to be prevented.⁴⁶ No cases of duress were accepted by the SPSC. In cases where duress was claimed, it was commonly argued by those accused that they were forced to kill or carry out crimes as part of their role in the militia and they would have been killed if they had not committed the acts. The SPSC's general response to this was not to treat the relevant time of threat as the time only of the act, but the period in which they were with the militia or engaged in a specific mission. The SPSC would rely on evidence that other individuals in the village did not join the militia and people escaped forced enrolment in the militia by running away to the mountains. It was often pointed out that the accused were not guarded by the militia 24 hours per day and, therefore, could have fled prior to committing crimes.⁴⁷

45 UNTAET Regulation 2000/15 (16 June 2000) UNTAET/REG/2000/15, s 21.

46 UNTAET Regulation 2000/15, above n 45, s 19.1(d).

47 See SPSC Cases: *Joseph Leki*, above n 17; *Mateus Tilman*, above n 17; *Los Paolos Case* (11 December 2001) 9/2000; *Augusto Asameta Tavares*, above n 17; *Lolotoe Case* (18 November 2002) 4B/2001.

It is noteworthy that according to the CAVR Report, released after the conclusion of the operation of SPSC, "a minimum of 84,200 people died from displacement-related hunger and illness" between 1975 and 1999.⁴⁸ Therefore, a choice to join a militia – although many people did not – may have been an act aimed at preserving life. In such an environment, it is difficult to see how the threat of punishment, at a later date and under significantly changed circumstances, would be sufficient to be effective.

The applicability of the theory of deterrence to lower-level perpetrators of international crimes, such as those tried by the SPSC, is questionable. However, this reasoning does not necessarily extend to those that planned and instigated the violence. International criminal trials may provide a deterrent for high-level perpetrators who "chose" their course of action. Whether criminal justice trials are able to produce a "general atmosphere of deterrence and respect for rule of law"⁴⁹ at a group level requires further research. However, in Timor-Leste, it appears that the partial trial of some low-level perpetrators without attention to those most responsible may not have achieved either deterrence or respect for the rule of law. Following the outbreak of violence in Timor-Leste in 2006, a local human rights commentator observed that the violence was related to the lack of accountability for past crimes: "I'm sure some of the people who [have been] looting and burning houses are thinking, 'if nothing can be done about the crimes of 1999 what can they do against me?'"⁵⁰

48 CAVR Report, above n 7, 72.

49 Payam Akhavan "Current Developments: The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment" (1996) 90 AJIL 501, 509.

50 Joaquim Fonseca, quoted in Shawn Donnan "Shadows of 1999 Killings Cloud East Timor" (20 June 2006) *Financial Times* <<http://www.ft.com/cms/s/129c869a-ffef-11da-93a0-0000779e2340.html>> (last accessed 18 December 2006).

D Retributive Justice: Victims' Wishes and Need for Localisation and Innovation

The limited field research conducted in Timor-Leste on the need for crime prosecution supports a finding that victims desire judicial accountability for serious crimes such as murder, rape and torture, both for those who planned and those who perpetrated such acts.⁵¹ In this way, criminal trials promote retributive justice that is aimed at removing the desire for victims to carry out their own punishment and providing a sense of justice which allows reconciliation. This type of justice has strong resonance with victims' communities. Raquel Aldana suggests:⁵²

When achievable, prosecutions are superior to truth commissions precisely for their potential in satisfying victim's legitimate goals for retributive justice, without which the most vulnerable victims of the worst crimes are selectively asked to "transcend" the world's consensus about how evil should be punished. ... The expectation of forgiveness with punishment also silences victims' anger and indignation as a response to the terrible wrong committed against them.

Similar sentiments have been expressed by victims in Timor-Leste in requesting continued efforts towards justice:⁵³

51 Piers Pigou "Crying Without Tears. In Pursuit of Justice and Reconciliation in Timor-Leste: Community Perspectives and Expectations" (Occasional Paper Series, ICTJ, August 2003) 26, 36, available at <<http://www.ictj.org/images/content/0/9/096.pdf>> (last accessed 28 November 2006); JSMP "Unfulfilled Expectations: Community Views on CAVR's Community Reconciliation Process" (JSMP, Dili, August 2004) 40 [Unfulfilled Expectations], available at <http://www.jsmp.minihub.org/Reports/jsmpreports/CAVR_Reports/cavr_report_2004_e.pdf> (last accessed 28 November 2006).

52 Raquel Aldana "A Victim-Centered Reflection on Truth Commission and Prosecutions as a Response to Mass Atrocities" (2006) 5(1) JHR 107, 108.

53 Unfulfilled Expectations, above n 51, 44. See also the following statement by an unidentified 42-year old male political prisoner in Dili, quoted in Pigou, above n 51, 44: "I think justice in Timor-Leste should be prioritised first [I]f there is no justice, resentment will continue to exist."

People will not accept it if the tribunal does not process them. Gil's widow is also very poor, doesn't have any food or any assistance. We wait and we wait and if nothing happens within one month I am worried someone will beat them or maybe kill them. So they should be investigated quickly.

In providing retribution for victims, the SPSC had some success as it prosecuted 87 and found 85 people guilty,⁵⁴ a better average than any other international criminal tribunal. Presumably, a sense of justice would be felt by the victims in these cases. To what extent "justice" was achieved for the victims requires further research as such reactions were difficult to determine because of the lack of community response to the trials.

A common criticism of international ad hoc tribunals is that they are too removed from the population they are trying to serve. A perceived benefit of hybrid tribunals is their ability to facilitate access to justice and increase the relevance of the process to the affected community, not only by being located in the country, but also through employing local personnel and operating within the framework of the local justice system.⁵⁵ However, although the SPSC were established as part of the national court system, that they were located in Dili and that they employed a number of Timorese judges⁵⁶ and other court staff, there was virtually no participation from the local communities in the processes of the SCPC, except when citizens were required to appear as witnesses.

In a typical case, the only persons present in the public gallery would be one or two court monitors belonging to non-governmental organisations, SPSC or prison service staff, possibly a Timorese journalist and maybe one or two interested persons. This situation can

54 It should be noted that this figure includes persons found guilty of lesser crimes than those indicted, including crimes that could not be classified as crimes against humanity.

55 See Costi, above n 4, 224-225.

56 One Timorese judge and two international judges sat on each panel.

in some ways be contrasted with the case of ordinary crimes prosecuted entirely within the domestic legal system, which, for high profile cases, would have a significant number of interested persons in attendance.

The reason for the limited community participation in the SPSC has not been researched, but it would appear to be related to the lack of outreach by the SPSC,⁵⁷ the limited information about the process, the domination of international personnel and languages, the use of foreign procedures, the length of trials and related delays as well as the inaccessibility of Dili for many people living in the districts (mainly due to distance and financial constraints). Although other hybrid models, such as the Special Court for Sierra Leone, appear to have adopted far more comprehensive and effective outreach programmes, the SPSC serve as a lesson that a domestic location and inclusion of some local staff do not necessarily provide a sound basis for access by affected communities.

Despite the lack of participation of Timorese communities in the SPSC process, a sense of justice may possibly have been promoted through interaction by the accused with their community. Tallgren, in analysing trends in retributive punishment, has noted:⁵⁸

Prevailing feature in the current thinking on retributivism is the understanding of punishment as the expression of disapproval, as the communication of condemnation. The punishment is meant to invite the offender to reflect on right and wrong and to reform, in addition to reconciling himself with those he has wronged.

The SPSC did demonstrate some innovation in recognising local practice and encouraging community reconciliation. In an *ad hoc* approach, the SPSC allowed four defendants, who were found guilty of crimes against humanity, to return to their villages for one month to

57 The only direct engagement of the community by the SPSC was when the trial included a visit to the scene or area of the crime. This occurred in three cases. The SCU did engage in limited community outreach.

58 Tallgren, above n 37, 580.

finalise their affairs. The SPSC noted the strong Timorese tradition rooted in *adat* (custom) as a compelling reason explaining why the risk of flight was small.⁵⁹ In another case, a defendant was given a lighter sentence because he had already participated in a traditional community reconciliation ceremony and had been accepted back into his community.⁶⁰ Testimony from the victims' or accused's family and traditional leaders regarding the social bonds with the accused was accepted in mitigation of sentence.⁶¹ The incorporation and recognition of local practices and values into decisions of the SPSC⁶² arguably provide a sound basis for reconciliation and acceptance once the person is released from prison. However, no research on this has yet been undertaken.

Such innovation may be desirable and necessary when trying to maximise the relevance and benefits of the judicial process to local communities. In debates surrounding the establishment and operation of future hybrid or regional tribunals, consideration should be given to ways of promoting locally relevant aspects of the process to try to increase the benefits to local communities. The presence of one Timorese judge on each panel undoubtedly assisted in the SPSC's understanding of local custom and practice. In seeking locally appropriate means of addressing past atrocities, there is also a need to

59 SPSC Cases: *Anton Lelan Sufa et al* (28 October 2004; 8 November 2004) 4/2003, 4A/2003, 4B/2003, 4C/2003.

60 SPSC Case *Gaspar Leite aka Gaspar Leki* (14 September 2002) 5/2001 (judgment in Bahasa Indonesian and aforementioned comments based on author's own interpretation). See also SPSC Case *Albilio Mendez Correia* (3 March 2004) 19/2001, in which the traditional village leader and representative of the family of the victim provided testimony in support of the accused, which assisted in the accused being granted pre-trial release.

61 SPSC Cases: *Lolotoe Case*, above n 23; *Gaspar Leite*, above n 60; *Augusto dos Santos* (14 May 2002) 6/2001; *Albilio Mendez Correia*, above n 60; *Sisto Barros and Cesar Mendonca* (29 April 2005) 1/2004; *Domingos de Deus* (16 March 2005) 2A/2004.

62 In SPSC Case *Carlos Soares Carmona* (19 April 2001) 3/2000, the importance of "black" magic in Timorese beliefs was recognised for sentencing purposes.

ensure that the issue of localisation is not politically motivated, but reflects the values of the community.

E Local Justice or International Justice

In seeking local approaches to justice, there is a need to ensure both a sound methodological basis and legitimacy for the community. The pluralist approach offered by hybrid tribunals, while providing some opportunity for localisation, at its foundation promotes an international criminal justice model. Since the UN stopped support for the prosecution of cases, the government of Timor-Leste has decided to favour a "unique and local approach" which is able to "balance between the competing principles of justice and achieving peace and stability."⁶³ The Commission of Truth and Friendship (CFT), a joint initiative of the governments of Timor-Leste and Indonesia, rejects the desirability of prosecutions in seeking "true justice":⁶⁴

Different countries with their respective experiences have chosen different means in confronting their past Indonesia and Timor-Leste have opted to seek truth and promote friendship as a new and unique approach rather than a prosecutorial process. True justice can be served with truth and acknowledgement of responsibility. The prosecutorial system of justice can certainly achieve one objective; which is to punish perpetrators; but it might not necessarily lead to the truth and promote reconciliation.

The preference for justice through truth and friendship rather than prosecution has been sold to the international community as a more appropriate option for the two states concerned. In Timor-Leste, the

63 UN Secretary-General "Letter Dated 14 July 2005 Addressed to the President of the Security Council" (15 July 2005) S/2005/459, Annex I "Letter dated 22 June 2005 from the President of Timor-Leste to the Secretary-General", and Annex II "Letter dated 22 June 2005 from the President of Timor-Leste to the Secretary-General", referred to in Justice and Reconciliation, above n 13, para 9.

64 Terms of Reference for The Commission of Truth and Friendship Established by the Republic of Indonesia and the Democratic Republic of Timor-Leste (10 March 2005), art 10, available at <<http://www.etan.org/et2005/march/06/10tor.htm>> (last accessed 31 October 2006).

option was developed by the President and the then Foreign Minister, with some closed consultation with the Council of Ministers and limited debate in Parliament. There was no consultation on the CFT with civil society, communities and particularly victims in Timor-Leste. While recognising that the concerns of governments may be different from those of communities and especially victims, it is hard to sustain an argument of an option being culturally appropriate when perception is not necessarily commonly held by the population. Research on "Asian values talk" has suggested that manipulation of cultural values for political purposes does not have local legitimacy. As noted by one academic from an Indonesian government think-tank, overall "there was a strong resistance to the national or cultural essentialism that is so often used to justify particular discourses of governance."⁶⁵ The CFT appears to fall squarely within the discourse of the government, and any evidence as to its positive impact is yet to be demonstrated.⁶⁶

V CONCLUSION

Hybrid tribunals have high ideals imposed on them and, therefore, a clear and realistic mandate is essential to ensure that efforts can be focused and performance can be assessed and improved. The operation of the SPSC illustrates that a lack of pre-determined objectives can lead to a scattered approach for which progress is difficult to measure. A failure to meet expectations, such as capacity-building of the national justice system, can be destabilising in a post-conflict environment, where the national justice system is required to continue the work remaining after international support has ceased.

Much of the strength of international tribunals is in their perceived impartiality from national bias and their ability to adhere to objective

⁶⁵ Anthony Langlois *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory* (Cambridge University Press, Cambridge, 2001) 48-49.

⁶⁶ The mandate of the Commission of Truth and Friendship Established by the Republic of Indonesia and the Democratic Republic of Timor-Leste has recently been renewed for another year until August 2007. To date, there has been no significant progress in accessing new information or testimony.

standards reflecting "universal norms". On the other hand, such "international objectivity" has been criticised as promoting a western liberal system of justice which may not reflect the values of the community it is intending to serve. The hybrid model, in theory, allows for international standards to be upheld by international personnel, while retaining local relevance by locating it within the national system with local actors. Despite being based in Dili and staffed with some national actors, the SPSC did not engage the people of Timor-Leste. The domination of international personnel and lack of outreach is likely to have played a contributing role in the lack of attendance by local communities. The example of the SPSC, actively encouraging community reconciliation alongside penal sentencing, should be researched further to determine whether such a unique approach did – and does – benefit justice, peace and reconciliation in the community.

The assignment of priorities and decisions as to who should be prosecuted could be greatly assisted by a sound international criminal law methodology, which is currently lacking. The applicability of ordinary criminal law theory based on stable societies in the context of international crimes has been questioned by theorists on the basis that the conditions of post-conflict situations alter the application of some aspects of the theory to such an extent that concepts such as deterrence may not be applicable to all perpetrators. The development of a unique theory for international crimes may provide a more reasoned approach to determine the benefits and risks in pursuing prosecutions. Such methodological development could also provide a sound basis for comparing the merits of "truth and friendship" with the virtues of justice.